

Options for
addressing
the issue of
sexting by
minors

Submission to the
Senate Select Committee on
Cyber Safety

The National Children's and Youth Law Centre

I. Introduction

The National Children's and Youth Law Centre (NCYLC) is a Community Legal Centre dedicated to working for and in support of Australia's children and young people, their rights and access to justice. We advance this mission by providing young Australians with sound legal advice and education; advocating for changes to laws, policies and practices to advance their rights; creating opportunities for their participation in decision making; and promoting the implementation of the United Nations Convention on the Rights of the Child.

We welcome this opportunity to provide our views on the options for addressing the issue of sexting by minors in Australia. This submission will only address age-appropriate, peer-to-peer sexting among young people (as opposed to sexting between individuals where there is an inappropriate age gap that creates an opportunity for exploitation). The NCYLC has written and spoken extensively about this issue and the need for law reform. To avoid repetition, this submission will focus on the following:

- I. Highlighting the three overarching flaws that we have identified within the current legal framework.
- II. Outlining our views on developments in relation to the issue of sexting since our last publication on the issue. In particular, this submission will comment on the report and recommendations from the Victorian Law Reform Committee's inquiry into sexting ("**Victorian Inquiry**").
- III. Explaining how we advise young people who contact us in relation to youth peer-to-peer sexting, the law and their options.
- IV. Briefly commenting on our proposals for preventing the harms that can result from sexting by minors.

II. NCYLC research and publications

Youth peer-to-peer sexting is a key area of interest and expertise for the NCYLC and we hope that our past publications will assist the Committee in its consideration of this complex issue. We continue to endorse the findings and recommendations in our past publications. Accordingly, we would like to bring the following publications to the Committee's attention:

1. **New Voices/New Laws Report** (available at http://www.lawstuff.org.au/_data/assets/pdf_file/0009/15030/New-Voices-Law-Reform-Report.pdf)

This report provides a children's rights-based analysis and evaluation of the current criminal laws that can apply to peer-to-peer sexting and cyber bullying among young people in New South Wales (NSW). The report is the outcome of *New Voices/New Laws*, a project undertaken by the National Children's and Youth Law Centre (NCYLC) and Children's Legal Service of Legal Aid NSW (CLS). It offers insight on sexting and cyber bullying that we have garnered from our work as youth legal educators and advocates; examines the criminal law framework that applies to these behaviours in NSW; explains the need to reform these laws; reviews some of the law reform efforts undertaken in other Australian and overseas jurisdictions; and on these bases, makes recommendations for law and policy makers in NSW. The report also includes children and young people's views on sexting, cyber bullying and the law, and we urge the Committee to pay due regard to these views, as required by Article 12 of the Convention on the Rights of the Child. Further, we hope that any resulting law reform initiatives will include an effort to consult with children and young people.

2. **Submission to the Victorian Inquiry** (available at <http://www.parliament.vic.gov.au/images/stories/committees/lawrefrom/isexting/subs/S36 - National Childrens and Youth Law Centre.pdf>)

Our submission to the Victorian Inquiry commented briefly on Terms of Reference 1 (the incidence, prevalence and nature of sexting in Victoria) and 2 (the extent and effectiveness of existing awareness and education about the social and legal effect and ramifications of sexting) of the Victorian Inquiry, with a more in-depth discussion of Term of Reference 3 of the Victorian Inquiry (the appropriateness and adequacy of existing laws, especially criminal offences and the application of the sex offenders register, that may apply to the practice of sexting).

3. **Draft Lawstuff pages on sexting and the law for each state and territory** (attached to this submission)

The NCYLC provides legal information to children and young people across Australia through its website Lawstuff (www.lawstuff.org.au). We are currently reviewing and updating the pages on the laws relating to sexting for every state and territory. We understand the Committee is interested in the differences in laws on sexting across the states and territories and hope that these draft pages will be of use. However, we note that these pages have been drafted by volunteers at the Centre and not all pages have been reviewed by NCYLC staff.

III. The overarching flaws within the legal framework

There are three overarching flaws within the legal framework which we wish to bring to the Committee's attention.

1. Outdated

An overarching problem with the legislation is that it is **out-dated**. Legislation criminalizing child exploitation and child pornography was passed in all jurisdictions to protect children from traumatising experiences or abuse from adults. Ironically, with the widespread usage of instant messaging and social media, legislation that was enacted to protect children now makes them more vulnerable to criminal prosecution. It does not recognise that young people may use technology and social networking that is so easily accessible to them to act naively or irresponsibly - with severe, possibly lifelong, consequences.

2. Inconsistency of Law - Confusing Legal Situation

There exists a confusing legal situation that is ineffective at deterring the crime and incapable of addressing it fairly and equitably. Under the current framework, a young person can be charged both under the Commonwealth and their State's legislation. In many situations the State's legislation differs greatly from the related Commonwealth offences, where the relevant cut off age for child exploitation and child pornography material is lower than it is for the Commonwealth offences.

Furthermore, the inconsistency in laws dealing with sexual behaviour (i.e. sexting and sexually intimate behaviour) can cause confusion among young people. This confusion further renders the child pornography laws incapable of deterring young people from committing offences. It also leaves victims of sexting related harm without certain options for recourse and resolution.

3. Uncertainty as to Repercussions

A further problem is the great deal of discretion with which the legislation can then be enforced by the police. For example, while both the Victorian and Tasmanian police forces have made public statements endorsing the

“decriminalisation of sexting,”¹ and have stated that situations should be dealt with by “parents or social workers,”² Queensland Police consider the “level of criminality”³ to determine whether criminal sanctions are warranted. This has reportedly resulted in 240 children in Queensland being charged with producing and distributing child pornography in January to May 2013. Further compounding the issue is the fact that each local police force can choose to be as harsh in prosecution as they deem fit.

There is a **lack of non-criminal legal options**, making prosecution more likely against young people. An example of what could be implemented as an alternative can be found in Recommendation 13 of the Victorian Law Reform Committee’s Inquiry into Sexting. It proposes the creation of a Digital Communications Tribunal, to deal with complaints about harmful digital communications. A similar proposal has also been endorsed by other jurisdictions – for example the New Zealand Law Commission’s proposal for an independent Communications Tribunal.⁴

IV. Victorian Law Reform Committee’s inquiry into sexting

In addition to making a submission to the Victorian Inquiry, we gave oral evidence at the public hearing on 10 December 2012. In May 2013, the Victorian Law Reform Committee tabled its final report which referred to the NCYLC’s submission and evidence frequently. The report also made various recommendations which we would like to take the opportunity to comment very briefly on in this submission.

