

POLICY PAPER

[Sexting amongst children and teenagers: towards a policy that balances protection and autonomy](#)

ARGYRO CHATZINIKOLAOU & EVA LIEVENS (LAW & TECHNOLOGY, FACULTY OF LAW AND CRIMINOLOGY, GHENT UNIVERSITY)

Children increasingly engage with digital technology to establish and maintain intimate relationships and develop their sexual identity. Sending self-generated sexually explicit photos via the internet and mobile apps, a phenomenon known as 'sexting', is one of the ways in which this exploration materialises. It is essential that clear and foreseeable national regulatory frameworks protect consensual sexual activities in which children are involved, on the one hand, and address coercive and nonconsensual acts on the other hand.

Sexting: legitimate youth behaviour or risky business?

On the one hand, sexting is associated with notions of risk and harm and has been attracting considerable public anxiety. Risks that may arise are, for instance, coercion to produce such pictures, further distribution of intimate images without the consent of the person who is pictured, and, subsequently, the inclusion thereof in the corpus of circulating child sexual abuse material.

On the other hand, sexual acts or expressions may constitute a part of children's legitimate exploration of their sexual identity and a way to express their sexual individuality. In this sense, the production of sexually suggestive or explicit images by children may be conceived as falling within the scope of a child's freedom of expression and right to privacy (articles 13 and 16 of the United Nations Convention on the Rights of the Child; UNCRC). Research has found, for instance, that most sexting occurs within the context of a romantic relationship and can be considered a positive experience. According to recent findings, consensual sexting is becoming a more common practice among the youth, with prevalence rates increasing in recent years and as they age.

Given this tension, it is essential that the legal framework enables the legitimate exploration and expression of one's sexual identity, while aiming to minimise adverse consequences thereof. However, in the context of legislative instruments at different levels, sexting may fall under the concept of production, possession and/or dissemination of child sexual abuse material and may, therefore, be criminalised according to the existing legislation. When sexting occurs on a consensual basis among children, though, criminalisation could destabilise the cultivation of trust and establishment of control and privacy rights.

Three prerequisites: trust, control and privacy Firstly, in the digital environment, the amplification of risks related to online behaviour, such as the simplified (online) spreadability, persistence and visibility of content, intensify the need for the cultivation of trust within intimate (online) communications.

Secondly, control relates to the ability to self-determine one's sexual identity and (online) sexual representation. During adolescence, a highly developmental period of a person's life, experimenting with one's sexual identity through sexting presupposes and at the same time is expressed through the exercise of control over one's image. It is fundamental that (also) a young person under the age of 18 maintains the ability to decide on essential factors, such as the content which will be produced and exchanged, the person(s) who will have access to the sexual(ly) expressive or suggestive content, and the time and duration of the exchange and access. When reflecting on the exercise of control in the context of online sexual acts such as sexting, the concept of 'consent', which denotes the autonomy of individuals to have control over their lives, is essential. Providing consent, either explicitly or silently, for the creation and sharing of intimate (audio)visual material of oneself is an essential aspect of exercising control.

Thirdly, the potential violation of privacy does present a risk for individuals who engage in sexting, as online spatial boundaries seem to be blurred and the often unknown number of individuals who may gain access to a piece of information or image create the impression that digital spaces are inherently public. However, there is a wide consensus rejecting the assumption that everything digital is automatically public; individuals – children included – maintain the right to protect their personal information from being accessed or monitored in case they decide to share intimate imagery or texts of sexual content.

A legal perspective on sexting

From a legal perspective, trust, control and privacy as prerequisites for engaging in sexting, are safeguarded in a number of ways.

First and foremost, the exploration and expression of one's sexual identity fall within one's private sphere. On the basis of international human rights instruments, such as Article 16 UNCRC, Article 8 of the European Convention on Human Rights (ECHR) and Article 7 of the Charter of Fundamental Rights of the European Union (CFREU), children merit protection of their sexual development and expression as part of their established right to protection of private life. Although in certain circumstances and under strict conditions, certain restrictions may be imposed on an individual's right to privacy, an absolute restriction of the right of children to explore their sexual identity as part of their private life would constitute a violation of the right to privacy.

