

Sexting and Cyberbullying

Presented by Julianne Elliott as "Sex, Lies and Videotapes: sexting, mobiles and cyber evidence" at the Children's Legal Service Annual Conference
24 September 2011

Updated by Aaron Tang and presented at the NSW Aboriginal Legal Service, Western Region Conference 13 March 2014

What is sexting?

Sexting refers to the act of sending naked or sexually explicit images and/or messages, generally via mobile telephone or over the internet.

Setting the scene

One of my favourite quotes from my research into this topic was from Andrew Haesler SC, as he then was, in his paper '*Sex and the Modern Criminal Lawyer*'.

'Despite every attempt to preach the virtues of abstinence, children still seem to think that sexual intercourse can be enjoyable and fun, and ignore laws that say they can't engage in it'

Much the same could be said in relation to our topic for today - sexting. Young people are picking up technology and running with it. If cyberspace mirrors a young person's social reality, then flirting, sexual relationships and friendship bonding will happen as much via mobile phone and social networking sites as happens in the 'real' world.

If we want to work with young people around safe, responsible and *legal* use of technology, we need to acknowledge that any response that advocates a zero tolerance approach (just don't use Facebook, get rid of your brand new smartphone etc) is going to be of limited use. Young people need to understand their responsibilities and liability in cyberspace and be empowered to make decisions that will keep them safe and out of trouble as well as respecting how and why young people are engaging with this technology.

¹ Presented at the Legal Aid Annual Children's Criminal Law Conference, 2008

There is a growing body of evidence to suggest that there is very little understanding amongst young people of the serious legal implications of sexting. We are in a good position to provide young people with these harm minimisation tools.

NSW offences

Child Abuse Material

Under NSW law, a person who *produces, possesses or disseminates* child abuse material is guilty of an offence. The maximum penalty under this section is 10 years imprisonment².

A *child* is defined as a person who is under 16 years of age³.

Child abuse material includes material that depicts or describes a child, or someone who appears to be or is implied to be a child:

- as a victim of acts of torture, cruelty or physical abuse,
- engaged in a sexual pose or sexual activity,
- in the presence of another person engaged in a sexual pose or sexual activity
- showing 'private parts' (genitals, the anal area, or female breasts).

This material must be capable of being considered offensive by a reasonable person in all the circumstances⁴.

Relevant defences for this paper's purposes may include:

- that the defendant did not know and could not reasonably be expected to know that they produced, disseminated or possessed child abuse material⁵
- that a defendant received material without asking for it and took reasonable steps to get rid of child abuse material as soon as they realised the nature of the material⁶

Child abuse material can include films, photos, digital images, videos or written scenarios sent by SMS, email, in chat rooms or published on

² *Crimes Act 1900 NSW, s91H*

³ *Crimes Act 1900, NSW, S91FA*

⁴ *Crimes Act 1900 NSW, s91FB*

⁵ *Crimes Act 1900 NSW, s91HA(1)*

⁶ *Crimes Act 1900 NSW, S91HA(2)*

blogs or social networking sites.⁷ They also include images of an adult which are digitally altered to make it look like a person under 16.⁸

In this way, a young person who takes a naked photo of themselves on their phone is both a victim of and perpetrator of the offence of producing child abuse material. If they then text that picture to their partner, they have disseminated material and if the partner doesn't delete the picture as soon as they receive it, they may be guilty of possessing child abuse material.

It would also appear that material such as films taken of bullying incidents or fights may be caught under the definition of child abuse material.

Note: It is also an offence to incite someone to commit an offence under this section⁹.

Publishing indecent articles

Section 578C makes it an offence to publish indecent articles and may also be used in relation to sexting, as the section defines publishing broadly to include:

- distribution, dissemination, circulation, delivery etc of the article¹⁰,
- being in possession or control of the article¹¹ or
- printing, photographing or making the article¹².

An article is defined as anything that is a record, that contains or embodies matter to be read or looked at but does not include classified films, computer games or publications¹³.

It would then appear that this charge could cover posting articles to social media websites as well as sending by text.

It would also be a direct alternative to the s91H offence as you cannot be convicted of both this offence and an s91H offence for the same matter¹⁴.

⁷ *Crimes Act 1900 NSW*, s 91FA.

⁸ *Crimes Act 1900 NSW*, s91FB(3).