Recommendations that we strongly support as the template for a national legal approach

- ❖ **Rec 5:** Providing diversionary options for young adults charged with sexting offences that do not involve exploitative behaviour

We believe this would provide an alternative to criminal convictions and official court orders, which burden young offenders often disproportionately to the offence committed. Furthermore, the flexibility of diversionary options could more effectively address the harm created by sexting related incidents as well as educating and resolving issues between the parties involved more directly.

However, we believe that there is potential for this approach to encourage a criminal law response in all cases. In some situations, it may be preferable not to encounter the criminal justice system but rather take a more holistic approach, which focuses upon social context and harm.

- ❖ **Rec 6:** Adding defences to child pornography laws for close-in-age minors

This recommendation addresses our point regarding “out-dated legislation” and recognises the prevalence of consensual sexting among peers (e.g. between boyfriend and girlfriend). We also believe that adding defences will minimise the confusion among young people by bringing consistency to laws dealing with sexual behaviour i.e. sexting behaviour and sexually intimate behaviour.

¹ <http://www.parliament.vic.gov.au/images/stories/committees/lawrefrom/isexting/subs/S24 - Victoria Police.pdf>, p. 1

² <http://www.parliament.vic.gov.au/images/stories/committees/lawrefrom/isexting/subs/S48 - Tasmania Police.pdf>, p. 1

³ (<http://www.brisbanetimes.com.au/queensland/sexting-children-charged-with-porn-offences-20130625-2oub3.html>)

⁴ <http://www.parliament.vic.gov.au/images/stories/committees/lawrefrom/isexting/subs/S48 - Tasmania Police.pdf>, p. Xxiv.

❖ **Rec 7:** National conversation to make laws consistent

This addresses our point above regarding the inconsistency between Commonwealth, State and Territories' laws concerning "sexting" as well as the resulting uncertainty.

❖ **Rec 8:** Express police guidelines on how laws will be enforced

We believe that an express policy would reduce uncertainty regarding the inconsistency between the laws relating to sexting and to some extent lead to a uniform approach to offences relating to sexting involving young people.

❖ **Rec 10:** Discretion in registering defendants as sex offenders

This recommendation addresses the issue that the laws are outdated with regard to the prevalence of consensual sexting among young persons.

Rec 11: Review registration of those currently listed on register for sexting

If defences were to be added to child pornography laws, a review of the current register would ensure uniformity. Therefore, where a currently registered individual would have had a defence under the new laws, a review would provide for equality of treatment.

❖ **Rec 13:** Victorian Digital Communications Tribunal to fill existing gap in non-criminal legal responses that are fast, easy and effective at minimising harm

This recommendation addresses the lack of non-criminal options of recourse for victims of sexting.

❖ **Rec 14:** Establishment of a National Digital Communications Tribunal

This recommendation addresses the issue of a lack of non-criminal options of recourse as well as the inconsistency and lack of uniformity between states. The establishment of such a Tribunal could also effectively promote national reform in this area.

Additional recommendations that we support

❖ **Rec 1:** Research

We support research that aims to understand the position of young people on sexting particularly regarding the most effective preventative and resolution based options where sexting is not consensual and/or harmful. However we would like to see research into the effectiveness of current legal responses as well as the development of the best practices regarding sexting.

❖ **Rec 2:** Programs in school to create awareness and safety concerning the internet and communication technologies

We would like to see the legal aspects of sexting incorporated into this training i.e. especially reporting requirements as well as relevant, current criminal offences. This is because such awareness could prevent young people in acts of naivety and youthful recklessness in becoming victims or becoming liable to criminal offences with lifelong repercussions. Furthermore, we would like to see greater awareness for alternative non-criminal or non-legal avenues upon which victims can seek advice, counselling or redress.

❖ **Rec 3:** Teacher Training

Again, we would like to see the training and development programs for teachers to incorporate training on the legal aspects of cybersafety, other options for victims and the criminal liability of sexting in general.

Recommendations that we withhold judgment upon (neither support nor oppose)

❖ **Rec 9: New offence for sexting**

We would welcome the use of lesser penalties for sexting and recognise the advantages of a specific offence which would help to resolve legal uncertainty in this area. However, we are reluctant to endorse any new criminal offences because the very existence of an offence called “sexting”, could provoke a purely criminal law response to these issues, and thereby ignore potential, more effective options. Furthermore, this could prevent a holistic response to sexting related harm, stigmatising the naive and reckless acts of young people as criminal- alienating victims and unintentional offenders.

V. Responding to cases of sexting by minors

As noted above, the NCYLC’s Lawstuff website provides legal information about sexting to children and young people across the country. Since their creation, the sexting pages have had 25,962 unique page views. Through the Lawstuff website, children and young people are also able to access our online legal advice service, called Lawmail. To date, we have provided legal advice to young people or their advocates in at least 25 sexting related cases in NSW, Vic, Qld, WA, SA and the ACT.

Our experiences with children and young people and their sexting issues suggests that the following key principles should inform strategies to respond to cases of sexting by minors to ensure the best interests of all involved children and young people are being appropriately considered:

- Every party involved in sexting incidents (including victims, alleged perpetrators, schools and in particular, police) must have access to:
 - accurate legal information and advice about sexting and
 - appropriate referral pathways to ensure there is a holistic response
- Responses to sexting should provide the young people involved with the opportunity to participate in the resolution of the incident, which will in turn facilitate informed decision making by all parties
- This participation should be guided by principles of procedural fairness

We believe that cyber safety advocacy services aimed at problem-solving, early intervention and harm minimisation (using the principles outlined above) should be mandated. For example, the NCYLC or other legal or advocacy bodies could be funded to do this work. As we noted in our submission to the Victorian Inquiry, there is a preponderance of cyber safety programs and initiatives with a major focus on prevention and education but there is a dearth of resources directed to advocating for quick and effective solutions once an incident has occurred.

VI. Preventing harms from sexting by minors

While our particular expertise is in *responding* to cases of sexting, we believe that education and information is also central to *preventing* the harms that can arise from sexting. We consider that preventive education programs should include information about the laws that apply to common situations and note that our Lawstuff pages are useful resources that could be used to achieve this end (including at schools).

VII. Conclusion

We commend the Committee for inquiring into this difficult and important issue, and thank you for the opportunity to share our perspective. We expect that the inquiry will result in more helpful and appropriate ways to address sexting by minors.

Submitted on [date]

By:

Matthew Keeley, Director

Kelly Tallon, Cyber-Project Coordinator

Rosie Thomas, Seconded Solicitor

Tess Grieve, Volunteer

Marie-Ellen Karykis, Volunteer

Nina Wu, Volunteer

National Children's and Youth Law Centre

With the endorsement of the **Youth Law Centre ACT**.

SEXTING - NSW

What is sexting?

Sexting is using the internet or your mobile to share nude/sexy pictures.

Is sexting a crime?

Sexting is a crime when it involves people under 18¹. It's also a crime when it involves harassing people of any age².

