



YOUTH PRACTITIONERS ASSOCIATION

Response to the Law Commission Consultation on Intimate Image Abuse:

Education not Prosecution

The YPA aims to encourage and maintain the highest standards of advocacy and practice from the police station to the High Court and to support, assist and educate those who represent young people in the criminal justice system. The YPA is committed to promoting the importance of specialist youth representation and encouraging and maintaining the highest standards of advocacy and practice.

As long ago as 2012, the NSPCC identified that at least 40% of children are involved in sexting, the sharing of sexual messages and images including nude images, or 'youth produced sexual imagery'. Their subsequent research showed that as many as 1 in 6 people reported to the police for sexual images were under 18 years of age. Their report in 2016 coincided with the implementation of Outcome 21 which enables the police to record that a crime has been committed but that taking formal action is not in the public interest when a young person is found creating or sharing sexual images. This still leaves children at risk of prosecution and the current Crown Prosecution Service guidance that suggests sexual imagery produced by children should not be routinely prosecuted is often not adhered to.

The consultation document does not deal in any detail with the complex issues arising from prosecuting children for intimate image offences. We hope that our consultation response results in proper consideration of the issue of prosecuting children for these kind of offences and urge the Commission to exclude those under the age of 18 from the proposals.

There has been a number of reports published in the past 5 years that recommend moving away from prosecuting children for producing sexual imagery. In July 2016 a report of the parliamentary inquiry investigating children who display harmful sexual behaviour said that children should be treated as children first and should not be unnecessarily criminalised.¹ It recognised that children who engage in certain harmful behaviours against others have often been the victims of those behaviours themselves and an overly punitive approach risked criminalising some young people, including those who have made a 'mistake' in their adolescent development, or those with a learning difficulty or disability. In relation to sexting it stated that "there are signs that we are moving away from criminalisation of children in relation to lower level sexual offences". The YPA is concerned that the application of the new proposals to under 18s will exacerbate the current problems identified and, in fact, be a regressive step.

¹ https://www.basw.co.uk/system/files/resources/now_i_know_it_was_wrong_0.pdf

In August 2016 August the UK Council for Child Internet Safety (UKCCIS) published non-statutory guidance on managing incidents of sexting by under-18s. Over 200 organisations were involved in creating the guidance, including government and the DfE, children's charities, UK Safer Internet Centre, CEOP, Police, and teachers' groups. The guidance recognised that children often engage in these activities through curiosity and exploration and need education and safeguarding rather than criminalisation. The guidance served as a reminder that the current laws in relation to sexual imagery were designed principally to safeguard children rather than to prosecute them and that, at all times, the focus should be on the welfare and protection of the young people involved. This guidance was updated in 2021 and included a specific section explaining the motivations and behaviours that influence the sharing of such images, recognising that they are not always sexually or criminally motivated.²

In 2016 the National Institute for Health and Care Excellence (NICE) produced a report on children and young people who display harmful sexual behaviour.³ It sets out proposals to prevent the escalation of problems that could lead to criminal charges whilst at the same time ensuring children and young people are not unfairly stigmatized and are not referred to specialist services where it is unnecessary. It was careful to use the NSPCC definition of harmful sexual behaviour to avoid labelling children and young people as sex offenders and agreed with expert evidence provided that stated "many children and young people's display of harmful sexual behaviour will naturally come to an end as they mature".

The focus of this response

The Law Commission's summary consultation paper acknowledges children as victims but not as potential offenders.

Page 11 of the summary paper makes reference to those with disabilities having a skewed view of what is normal or acceptable :

"May have a skewed or incomplete picture of what is normal or acceptable behaviour in relationships (Sue Larner, Sense) "

This arguably goes wider to encapsulate both children and those with mental health problems (whether child or adult). However, it fails to factor in the relative psycho-sexual immaturity of children which may have the same result by virtue of age alone, namely a skewed or incomplete picture of what is normal or acceptable behaviour in respect of sex and relationships.