Secondly, images of a recognisable individual may be protected under the right to image, a personality right which attributes control rights to persons about whether and how their image can be taken and disseminated, and which can in many jurisdictions be enforced before a court, or under data protection legislation, as images may also constitute 'personal data'. In this respect, unlawful use of personal data may for instance be complained about to national Data Protection Authorities under the 2016 EU General Data Protection Regulation.

Thirdly, in national legal frameworks, specific legislation that criminalises the non-consensual dissemination of sexual images is being increasingly adopted. This type of legislation usually focuses on the further dissemination of such images where the pictured person has not consented to this or is unaware that the images are being distributed further, and labels this a criminal offence.

Yet, whereas the three above-mentioned rights and legislative instruments actually allow the enhancement and enforcement of trust, control and privacy in the context of sexting, other regulatory frameworks still exist that – at least from a theoretical point of view – consider (even consensual) sexting between children to be a criminal offence under legislation that was originally adopted to criminalise child sexual abuse acts by adults. In fact, analysis of the legal provisions regulating the production, possession and acquisition of child sexual abuse material across Europe, on the one hand, and the interpretation and implementation of these provisions by the respective Member States, on the other hand, reveal an emerging gap between theoretical criminalisation and non-implementation of the legislation in practice. For instance, the Member States of the Council of Europe are afforded the option to decriminalise the “production and/or possession of pornographic material involving children who have reached the age of sexual consent [as set by the national legislator] and where these images are produced and possessed by them with their consent and only for their own private use”, as stated in the Lanzarote Convention.

At the same time, the Member States of the European Union are, according to Directive 2011/93/EU on combating the sexual abuse and sexual exploitation of children and child pornography, afforded the discretion to decide whether the legislation on the production, possession or acquisition of child pornography applies “to the production, acquisition or possession of material involving children who have reached the age of sexual consent where that material is produced and possessed with their consent and only for the private use of the persons involved, in so far as the acts did not involve any abuse”. While only a few Council of Europe Member States have explicitly allowed for a relevant exemption in respect of consensual sexting between minors (for instance Austria, Cyprus, Germany and Liechtenstein), most Member States clarify that in practice children shall not be prosecuted. The findings of such divergence between theory and practice gives rise to legal uncertainty, both for citizens and law enforcement authorities, and calls for additional (legislative and policy) clarity.

Policy recommendations

- Roll out an evidence-based child rights impact assessment, as a basis to define policies on sexting that balance the need to protect children from exploitation or abuse with children's integrity and autonomy rights, in view of their best interests.
- Carefully consider exceptions to criminalisation of production and possession of sexual material involving children based on the age of sexual consent. These exceptions may not dissolve the legal uncertainty for those children that are younger but who do engage in sexting. The higher the age of sexual consent in a given country is, the wider the gap will be between the legal framework and the day-to-day reality and practice of sexting. Different ages for different types of sexual activities might be a solution, but this still does not alter the fact that young people develop at very different paces and that a set age will not always be in the best interests of every child of that age. Moreover, different age thresholds adopted across countries can lead to a fragmented approach as to the criminalisation (or not) of similar behaviour performed by children residing in different countries.
- Formulate uniform guidelines to deal with sexting cases in which children are involved, for instance in a circular addressed to police and prosecutors. This is even more important in the absence of an explicit legal decriminalisation of consensual sexting by children.
- Educate and cultivate awareness on the importance of consent as a fundamental element for legitimate online sexual exploration. Avoid blaming individuals who engage in sexting, rather blame those who breach the trust or engage in abusive behaviour.

This contribution is adapted from the authors' submission to the public consultation of the United Nations Committee on the Rights of the Child regarding its Draft General Comment on the rights of the child in the digital environment. These policy recommendations have also been presented to and discussed with the Council of Europe's Lanzarote Committee, the Belgian Federal Public Service of Justice and civil society organisations such as Sensoa.

Academic Network for Sexual and Reproductive Health and Rights Policy
Campus UZ, C. Heymanslaan 10, entrance 75, UZP 114, 9000 Ghent, Belgium
T Administration office +32 9 332 35 64 / F +32 9 332 38 67
anser@ugent.be
<https://www.ugent.be/anser/en>