Why 18?

In NSW, the law says you can consent to both sex and sexting at age 16.³ But NSW law is not the only law that applies.⁴ When you use the internet or a mobile phone, the national law of Australia also applies, even though you are in NSW⁵. The national law bans sexting for anyone under 18.⁶

When sexting involves someone under 18...

When sexting involves someone under 18, it can be 'child pornography'⁷ or an 'indecent act'⁸.

What is child pornography?

Child pornography is a picture of a young person who is:

- showing their private parts (genitals⁹, anus¹⁰ or breasts¹¹)¹²;
- posing in a sexual way¹³;
- doing a sexual act¹⁴; or
- in the presence of someone who is doing a sexual act or pose¹⁵.

Child pornography can include real pictures¹⁶, photo-shopped pictures¹⁷, videos¹⁸ and cartoons¹⁹. But a picture is only child pornography if it is offensive to the average person²⁰. That's why a picture of a naked baby in a bath isn't child pornography, but a picture of a naked teenager in a bed could be.

¹ *Criminal Code Act 1995 (Cth)* s473.1; s474.19

Crimes Act 1900 (NSW) s91G, s91H, s91K

² *Criminal Code Act 1995 (Cth)* S474.17

³ *Crimes Act 1900 (NSW)* s91FA (definition of child = under 16)

Crimes Act 1900 (NSW) s66C (age of consent)

⁴ *Criminal Code Act 1995 (Cth)* S474.19

⁵ *Criminal Code Act 1995 (Cth)* S474.19

⁶ *Criminal Code Act 1995 (Cth)* s473.1 (definition of child pornography = under 18)

Criminal Code Act 1995 (Cth) S474.19

⁷ *Criminal Code Act 1995 (Cth)* s 473.1;

Crimes Act 1900 (NSW) s 91FB.

⁸ *Crimes Act 1900 (NSW)* s61N – for 16 or under

⁹ *Criminal Code Act 1995 (Cth)* s 473.1 "child pornography material" (b)(i), (b)(ii)

¹⁰ *Criminal Code Act 1995 (Cth)* s 473.1 "child pornography material" (b)(i), (b)(ii)

¹¹ *Criminal Code Act 1995 (Cth)* s 473.1 "child pornography material" (b)(i), (b)(iii)

¹² *Crimes Act 1900 (NSW)* s91FB(4)

¹³ *Criminal Code Act 1995 (Cth)* s 473.1 "child pornography material" (a)(i)

¹⁴ *Criminal Code Act 1995 (Cth)* s 473.1 "child pornography material" (a)(i)

¹⁵ *Criminal Code Act 1995 (Cth)* s 473.1 "child pornography material" (a)(ii)

What is illegal about it?

Child pornography pictures are illegal if they are:

- asked for²¹;
- taken²²;
- received and kept²³; or
- sent, posted or passed around.²⁴

These actions are crimes even if the picture is only of you, your boyfriend/girlfriend or someone else who says it's ok²⁵. Remember, the national law says a person under 18 can't agree to sexting²⁶.

It can also be a crime to share a nude/sexy picture of someone who looks like they are under 18²⁷, even if they are actually over 18 when the picture was taken.

Even if a picture is not child pornography, asking for or sending a nude/sexy photo can be an indecent act and this is a crime²⁸. An indecent act is usually a sexual act that the average person finds offensive²⁹.

A real life example:

18 year old Damien³⁰ texted a 13 year old girl and asked her for a "hot steamy" picture. The girl texted back to Damien a nude picture of herself. The girl's father found the picture on her phone and called the police. Damien was charged with possessing child pornography and causing the girl to do an act of indecency. He was found guilty of the indecency charge and was placed on a good behaviour bond.

The girl also broke the law by taking and sending the picture³¹. In this case, she was not charged (probably because she was so much younger than him, Damien was considered more at fault).

What are the penalties?

¹⁶ *Crimes Act 1900 (NSW)* s91H(1)

¹⁷ *Crimes Act 1900 (NSW)* s91H(1) "produce" (b); s91FA definition – "material" includes computer image

¹⁸ *Crimes Act 1900 (NSW)* s91FA definition – "material" includes film

¹⁹ *Criminal Code Act 1995 (Cth)* s 473.1 "child pornography material"

Crimes Act 1900 (NSW) s91FB(1)

²⁰ *Criminal Code Act 1995 (Cth)* s 473.1 "child pornography material"

Crimes Act 1900 (NSW) s91FB(1)

²¹ *Crimes Act 1900 (NSW)* s 91G(1); s 61N(1)

Criminal Code Act 1995 (Cth) s 473

²² *Crimes Act 1900 (NSW)* s91G; s91H

²³ *Crimes Act 1900 (NSW)* s 91H(1)

²⁴ *Crimes Act 1900 (NSW)* s 91H(1)(a).

²⁵ *Criminal Code Act 1995 (Cth)* s473.1; s473.21 defence – there is no defence on grounds of consent

²⁶ *Criminal Code Act 1995 (Cth)* s473.1; s474.19

²⁷ *Criminal Code Act 1995 (Cth)* s 473.1 "child pornography material" – "appears to be, under 18 years of age"

²⁸ *Crimes Act 1900 (NSW)* s61N – indecency charges

²⁹ *Eades v DPP (NSW)* [2010] NSWCA 241 [39], quoting *R v Manson (NSWCCA, 17 February 1993, unreported)*.

³⁰ Facts of *Eades v DPP (NSW)* [2010] NSWCA 241

³¹ *Crimes Act 1900 (NSW)* s61N – indecency charges; *Crimes Act 1900 (NSW)* s91G; s91H – child abuse material; *Criminal Code Act 1995 (Cth)* s 473.1; s474.19 – sending child pornography material using a carriage service

The maximum penalties for child pornography can be up to 15 years in gaol³² and being placed on the sex offender register³³ (see below). The maximum penalty for an act of indecency is 2 years in goal if the person in the picture is under 16.³⁴ If the person is over 16, the maximum penalty is 18 months in gaol.³⁵ The penalties are high because the laws were meant to stop adults from sexually abusing children. When the laws were passed, nobody realised that they might also be used against young people who took pictures of themselves or other people of their own age.

In some sexting cases, instead of using child pornography laws, the police might decide to:

- charge you with a less serious crime (like posting an indecent picture, which has a maximum penalty of 12 months in gaol)³⁶;
- send you to youth justice conferencing;
- give you a warning or caution; or
- let your parents or school decide your punishment.

When sexting involves harassment and threats, it's much more likely that police will press serious charges that could lead to sex offender registration.³⁷

If the person is under 18 when they commit the child pornography crime, the police must get the Attorney General's permission before they can make child pornography charges under the national law³⁸. The police do not need to get this permission before making charges under the state law.

What is the child sex offender register?