This response deals with the summary questions by addressing the issue of children who could potentially be prosecuted for these offences to fill this gap, drawing on the experience and expertise of the YPA in working on cases of children accused of harmful sexual behaviour. The YPA considers that it is essential that the Law Commission fully considers the implication of its proposals on children so as to avoid the unnecessary criminalisation of thousands of children, with all the harm that may entail to their life chances. We consider this must be

² <https://www.gov.uk/government/publications/sharing-nudes-and-semi-nudes-advice-for-education-settings-working-with-children-and-young-people>

³ <https://www.nice.org.uk/guidance/ng55/resources/harmful-sexual-behaviour-among-children-and-young-people-pdf-1837514975173>

fully considered in the crafting of any proposed legislation and it is not sufficient to rely on prosecutorial guidance to mitigate any risk of harm.

The full consultation paper refers to the possibility of placing reliance on CPS guidance, as with the present legislation, but we submit that this is not as desirable as having correctly worded legislation in the first place.

Response to summary paper questions – risk to children accused of intimate image offences

Question 1

We would not support the prosecution of children for the base offence outlined in the consultation. The reports outlined above make it clear that children should not be prosecuted for lower level sexual offences that occur through curiosity, exploration and natural development.

We recognise that if children are excluded from prosecution of the base offence alone there is the risk that they could be prosecuted under the more serious provisions and we cite that as a reason why they should be excluded from prosecution of all offences outlined in the consultation.

Question 2

Prosecution of children for the taking or sharing of an intimate image with the intention to humiliate, alarm or distress expects them to function in the same way as adults. It may be reasonable to expect the average adult to know what amounts to harassment, alarm or distress but the consequential thinking skills and development of children are very different. In today's age of smart phones, instant message applications and live streaming, where information is shared at the click of a button, children are highly likely to take or share an image without considering the implications of their actions on either the person contained within the image or for themselves.

Recognition of this lack of maturity and the impact it has on children's decision making and risk taking behaviour is encapsulated in paragraph 1.5 of Overarching Principles: Sentencing Children and Young People:

It is important to consider the extent to which the child or young person has been acting impulsively and whether their conduct has been affected by inexperience, emotional volatility or negative influences. They may not fully appreciate the effect their actions can have on other people and may not be capable of fully understanding the distress and pain they cause to the victims of their crimes.

Question 3

The prosecution of children for taking or sharing an image for the purpose of sexual gratification would mistakenly presuppose that children can be treated in the same way as an adult. Children do not necessarily understand sexuality in the same way as an adult would.

Many images are taken or shared by young people because it is what they see their friends doing. This returns to the themes discussed above of healthy experimentation and exploration.

Question 4

The prosecution of children for threatening to share an image again fails to recognise that children do not have the consequential thinking skills expected of adults. The prosecution of children for any offences that require the mens rea of recklessness has always been difficult. When it is under dispute what a child intended or foresaw, the court must take into consideration the age and maturity of the child as inferences that would ordinarily be drawn in the case of adult defendants may not be applicable to children.

R v G [2003] UKHL50 which deals with the concept of recklessness confirmed that the age of the defendant was material in deciding what a defendant is aware of and what it was reasonable for them to do. Paragraph 53 of Lord Steyn's judgement can be applied not just to the issue of children and recklessness but this consultation as a whole:

Ignoring the special position of children in the criminal justice system is not acceptable in a modern civil society. In 1990 the United Kingdom ratified the Convention on the Rights of the Child which entered into force on 15 January 1992. Article 40.1 provides:

"States Parties recognise the right of every child alleged as, accused of, or recognised as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society"

This provision imposes both procedural and substantive obligations on state parties to protect the special position of children in the criminal justice system.

There is an issue of child protection that has to be considered if children are to be prosecuted for any of the proposed offences contained within the consultation. It is acknowledged in all of the reports cited above that children should be treated as children foremost who are developing and in need of protection and safeguarding. However, the investigation and defence of children for the proposed offences risks exposing those children to further harm through the trauma of the judicial process. The proposed offences could easily be committed by a child making a mistake who has little concept of sex. The questioning of them and defending of them will necessitate explanation of sex and the law. The justice system is not an appropriate channel to teach sex education and risks traumatising children unnecessarily.

Questions 5– 8

There are great difficulties with defining an intimate image in an age where the government recognises that society has become hypersexualised and the difficulties are heightened if they are to be applied to the prosecution of children.