⁹ *Crimes Act 1900 (NSW)*, s80G

¹⁰ *Crimes Act 1900 NSW*, s578C(1)

¹¹ *Crimes Act 1900 NSW*, s578C(1)

¹² *Crimes Act 1900 NSW*, s578C(1)

¹³ *Crimes Act 1900 NSW*, s578C(1)

¹⁴ *Crimes Act 1900 NSW*, s578C(3A)

The maximum penalty for this offence is 12 month imprisonment¹⁵.

Acts of Indecency

Sexting may also be prosecuted under the acts of indecency provisions in the *Crimes Act*.

Section 61N makes it an offence to commit an act of indecency with or towards a person under the age of 16 years, or to incite a person under that age to an act of indecency with or towards that or another person.

The maximum penalty under this section is 2 years imprisonment (or 18 months imprisonment where a victim is 16 years or older).

A well publicised early attempt at prosecuting a sexter involved an 18 year old who was charged with inciting an under 16 year old to commit an act of indecency as well as possession of child pornography. The defendant, Mr Eades, asked his 13 year old girlfriend to send him a 'hot steamy picture' after he sent a picture of himself with no shirt on. The girlfriend sent Mr Eades a full frontal naked photo of herself via picture message. Her dad checked the mobile, found the text exchange and went to the police.

At first instance, both charges were dismissed in the Local Court. The DPP appealed and were successful¹⁶. The matters were referred back to the Local Court for fresh hearing. This time, the Court dismissed the child pornography charge, but found Mr Eades guilty of inciting an act of indecency. He received a section 10 and a 12 month good behaviour bond.

It isn't clear from the facts of the case whether the girlfriend was also charged.

¹⁵ Crimes Act 1900 NSW, s 578C(2).

¹⁶ *DPP v Eades* [2009] NSWSC 1352 (17 December 2009); NSWCA 241. James J found that when considering whether an act is indecent, the tribunal of fact must take into account the surrounding circumstances as well as the photograph itself. James J also found that the remoteness of the defendant and the complainant at the relevant time was not a barrier as an act can be 'towards' a defendant even if the defendant is not physically present when it is committed. See also *Eades v DPP* (NSW) [2010] NSWCA 241.

Filming

Crimes Act 1900 (NSW), section 91K makes it an offence to film a person engaged in a 'private act' without their consent, knowing they do not consent, and for the purposes of obtaining or enabling another person to obtain sexual gratification.

Section 91L is similar but relates to non-consensual filming of 'private parts'.

I raise these sections here because of a recent spate of well publicised incidents involving webcam and mobile filming of people engaged in what the legislation refers to as 'private acts'.

It is important that young people are aware that practices such as upskirting or filming in bathrooms or during sex without the consent of their partner have criminal ramifications.

The maximum penalty for these offences is 2 years imprisonment, or 5 years if the offence is aggravated (eg because a child who is under 16 years old is being filmed).

Commonwealth offences

At a Commonwealth level, the potential liability for young people who sext is much broader. A child is defined as a person who is or appears to be under 18 for the purposes of child pornography and child abuse material offences under Commonwealth *Criminal Code*¹⁷.

A young person is already over the age of consent at 16 years of age in NSW but is still not legally permitted to sext until they are 18 (and even longer if they look like they are under 18?)

Using a carriage service for child pornography material

The Commonwealth legislation makes it an offence to use a carriage service (such as the internet or mobile phones) to access, transmit,

¹⁷ *Criminal Code Act 1995 (Cth)*, s473.1

make available, publish, distribute, advertise, promote or solicit child pornography material¹⁸.

A carriage service is defined as 'a service for carrying communications by means of guided and or/unguided electromagnetic energy'¹⁹, i.e. mobile phones, the internet and whatever the next big tech concept may be.

Child pornography material includes material that depicts or describes a child (or a person who appears to be a child) engaged in a sexual pose or activity (or in the presence of a person engaged in a sexual pose or activity), or depicts for a sexual purpose sexual organs, the anal region or female breasts, in a way that a reasonable person would find offensive²⁰.

The maximum penalty for an offence under this section is 15 years imprisonment. The maximum penalty is 25 years if the offence is aggravated by the involvement of 2 or more people.

Possessing, controlling, producing, supplying or obtaining child pornography material for use through a carriage service

The Commonwealth legislation also makes it an offence to possess, control, produce, supply or obtain child pornography material with the intention that the material will be used by themselves or others through a carriage service²¹.

The maximum penalty for this offence is 15 years. The maximum penalty is 25 years if the offence is aggravated by the involvement of 2 or more people.