You may be placed on the Australian National Child Offender Register if you are found guilty of a child pornography or indecency crime.³⁹ People on this Register have to give their contact details to the police and inform them of any changes (like moving houses or switching jobs)⁴⁰. They are not allowed to work or volunteer in places involving children⁴¹. For example, they are not allowed to coach junior sports teams or become a surf lifesaver.

If you are under 18, you can't be placed on the Register for committing just one child pornography or indecency crime.⁴² But when sexted pictures show more than one person or are sent on multiple

³² *Criminal Code Act 1995* (Cth) s 474.19

³³ *Child Protection (Offenders Registration) Act 2000* (NSW) s3A

³⁴ *Crimes Act 1900* (NSW) s61N

³⁵ *Crimes Act 1900* (NSW) s61N

³⁶ *Crimes Act 1900* (NSW) S578C

³⁷ Per email from John Kerlatec to Kelly Tallon dated 19 Jul 2012 - In a situation where the behaviour crosses the line from "stupid" to "malicious", the NSW police have emphasised that they would be far more inclined to press charges.⁷⁷ For example, where the motive for dissemination is retribution or serious damage to a person's reputation, where the photo was the product of coercion or where the subject of the photo did not consent to being filmed, the offenders would likely be charged under child pornography laws

³⁸ *Criminal Code Act 1995* (Cth) s 474.24C(2)

³⁹ *Child Protection (Offenders Registration) Act 2000* (NSW) s3A.

⁴⁰ *Child Protection (Offenders Registration) Act 2000* (NSW) Division 3 – obligation to report

⁴¹ *Child Protection (Working with Children) Act 2012* (NSW) Schedule 2 Disqualifying offences – include the offences highlighted relating to sexting

⁴² *Child Protection (Offenders Registration) Act 2000* (NSW) s3A(2)(c) Registrable Persons

days, this can be more than one crime. This means if you are under 18 but are involved in sexting with more than one person or on more than one day, you could still be placed on the register.

What should you do?

If you receive nude/sexy pictures or videos on the internet or on your mobile, you can avoid getting into trouble by⁴³:

- Deleting the pictures/videos immediately and
- Letting the sender know that you don't want to receive any more of these pictures/videos⁴⁴.

You should NEVER forward these images onto other people because this is a crime⁴⁵.

When sexting involves harassment...

Sexting can also be a form of harassment⁴⁶. For example, someone might keep bothering you with requests for a naked picture. Or they might send you a naked picture that you don't want. Or they might threaten to send a naked picture of you to other people without your permission.

Sexting that involves harassment can be an indecent act, even if everyone is over 18. It can also be considered a menacing, harassing or offensive use of the internet or a mobile phone⁴⁷.

What is menacing, harassing or offensive use of the internet or a mobile?

It is a crime to use your mobile phone or the internet in an offensive way or to harass somebody⁴⁸. Something could be offensive or harassing if it makes a person feel disgusted, humiliated⁴⁹ or threatened⁵⁰. When sexting is used to threaten or bother someone, it is against the law. The maximum penalty is 3 years in gaol⁵¹.

Real life examples:

20 year old Ronnie⁵² posted 6 nude photos of his 18 year old ex-girlfriend on Facebook as a revenge for breaking up with him. Ronnie's ex-girlfriend reported this to the police and he removed the photos for a short time. When Ronnie re-posted those photos later that day, the Police arrested and charged Ronnie with posting indecent pictures. Ronnie was given a 6 months home detention and was left with a criminal record.

Child Protection (Offenders Registration) Act (NSW) s3A(5) Single offence

Child Protection (Offenders Registration) Act (NSW) s3(3) same incidence

⁴³ *Crimes Act 1900 (NSW) s91HA defences*

⁴⁴ *Crimes Act 1900 (NSW) s91HA(2)*

⁴⁵ *Crimes Act 1900 (NSW) s578C*

⁴⁶ *Criminal Code Act 1995 (Cth) s 474.17*

⁴⁷ *Criminal Code Act 1995 (Cth) s 474.17*

⁴⁸ *Criminal Code Act 1995 (Cth) s 474.17*

⁴⁹ *Sexual Discrimination Act 1984 (Cth) s28A(1); Johanson v Michael Blackledge Meats [2001] FMCA 6 para 22*

⁵⁰ *Crowther v Sala [2007] QCA 133 [25]*

⁵¹ *Criminal Code Act 1995 (Cth) s 474.17*

⁵² *Police v Ravshan USMANOV [2011] NSWLC 40*

Jason⁵³ repeatedly sent unwanted sexy pictures to a new friend by SMS on his mobile. His friend was intimidated by the pictures he sent. Jason was charged with menacing, harassing or offensive use of a mobile for each SMS he sent. He was sent to jail for 12 months.

What if you didn't know or agree to your picture or video being taken in the first place?

It is a crime for someone to take a picture or video of your private parts⁵⁴ or private actions⁵⁵ if you didn't know or didn't agree.

Private parts include a person's genitals or anus, even when they are covered by underwear⁵⁶.

Private actions include:

- Undressing;
- Using the toilet;
- Taking a shower or a bath; or
- Having sex or doing a sexual act⁵⁷.

The maximum penalty is 5 years in gaol if the person being filmed is under 16⁵⁸. If the person being filmed is over 16, the maximum penalty is 2 years in gaol or a fine⁵⁹. Remember, it is still a crime if the person being filmed is over 18⁶⁰.

Other laws that can apply to sexting...

When sexting involves a person who is under 16 and a person who is over 18, the person who is over 18 could be committing some other very serious crimes.⁶¹

When sexting is unwanted, it could also be a form of sexual harassment⁶², invasion of privacy⁶³ or defamation⁶⁴.

You can find out more on our Lawstuff factsheets:

⁵³ R v Vaughan [2011] QCA 224

⁵⁴ *Crimes Act 1900* (NSW) s91L

⁵⁵ *Crimes Act 1900* (NSW) s91K

⁵⁶ *Crimes Act 1900* (NSW) s91L(1)

⁵⁷ *Crimes Act 1900* (NSW) s91L(2)

⁵⁸ *Crimes Act 1900* (NSW) s91L(1)

⁵⁹ *Crimes Act 1900* (NSW) s91L(3) aggravated offence; s91L(4) circumstance of aggravation includes child under 16 being filmed

⁶⁰ *Crimes Act 1900* (NSW) s91L(1) – there is no age cap to this offence as far as there is no consent to the filming

⁶¹ *Criminal Code Act 1995* (Cth) s474.25A; 474.26; 474.27; *Crimes Act 1900* (NSW) s66EB.