Relying on the definition that a reasonable person would consider the image to be sexual does not allow for the reasonable person to be a child imbued with that child's relevant characteristics (for example as defined in s45(5) of The Modern Slavery Act 2015). Both children and adults are bombarded with images that are overtly sexual.

We have grave concerns that the manner in which an intimate image is defined will have huge implications for the over-criminalisation of children. We cannot expect children to make a decision as to what is a sexual image or not. The definitions contained within this part of the consultation are too vague and we would urge against the inclusion of "semi nude" and "covered with underwear".

In the case of adults, images of toileting should be included in the definition but again, where children are concerned, and in our experience particularly boys, images of defecation and urination are not viewed in a sexual manner but instead as immature humour.

We think that the section relating to images in a state of undress is poorly drafted and unnecessary. Images of partial undress are everywhere: the recent presentation of the Eurovision Contest saw scantily clad contestants beamed into homes across the world; the modesty of the Little Mermaid is only saved by a couple of well-placed seashells which arguably would not meet the proposed definition within the consultation.

Question 9

The inclusion of images that would be considered intimate by particular religious groups is not workable if children are to be prosecuted for these offences. We suggest that it simply will not be possible to prove the elements of the offence if it is dependent on the child knowing whether a particular image is affected by a particular religion. And if it is not dependent on the child's knowledge but instead an expectation that all people should simply know, then it is risking again the criminalisation of children for their lack of knowledge. The examples provided are from two mainstream religions but there are many others that many adults could not be reasonably expected to know.

Question 10

We acknowledge that there are gaps in the law but we do not accept that the law needs to be widened to prosecute children. Their education is more important than their prosecution.

Question 11

We agree that the definition is sufficient but should not apply to children.

Question 12

We agree that the definition of sharing is sufficiently wide for the purposes of the proposed legislation but again, it should not be applied to children.

Question 13

Yes consent is sufficiently defined within these provisions for adults. Consent, however, is a problematic issue if the proposals are to extend to children. Their lack of understanding regarding consent, exploitation, coercion and appropriate sexual behaviour is highlighted as a consideration in the Sexual Offences Sentencing Guideline for children and young people. Very many cases of youth generated intimate imagery involve children under the age of consent in law and, anecdotally, are known to start upon entry to secondary school. Careful consideration will have to be applied to this area to avoid the criminalisation of children who have no intention of committing a criminal offence.

Question 14

We recognise that these offences can sometimes cause harm and would not expect proof of harm to be required; however with children the harm caused to them as a victim has to be balanced against the retraumatising effect on them of the judicial process (as well as the traumatising effect on the suspect) and the restorative effect of the youth justice system. The possibility of restorative processes rather than prosecution where both parties to “sexting” are children were canvassed back in 2016 when the issue of proportionality was considered to be a key factor. The Overarching Principles – Sentencing Children and Young People subsequently confirmed that “Restorative justice disposals may be of particular value for children and young people as they can encourage them to take responsibility for their actions and understand the impact their offence may have had on others”.

Question 15

It is impossible for us to say how prevalent these offences are but it has been well researched previously and is known that what is reported is the tip of iceberg. This is where the injustice for children is so acute as taking and sharing images has become a societal norm which needs to be addressed through education and support for children and their families. Children who share images may well have had images shared of themselves. We have, above, referred to figures provided by the NSPCC several years ago. We can only assume with growing technology and over a year in lockdown that such incidents have become even more prevalent than documented.

Question 16

If children are to be prosecuted for these offences, there must be a completely different approach to them because they are still developing. Both complainants and suspects should be entitled to complete anonymity, and with child defendants, that anonymity should not expire on their 18th birthday. We would also urge against the ancillary orders proposed for these offences. Sex Offender Notification Requirements have been shown for children to block their life chances and chances of rehabilitation. In our experience children do not

understand what they are and risk further criminalisation for breaches where there is no criminal intention. Both these and Sexual Harm Prevention Orders are too onerous for children to manage and should not be applied to children under the age of 18 as they cause prolonged periods of stigmatisation that the reports of 2016 were trying to steer away from.

Question 17

We agree that there should be a defence of reasonable excuse and are satisfied with the scope of its definition.

Conclusion

For all the reasons set out above, the YPA urges the Commission to exclude children from these proposals. We would be happy to discuss this with you further if that would be of assistance.

Youth Practitioners Association

26 May 2021