Using a carriage service for child abuse material or possessing, controlling etc child abuse material for use through a carriage service

The above sections about child pornography material are mirrored in s 474.22 and 474.23 respectively in relation to child abuse material.

Child abuse material includes depictions or descriptions of a child (or someone who appears to be a child) as a victim of torture, cruelty or physical abuse, in a way that a reasonable person would regard as offensive.

¹⁸ *Criminal Code Act 1995 (Cth)* s474.19

¹⁹ *Telecommunications Act 1997 (Cth)*, s7

²⁰ *Criminal Code Act 1995 (Cth)* s473.1 - Definitions

²¹ *Criminal Code Act 1995 (Cth)* s474.20

The maximum penalty for these offences is 15 years. The maximum penalty is 25 years if the offence is aggravated by the involvement of 2 or more people.

Defence for child offenders

The only 'protection' that the Commonwealth legislation affords young people can be found in section 474.24C of the Commonwealth *Criminal Code*. This section states that consent is required from the Commonwealth Attorney-General to commencement of proceedings where the defendant is under 18 at the time of the alleged offence. This section was inserted on recommendation of a Senate Standing Committee on Legal and Constitutional Affairs as an attempt to avoid capturing underage sexters in child sex offences where there was no malicious or exploitative intent²². Practically speaking, it is unclear how much protection this affords young people as the section also states that a person can be arrested, charged and remanded in custody before such consent is obtained.

Sexting offences and the Sex Offender's Register

Of significant concern is the capacity for a conviction for these types of offences to lead to a young person being placed on the Sex Offenders Register.

The NSW offences outlined above (including any incite, attempt, and conspiracy charges under the same sections) are Class 2 registrable offences for the purposes of the *Child Protection (Offenders Registration) Act 2000*²³.

If a person is sentenced to a Class 2 registrable offence, registration is required. Exceptions include²⁴:

- if the person receives a Crimes (Sentencing Procedure) Act 1999, s 10
- if a young person receives a s33(1)(a) caution as a sentence outcome
- the young person has been charged with a single offence involving an act of indecency. A single offence refers to more

²² *Crimes Legislation Amendment (Sexual Offences Against Children) Bill 2010* (Cth) Supplementary Explanatory Memorandum. http://www.austlii.edu.au/cgi-bin/sinodisp/au/legis/cth/bill_em/claoacb2010554/memo_1.html?stem=0&synonyms=0&query=sexting

²³ *Child Protection (Offenders Registration) Act 2000*, s 3

²⁴ s 3A

than one offence arising from the same incident²⁵ – ie offences committed within a 24 hour period and against the same person²⁶.

As part of registration, a person must provide their personal details, details about their employment, car, registrable offences, any changes in their personal circumstances, details of any other children they live with normally, details about their carriage service, internet service provide, email addresses, user names and many other onerous requirements²⁷. Most concerning, is the label of child sex offender, along with the limits this will inevitably place on their future employment prospects.

It is therefore worthwhile to engage (where appropriate) in charge negotiations to see whether it is possible to obtain an alternative charge(s) which will not be covered by the register, either because they fall within one of the exceptions referred to above, or because they are not registrable offences: eg Summary Offences Act 1988, s 4 (obscene conduct) or s 5 (obscene exposure) or single offences

Can sexting offences be referred to a Young Offenders Act option?

This question will be very important when dealing with a young person facing a sexting related charge. It would appear that if the matter is dealt with by way of a Young Offenders Act option, there would be no sentence for the purposes of the Sex Offenders Register and thus no requirement to register.

Act/Section	Offence	Referrable to YOA option?
s91H Crimes Act	Produce/possess/disseminate child abuse material	Yes
s61N Crimes Act	Act of indecency	No
s578C Crimes Act	Publishing indecent articles	Yes
s91K Crimes Act	Filming a private act	Yes
s91L Crimes Act	Filming private parts	Yes
s474.19 Criminal	Use carriage service for child	Yes ²⁸

²⁵ s 3A(5)

²⁶ s 3(3)

²⁷ s 9

²⁸ Section 20C *Crimes Act 1914* provides that children and young persons may be tried and punished for federal offences in accordance with the law of the State or Territory in which they were charged or convicted. This enables the States and Territories to apply their respective juvenile justice regimes.