⁶² Anti-Discrimination Act 1977 (NSW) s22A(b) meaning of sexual harassment to include unwelcome conduct of sexual nature

⁶³ United Nations Convention on the Rights of the Child, Article 16 – protection of basic human right

⁶⁴ *Crimes Act 1900* (NSW) s529(3)

Sexual harassment: http://www.lawstuff.org.au/nsw_law/topics/sexual-assault-and-sexual-harassment/sexual-harassment

Privacy: http://www.lawstuff.org.au/nsw_law/topics/privacy

Defamation: http://www.lawstuff.org.au/nsw_law/topics/defamation

What can I do to stop people from sending images of me around the Internet or through mobiles?

There are a number of things you can do to stop these pictures being sent out:

- If the picture is on a social networking site such as Facebook, you may be able to report the picture and have it taken off the site. You can report something on Facebook here: <http://www.facebook.com/help/?faq=167722253287296>.
- You can also make a report to your mobile phone company if you are receiving unwanted pictures or requests for pictures. Call your mobile phone company or go to their website.
- Apply for a protection order to stop a person from contacting you or sending out images to harass you.
- Send us a *Lawmail*. We can tell you what your options are, help you make a complaint or write a letter to the person threatening to share your picture.
- Tell someone you trust – a parent, friends, school counsellor or teacher.
 - You may also wish to speak to someone from the [Kids Helpline on 1800 55 1800](http://www.kidshelpline.com.au).
 - Be aware that your teacher may feel the need to report to the police.
- Contact the police if images are being spread without your consent or if you feel unsafe.
 - Be aware you may be charged if you took and sent the picture. But police have discretion not to charge victims of unwanted sexting.

What should I do if I have a picture or text I am unsure about?

It's important to protect yourself by deleting any pictures you are uncomfortable with straight away.⁶⁵ **NEVER forward these images on to anyone else.**

If you're worried you may have committed a crime, you can send a *Lawmail* at www.lawstuff.org.au or call the *Youth Hotline* on 1800 10 18 10.

You should also have a look at our Lawstuff factsheet on self incrimination: _____.

⁶⁵ *Crimes Act 1900* (NSW) s 91H(1) – prohibits possession of child pornography images.

SEXTING - QUEENSLAND

WHAT YOU NEED TO KNOW

- Sexting can be a crime
- The penalties can include gaol sentences and sex offender registration
- If your pic has been shared – or if you're nervous that it might be – there are a number of things you can do to stop these pictures being sent around

What is sexting?

Sexting is using the internet or your mobile to share nude/sexy pictures.

Is sexting a crime?

Sexting is a crime when it involves people under 18.¹ It's also a crime when it involves harassing people of any age.²

Why 18?

In Queensland, the law says you can consent to most forms of sex and sexting at age 16.³ But Queensland law is not the only law that applies.⁴ When you use the internet or a mobile phone, the national law of Australia also applies, even though you are in Queensland.⁵ The national law bans sexting for anyone under 18.⁶

When sexting involves someone under 18...

When sexting involves someone under 18, it can be considered "child pornography"⁷ or an "indecent act".⁸

What is "child pornography"?

Child pornography is a picture of a young person who is:

- showing their private parts including their genitals,⁹ anus¹⁰ or breasts¹¹);¹²

¹ *Criminal Code Act 1995 (Cth)* s 473.1; s474.19

Criminal Code Act 1899 (Qld) Schedule 1, s 207A

² *Criminal Code Act 1995 (Cth)* s 474.17

³ *Criminal Code Act 1899 (Qld)* – All sexual acts (other than anal sex which is referred to as "sodomy" and dealt with in Schedule 1, s 208) are referred to as "carnal knowledge" in the Act (see definition of "carnal knowledge" in Schedule 1, s 6). It is an indictable offence to have unlawful carnal knowledge with a child under 16 years (s 215). For sexting, see s 207A "child exploitation material", Schedule 1, s 210, s 228B, s 228C, s 228D. Note that there is no definition of "child" in the Act. In s 1 "adult" is defined as a person of or above the age of 18 years, but in Schedule 1, s 207A "child exploitation material" is defined as material that "describes or depicts someone who is, or apparently is, a child under 16 years...".

⁴ *Criminal Code Act 1995 (Cth)* s 474.19

⁵ *Criminal Code Act 1995 (Cth)* s 474.19

⁶ *Criminal Code Act 1995 (Cth)* s 473.1 "child pornography material"

⁷ *Criminal Code Act 1995 (Cth)* s 473.1 (definition of "child pornography material" is material that depicts or describes a person who is or appears to be under 18 years of age in a sexual pose or activity).

Criminal Code Act 1899 (Qld) Schedule 1, s 207A (definition of "child exploitation material" is material that... describes or depicts someone who is, or apparently is, a child under 16 years)

⁸ *Criminal Code Act 1899 (Qld)* Schedule 1, s 210 (makes it an offence for anyone to unlawfully procure a child under the age of 16 years to commit an indecent act or wilfully and unlawfully expose a child under the age of 16 years to an indecent act, amongst others).

⁹ *Criminal Code Act 1995 (Cth)* s 473.1 "child pornography material" (b)(i), (b)(ii)

- posing in a sexual way;¹³
- doing a sexual act;¹⁴ or
- in the presence of someone who is doing a sexual act or pose.¹⁵

Child pornography can include real pictures, photo-shopped pictures, videos and cartoons.¹⁶ But a picture is only child pornography if it is offensive to the average person.¹⁷ That's why a picture of a naked baby in a bath isn't child pornography, but a picture of a naked teenager in a bed could be.

What is illegal about it?

Child pornography pictures are illegal if they are:

- asked for;¹⁸
- taken or created;¹⁹
- received and kept,²⁰ or
- sent, posted, passed around or uploaded to the internet.²¹

¹⁰ *Criminal Code Act 1995 (Cth)* s 473.1 "child pornography material" (b)(i), (b)(ii)

¹¹ *Criminal Code Act 1995 (Cth)* s 473.1 "child pornography material" (b)(iii)

¹² *Criminal Code Act 1899 (Qld)* Schedule 1, s 207A "child exploitation material" includes a depiction of "someone who is, or apparently is, a child under 16 years"; "someone" includes "the body part of someone, including for example, someone's breasts or genitals"

¹³ *Criminal Code Act 1995 (Cth)* s 473.1 "child pornography material"

Criminal Code Act 1899 (Qld) Schedule 1, s207A "child exploitation material" (a) includes depiction of a child "in a sexual context"

¹⁴ *Criminal Code Act 1995 (Cth)* s 473.1 "child pornography material"

Criminal Code Act 1899 (Qld) Schedule 1, s 207A "child exploitation material" (a) includes depiction of a child "in a sexual context, including for example, engaging in a sexual activity" but is not limited to such

¹⁵ *Criminal Code Act 1995 (Cth)* s 473.1 "child pornography material" (a)(ii)

¹⁶ *Criminal Code Act 1995 (Cth)* s 473.1 ("child pornography material" includes anything that "depicts" a child under 18 in a sexual context – "depict" is defined to include "contain data from which a visual image (whether still or moving) can be generated; "material" includes material in any form, or combination of forms, capable of constituting a communication)

Criminal Code Act 1899 (Qld) Schedule 1, s 207A "child exploitation material"; "material" includes anything that contains data from which text, images or sound can be generated.

¹⁷ *Criminal Code Act 1995 (Cth)* s 473.1 "child pornography material"

Criminal Code Act 1899 (Qld) Schedule 1, s 207A "child exploitation material" defined as material "likely to cause offence to a reasonable adult".

¹⁸ *Criminal Code Act 1995 (Cth)* s 474.19(1)(a)(iv); *Criminal Code Act 1899 (Qld)* s 228A(2)(b).

¹⁹ *Criminal Code Act 1995 (Cth)* s 474.20(1)(a)(ii)

Criminal Code Act 1899 (Qld) Schedule 1, s 228A (creates an offence of "involving a child in the making of child exploitation material", which includes concerning a child in any way with the making of such material, or attempting to do so); Schedule 1, s 228B (creates an offence of making child exploitation material, which includes producing such material or attempting to do so)

²⁰ *Criminal Code Act 1995 (Cth)* 474.20(1)(a)(i)

Criminal Code Act 1899 (Qld) Schedule 1, s 228D (creates an offence of knowingly possessing child exploitation material)

These actions are crimes even if the picture is only of you, your boyfriend/girlfriend, or someone else who says it's ok.²² Remember, the national law says a person under 18 can't agree to sexting.²³ It doesn't matter that the person taking the picture thought the person in it was old enough.²⁴ It can also be a crime to share a nude/sexy picture of someone who looks like they are under 18, even if they are actually over 18 when the picture was taken.²⁵

Even if a picture is not child pornography, asking for, taking, sending or showing someone under 16 a nude/sexy photo can be an indecent act and this is a crime.²⁶

A real life example

18 year old Damien texted a 13 year old girl and asked her for a "hot steamy" picture. The girl texted back to Damien a nude picture of herself. The girl's father found the picture on her phone and called the police. Damien was charged with possessing child pornography and causing the girl to do an act of indecency. He was found guilty of the indecency charge and was placed on a good behaviour bond.²⁷

The girl also broke the law by taking and sending the picture.²⁸ In this case, she was not charged (probably because she was so much younger than him, Damien was considered more at fault).

Even though this happened in New South Wales, similar penalties could apply in Queensland.

What are the penalties?

The maximum penalties for child pornography can be up to 15 years in gaol,²⁹ and being placed on the sex offender register (see below).³⁰ The maximum penalty for taking an indecent photo

²¹ *Criminal Code Act 1995 (Cth)* s 474.19(1)(a)(iii)

Criminal Code Act 1899 (Qld) Schedule 1, s 228C (creates an offence of communicating, exhibiting, sending, supplying or transmitting child exploitation material, or attempting to do so)

²² *Criminal Code Act 1995 (Cth)* s 473.1; s 474.21 – there is no defence on the ground of consent)

Criminal Code Act 1899 (Qld) Schedule 1, s 228E – there is no defence on the ground of consent

²³ *Criminal Code Act 1995 (Cth)* s 473.1 (under s 474.21 there is no defence on the ground of consent); s 474.19

²⁴ *Criminal Code Act 1899 (Qld)* Schedule 1, s 229 (knowledge of age immaterial).

²⁵ *Criminal Code Act 1995 (Cth)* s 473.1 "child pornography material" – includes a representation of a person who is, or appears to be, under 18 years of age)

Criminal Code Act 1899 (Qld) Schedule 1, s 207A "child exploitation material" includes the depiction of "someone who is, or apparently is, a child under 16 years" of age).

²⁶ *Criminal Code Act 1995 (Cth)* s 474.27A (makes it an offence for an adult to send indecent material to a child under 16 using a carriage service)

Criminal Code Act 1899 (Qld) Schedule 1, s 210(1)(f) (creates an offence of taking any indecent photograph or recording, by means of any device, of a child under 16); Schedule 1, s 210(1)(e) (creates an offence of wilfully exposing a child under 16 to any indecent object, film, videotape, audiotape, picture, photograph or printed or written matter – although note that the legislation does not define "indecent").

²⁷ *Eades v Director of Public Prosecutions (NSW)* [2010] NSWCA 241.

²⁸ *Criminal Code Act 1995 (Cth)* s 473.1; s474.19 – sending child pornography material using a carriage service

²⁹ *Criminal Code Act 1995 (Cth)* s 474.19

Criminal Code Act 1899 (Qld) Schedule 1, ss 228A-228D

³⁰ *Child Protection (Offender Reporting) Act 2004 (Qld)* s 5; s 9; Schedule 1; Schedule 2

of someone under 16 is 14 years in gaol,³¹ or 20 years in gaol if the child is under the age of 12 years.³²

These penalties are high because the laws were meant to stop adults from sexually abusing children. When the laws were passed, nobody realised that they might also be used against young people who took pictures of themselves or other people of their own age.

In some sexting cases, instead of using child pornography laws, the police might decide to:

- charge you with a less serious crime;
- send you to youth justice conferencing;
- give you a warning or caution; or
- let your parents or school decide your punishment.

In Queensland, the police have not released guidelines on how they will deal with sexting offences. However, it seems the police are more likely to press serious charges that would lead to sex offender registration if the sexting involves harassment or threats.

If the person is under 18 when they commit the child pornography crime, the police must get the Attorney General's permission before they can make child pornography charges under the national law.³³ The police do not need to get this permission before making charges under the state law.

What is the child sex offender register?

You may be placed on the Australian National Child Offender Register if you are found guilty of a child pornography or indecency crime.³⁴ People on this Register have to give their contact details to the police and inform them of any changes (like moving house or switching jobs).³⁵ They also have to tell the police about all of their email addresses or social media accounts – like Facebook, Twitter or Tumblr.³⁶ They are not allowed to work or volunteer in places involving children.³⁷ For example, they are not allowed to coach junior sports teams or become a surf lifesaver.

If you are under 18, you can't be placed on the Register for committing just one child pornography or indecency crime.³⁸ But when sexted pictures show more than one person or are sent on multiple days, this can be more than one crime. This means if you are under 18 but are involved in sexting with more than one person or on more than one day, you could still be placed on the Register.

What should you do?

³¹ *Criminal Code Act 1899 (Qld)* Schedule 1, s 210(2) (The provision includes a defence on grounds that the person reasonably believed the child to be of or above the age of 16: s 210(5)).