Code	pornography	
s474.20 Criminal Code	Possess, control etc child pornography material for use through carriage service	Yes ²⁹

Cyber-bullying

While not necessarily directly relevant to sexting, cyber-bullying does have a connection to sexting when the image is used in a way that the image-maker did not consent to. For example, after a bad breakup, a young person decides to send out an image that was sexted to them during the course of the relationship. The person in the image is then bullied as a result, both in person and online. What is the legal response to cyber-bullying?

What is Cyber-bullying?

Cyber-bullying involves the use of information and communication technologies to support deliberate, repeated, and hostile behaviour by and individual, or a group, that is intended to harm others³⁰.

Examples of cyber-bullying include posting threatening or demeaning messages on a Facebook wall, uploading pictures of people without their consent and setting up gossip pages.

Again, there seems to be something of a disconnect in terms of the understanding that some of these behaviours may have criminal and other legal consequences if the bullying is seriously threatening, harassing or offensive in nature.

There is no definition of "child" or "young person" under the *Crimes Act 1914*. The definition used in the respective State or Territory is generally adopted, which may result in discrepancies in the treatment received between jurisdictions.

Diversionary options for dealing with young offenders are available to some degree under s 20C. The section allows a child who is "charged with or convicted of" a federal offence to be "tried, punished or otherwise dealt with" as if the offence was a State or Territory offence. The words "otherwise dealt with" are sufficiently broad to encompass many diversionary programs. However, the child must be charged or convicted first, which is often not a characteristic of pre-court diversionary options. The power of a body to hear and determine federal offences must also be ascertained. Federal jurisdiction is invested in State and Territory courts of summary jurisdiction, including Children's Courts, pursuant to s 39 *Judiciary Act 1903* (Cth). But s 39 restricts jurisdiction to "courts", which may not necessarily cover all alternative schemes. See JIRS.

²⁹ Ibid.

³⁰ Bill Belsey, *Always on? Always aware!* www.cyberbullying.org

NSW offences

While there is no specific NSW cyber-bullying offence, we can generalise from 'real' world behaviour to cyberspace. If a cyber-bullying incident threatened force against a victim and a victim had an apprehension of present or immediate harm, it may be that a cyber-bully could be facing a common assault charge³¹.

Of particular relevance to cyber-bullying in a school setting is s60E of the *Crimes Act 1900* (NSW). An offence is committed under this section where an assault, stalking, harassment or intimidation occurs, directed at a school student or school staff member. This may have limited application because the section specifies the conduct must happen on the school premises or while going in or out of the school grounds³². This section would, however, include instances where a bully uses the Internet at school to carry out the bullying.

Cyber-bullies may also be leaving themselves open to stalking³³, threatening³⁴ or intimidation³⁵ charges under the *Crimes Act*.

Note: *Police v Gabrielsen*³⁶ established an interpretation of a victim suffering apprehension or fear to include circumstances where email or text contact that caused the victim fear for their reputation or, fear that they will be publicly embarrassed. This judgement has significant application to cyber-bullying instances.

If a young person documented an act of child abuse under the section 91FB(1)(a) definition - for example, filming an act of bullying and sending it to friends or posting it online - this could lead to a charge of producing/ possessing/ disseminating child abuse material³⁷.

Commonwealth offences

The section that seems to be most commonly used in relation to cyber-bullying is section 474.17 of the Commonwealth *Criminal Code*, which makes it an offence to use a carriage service in a way that a

³¹ *Crimes Act 1900* (NSW) s61

³² *Crimes Act 1900* (NSW) s60D(2)

³³ *Crimes Act 1900* (NSW) s545B

³⁴ *Crimes Act 1900* (NSW) s31

³⁵ *Crimes Act 1900* (NSW) s545B

³⁶ [2011] SASC 39 at para 14

³⁷ *Crimes Act 1900* (NSW) s91H

reasonable person would regard, in all the circumstances, menacing, harassing or offensive.

The maximum penalty for this offence is 3 years imprisonment.

Other offences that may be applicable to serious cyber-bullying may include:

- Using a carriage service for child abuse material³⁸
- Possessing, controlling etc child abuse material for use on a carriage service³⁹
- Using a carriage service to make a threat to kill⁴⁰ or cause serious harm⁴¹

Apprehended Personal Violence Orders (APVOs) and Cyberspace

It has become increasingly common for behaviour on social networking sites such as Facebook to be the basis for applications for APVOs. In addition to this, once an APVO is in place, young people need to remember that contact which breaches the terms of an order includes contact via electronic media including mobile phone contact or MSN Messaging, chat rooms and social media sites.