³² *Criminal Code Act 1899 (Qld)* Schedule 1, s 210(3)

³³ *Criminal Code Act 1995 (Cth)* s 474.24C

³⁴ *Child Protection (Offender Reporting) Act 2004 (Qld)* s 5; s 9; Schedule 1; Schedule 2

³⁵ *Child Protection (Offender Reporting) Act 2004 (Qld)* s 16 (personal details that are to be reported).

³⁶ *Child Protection (Offender Reporting) Act 2004 (Qld)* s 16 (personal details that are to be reported).

³⁷ *Commission for Children and Young People and Child Guardian Act 2001 (Qld)* Chapter 8 (see particularly, s 169(1)(b)(i) & s 174(1)(c)); Schedule 1, Part 1

³⁸ *Child Protection (Offender Reporting) Act 2004* s 5(2)(c)(i) and (iii). Note that "child" is not defined in this Act

If you receive nude/sexy pictures or videos on the internet or on your mobile, you should:

- delete the pictures/videos immediately; and
- let the sender know that you don't want to receive any more of these pictures/videos.³⁹

You should NEVER forward these images on to other people because this is a crime.⁴⁰

When sexting involves harassment...

Sexting can also be a form of harassment.⁴¹ For example, someone might keep bothering you with requests for a naked picture. Or they might send you a naked picture that you don't want. Or they might threaten to send a naked picture of you to other people without your permission.

Sexting that involves harassment can be an indecent act or stalking, even if everyone is over 18.⁴² It can also be considered a menacing, harassing or offensive use of the internet or a mobile phone.⁴³

What is menacing, harassing or offensive use of the internet or a mobile?

It is a crime to use your mobile phone or the internet in an offensive way to harass somebody.⁴⁴ Something could be offensive or harassing if it makes a person feel disgusted, humiliated⁴⁵ or threatened⁴⁶. When sexting is used to threaten or bother someone, it is against the law. The maximum penalty is 3 years in gaol.⁴⁷

Real life examples

20 year old Ronnie posted 6 nude photos of his 18 year old ex-girlfriend on Facebook as revenge for breaking up with him. Ronnie's ex-girlfriend reported this to the police and he removed the photos for a short time. When Ronnie re-posted the photos later that day, the police arrested and charged Ronnie with posting indecent pictures. Ronnie was given a 6 month home-detention order and left with a criminal record.⁴⁸ This was largely because of the embarrassment, humiliation and anxiety Ronnie's actions caused his ex-girlfriend – something the court takes very seriously.⁴⁹

³⁹ *Criminal Code Act 1899 (Qld)* Schedule 1, s 228D – possession of child exploitation material is only a crime if "knowingly" possessed

⁴⁰ *Criminal Code Act 1899 (Qld)* Schedule 1, s 228C

⁴¹ *Criminal Code Act 1995 (Cth)* s 474.17

⁴² *Criminal Code Act 1899 (Qld)* Schedule 1, s 210(1); Schedule 1, s 359B (unlawful stalking includes: (c)(ii) contacting a person in any way, including, for example, by telephone, mail, fax, email or through the use of any technology; or (c)(v) giving offensive material to a person, directly or indirectly, which would: (d)(i) cause the stalked person apprehension or fear of violence; or (d)(ii) cause detriment to the stalked person or another person).

⁴³ *Criminal Code Act 1995 (Cth)* s 474.17

⁴⁴ *Criminal Code Act 1995 (Cth)* s 474.17

⁴⁵ *Sexual Discrimination Act 1984 (Cth)* s 28A(1); *Johanson v Michael Blackledge Meats* [2001] FMCA 6 at [22]

⁴⁶ *Criminal Code Act 1899 (Qld)* Schedule 1, s 359B; *Crowther v Sala* [2007] QCA 133 at [25].

⁴⁷ *Criminal Code Act 1995 (Cth)* s 474.17

⁴⁸ *Police v Ravshan USMANOV* [2011] NSWLC 40

⁴⁹ *Police v Ravshan USMANOV* [2011] NSWLC 40. See also Heath Aston, "Ex-lover punished for Facebook revenge" *Canberra Times* 22 April 2012. Available at: <http://www.canberratimes.com.au/technology/technology-news/exlover-punished-for-facebook-revenge-20120421-1xdpy.html>. Accessed 21 January 2013.

Jason repeatedly sent unwanted sexy pictures to a new friend by SMS on his mobile. His friend was intimidated by the pictures he sent. Jason was charged with menacing, harassing or offensive use of a mobile for each SMS he sent. He was sentenced to 12 months in prison.⁵⁰

What if you didn't know or agree to your picture or video being taken in the first place?

It is a crime for someone to take a picture or video of your private parts⁵¹ or private actions⁵² if you didn't know or didn't agree.

Private parts include a person's genitals or anus, even when they are covered by underwear.⁵³

Private actions could include:

- (a) Undressing;
- (b) Using the toilet;
- (c) Taking a shower or a bath; or
- (d) Having sex or doing something sexual.⁵⁴

The maximum penalty is 2 years in prison.⁵⁵ If the person being filmed is under 16 and they are being filmed having sex or doing something sexual, the maximum penalty increases to 10 years in prison.⁵⁶ Remember, if the picture or film is of a person's private parts or private actions, it is still a crime even if the person is over 18.⁵⁷

Other laws that can apply to sexting...

When sexting involves a person who is under 16 and a person who is over 18, the person who is over 18 could be committing some other very serious crimes.⁵⁸ This is because when you turn 18, you legally become an adult, and the law takes any kind of sexual interaction between an adult and child very seriously.

When sexting is unwanted and happens at work or at school, it could also be a form of sexual harassment.⁵⁹

What can I do to stop people sending images of me around the Internet or through mobiles?

There are a number of things you can do to stop these pictures being sent around:

⁵⁰ *R v Vaughan* [2011] QCA 224

⁵¹ *Criminal Code Act 1899 (Qld)* Schedule 1, s227A(2)

⁵² *Criminal Code Act 1899 (Qld)* Schedule 1, s227A(1)

⁵³ *Criminal Code Act 1899 (Qld)* Schedule 1, s 227A(3)

⁵⁴ *Criminal Code Act 1899 (Qld)* Schedule 1, s 227A(1), see examples to this subsection

⁵⁵ *Criminal Code Act 1899 (Qld)* Schedule 1, s 227A

⁵⁶ *Criminal Code Act 1899 (Qld)* Schedule 1, s 207A "child exploitation material"; Schedule 1, s 228B (making child exploitation material).

⁵⁷ *Criminal Code Act 1899 (Qld)* Schedule 1, s 227A

⁵⁸ *Criminal Code Act 1995 (Cth)* ss 474.25A, 474.26, 474.27.