Where to from here? Law reform challenges

There does not appear to be a great deal of movement towards law reform at a state or national level in Australia. However, a number of states in the USA have been considering law reform options to ameliorate disproportionate criminal sanctions for teenage sexters.

An affirmative defence

One option for law reform may be to create an affirmative defence to child pornography charges for teenage sexters, as long as particular requirements are met. This approach was taken in Nebraska⁴² and is

³⁸ *Criminal Code Act 1995* (Cth) s474.22

³⁹ *Criminal Code Act 1995* (Cth) s 474.23

⁴⁰ *Criminal Code Act 1995* (Cth) s474.15(1)

⁴¹ *Criminal Code Act 1995* (Cth) s474.15(2)

⁴² See Arcabascio, above n 17, 36–9; W Jesse Weins and Todd C Hiestand, 'Sexting, Statutes and Saved by the Bell: Introducing a Lesser Juvenile Charge with an "Aggravating Factors" Framework' (2009) 77 *Tennessee Law Review* 1, 37–41.

being considered in Iowa.⁴³ It permits legislators to 'carve out' situations where sexting is less objectionable, while not decriminalising those situations which do warrant punishment. By permitting consideration of contextual factors such as age, consent and previous conduct, this option improves upon the current all-or-nothing situation by providing a more graduated approach to liability. For instance, a defence could be afforded when someone under 18 willingly provides a sexualised self-portrait, because the participant is young, his/her conduct is voluntary and no other parties are depicted. The defence might even be further refined by limiting its availability to first-time sexters.

Diversionsary education programs

In New Jersey and Pennsylvania, first-time sexters who are held not to have intended to commit a crime, and were also unaware that their actions were technically criminal, have the option of attending diversionary education programs in lieu of facing charges of child pornography possession and/or distribution.⁴⁴

A tailored outcome plan for sexting referrals to Youth Justice Conferences could be developed. This would be similar to the specific outcome plan requirements for young people who have been referred for arson offences.

'Romeo & Juliet' laws

This option focuses on the relative ages of teenage sexters. Modelled on an exception to liability under US statutory rape laws, the introduction of a 'Romeo and Juliet' provision would mean that if the older participant is only a few years older than the younger (the age difference varies between states), then neither would be criminally liable as a result of their sexting activity.⁴⁵ In some cases, the age range may extend to include teenagers who are adults at law (that is, 18- and 19-year-olds).

Conclusions

⁴³ Baumler, above n 19, 48–9.

⁴⁴ See Eraker, above n 17, 579–81; Barry, above n 3, 138–9, 146–7; Kimpel, above n 16, 327–30; Elizabeth M Ryan, 'Sexting: How the State Can Prevent a Moment of Indiscretion from Leading to a Lifetime of Unintended Consequences for Minors and Young Adults' (2010) 96 *Iowa Law Review* 357, 379–80.

⁴⁵ Clay Calvert, 'Sex, Cell Phones, Privacy, and the First Amendment: When Children Become Child Pornographers and the Lolita Effect Undermines the Law' (2009) 18 *CommLaw Conspectus: Journal of Communications Law and Policy* 1, 28–30.

We can and should make a clear distinction at this point about the differences between consensual and non-consensual activity in cyberspace. Where an image is forwarded or posted online in a way calculated to cause embarrassment or to bully a young person, a different approach is called for than if an image has been created for use within a consensual relationship space.

However, punishing teenage sexting using child pornography/child abuse material legislation is inappropriate in most instances. The severe sentences available operate too harshly in this context, and the current law is inadequately nuanced to account for the different degrees of harm that sexting can cause (or indeed, to recognise when there is none caused). The subsequent damage that being labelled a sex offender can cause in other areas of a young person's life also provide impetus for change.

There is also a legitimate concern regarding age of consent laws and laws around when young people are allowed to sext. No wonder young people are not aware that it is a crime to sext when they are already old enough to have sex in the real world!

Until law reform removes the current legislative approach of equating teenage sexters to child pornographers, our best weapon is education.

Julianne Elliott
Community Legal Education Solicitor
Children's Legal Service
Legal Aid NSW

Julianne.Elliott@legalaid.nsw.gov.au

Acknowledgements

A big shout out to Edrea Tio and Erica Lai, two amazing volunteers without whom this paper would not have been possible! Thanks to Ahram Choi for her research contribution! Thanks also to Aaron Tang, Angela Cook and Andrea Hadaway for their invaluable guidance and suggestions.