⁵⁹ *Anti-Discrimination Act 1991 (Qld)* ss 118-119 (purpose of Act, though, is to protect from unfair discrimination in the work, education and accommodation contexts, see Part 4)

- Don't take or send a naked picture of yourself – no matter who asks or how much you trust them.
- If a picture is on a social networking site like Facebook, you may be able to report the picture and have it taken off the site. You can report something on Facebook here: <http://www.facebook.com/help/263149623790594/>.
 - For images of children under 13, parents can fill out a form to have that photo removed. Facebook will comply provided the image does contain the child, he or she is under 13 and the form has been correctly filled. See here for more details: <http://www.facebook.com/help#!/help/441374602560317/>
 - Set privacy settings to allow you to review photo tags before they appear on your profile and your friends' newsfeeds.
- You can also make a report to your mobile phone company if you are receiving unwanted pictures or requests for pictures. Call your mobile phone company or go to their website.
- Apply for a protection order to stop a person from contacting you or sending out images to harass you.
- Send us a *Lawmail*. We can tell you what your options are, help you make a complaint, or write a letter to the person threatening to share your picture.
- Tell someone you trust – a parent, friend, school counsellor or teacher.
 - You may also wish speak to someone from the **Kids Helpline on 1800 55 1800**.
 - **Be aware** that your teacher may feel that they have to report the incident to the police.
- Contact the police if the images are being spread without your consent, or if you feel unsafe or threatened.
 - **Be aware** that you may be charged if you took and sent the picture. But the police have discretion not to charge victims of unwanted sexting.

What should I do if I have a picture or text I am unsure about?

It's important to protect yourself by deleting any pictures you are uncomfortable with straight away.⁶⁰ **NEVER forward these images on to anyone else.** If you're worried you may have committed a crime, you can send us a *Lawmail* at www.lawstuff.org.au, or call the *Youth Hotline* on 1800 10 18 10.

If you decide to do any of these things, you should also have a look at our *Lawstuff* factsheet on self incrimination: http://www.lawstuff.org.au/data/assets/pdf_file/0010/14887/SelfIncrimination-fact-sheet.pdf

⁶⁰ *Criminal Code Act 1899 (Qld)* Schedule 1, s 228D (prohibits possession of child pornography, provided that you know that you possess it)

Sexting – Victoria

WHAT YOU NEED TO KNOW

- **Sexting can be a crime**
- **The penalties can include gaol sentences and sex offender registration**
- **If your pic has been shared – or if you're nervous that it might be – there are a number of things you can do to stop these pictures being sent around**

What is sexting?

Sexting is using the internet or your mobile to share nude/sexy pictures.

Is sexting a crime?

Sexting is a crime when it involves people under 18.¹ It's also a crime when it involves harassing people of any age.²

When sexting involves someone under 18...

When sexting involves someone under 18, it can be 'child pornography'³ or an 'indecent act'⁴.

What is child pornography?

Child pornography is a picture of a young person who is:

- showing their private parts (including their genitals⁵, anus⁶, or breasts⁷);
- posing in a sexual way,⁸
- doing a sexual act,⁹ or
- in the presence of someone who is doing a sexual act or pose.¹⁰

Child pornography can include pictures, videos, publications or even computer games.¹¹ But a picture is only child pornography if it is offensive to the average person.¹² That's why a picture of a naked baby in a bath is not child pornography, but a picture of a naked teenager in a bed could be.

¹ *Criminal Code Act 1995* (Cth) s473.1; s474.19

Crimes Act 1958 (Vic) s47, s49, s49A; s67A "minor" and "child pornography", ss68-70

² *Criminal Code Act 1995* (Cth) s 474.17.

³ *Criminal Code Act 1995* (Cth) s473.1

Crimes Act 1958 (Vic) s67A "child pornography" and "minor"

⁴ *Crimes Act 1958* (Vic) s47 – for 16 years or under; s49 – for 16 or 17 years if under the care, supervision or authority of the offender

⁵ *Criminal Code Act 1995* (Cth) s473.1 "child pornography material" (b)(i), (b)(ii)

⁶ *Criminal Code Act 1995* (Cth) s473.1 "child pornography material" (b)(i), (b)(ii)

⁷ *Criminal Code Act 1995* (Cth) s473.1 "child pornography material" (b)(iii)

⁸ *Criminal Code Act 1995* (Cth) s473.1 "child pornography material" (a)(i)

Crimes Act 1958 s67A "child pornography" defined as "engaging in sexual activity or depicted in an indecent sexual manner or context"

⁹ *Criminal Code Act 1995* (Cth) s473.1 "child pornography material" (a)(i)

Crimes Act 1958 s67A "child pornography" defined as "engaging in sexual activity or depicted in an indecent sexual manner or context"

¹⁰ *Criminal Code Act 1995* (Cth) s473.1 "child pornography material" (a)(ii)

¹¹ *Criminal Code Act 1995* (Cth), s473.1 "child pornography material"; "material"

Crimes Act 1958 (Vic) s67A "child pornography"

¹² *Criminal Code Act 1995* (Cth) s473.1 "child pornography material"

What is illegal about it?

Child pornography pictures are illegal if they are:

- asked for;¹³
- taken;¹⁴
- received and kept;¹⁵ or
- sent, posted or passed around using the internet or a mobile.¹⁶

There is a limited legal defence in Victoria for the person who appears in the picture. There is also a limited legal defence for any person who took the picture or got it directly from the person in the picture, as long as they are no more than 2 years older than the person in the picture. But because these defences are very limited, the bottom line is that these actions can be crimes even if the picture is only of you, your boyfriend/girlfriend or someone else who says it's ok.¹⁷

It can also be a crime to share a nude/sexy picture of someone who looks like they are under 18,¹⁸ even if they are actually over 18 when the picture was taken.

Even if a picture is not child pornography, asking for or sending a nude/sexy photo can be an indecent act and this is a crime.¹⁹ An indecent act is usually a sexual act that the average person finds offensive.²⁰

A real life example:

18 year old Dave* received and kept six texts from a female friend with pictures of girls aged between 15-16 years either topless or in their underwear. The police searched Dave's computer and mobile phone while investigating an unrelated matter. Dave pleaded guilty to child pornography charges and was placed on the Sex Offenders Register.²¹

What are the penalties?

The maximum penalties for child pornography can be up to 15 years in gaol²² and being placed on the sex offender register (see below). The maximum penalty for an act of indecency is 10 years in gaol if it

Crimes Act 1958 (Vic) s67A "child pornography" definition includes "depicted in an indecent sexual manner". The term "indecent" has been interpreted to mean indecent to the ordinary person (see, for example, *Harkin* (1989) 38 A Crim R 296 at 299-301; *Phillips v Police* (1994) 75 A Crim R 480; *Drago v R* (1992) 8 WAR 488 as cited in *Halsbury's Laws of Australia* at [130-2090] ff 2).

¹³ *Criminal Code Act 1995* (Cth) s474.19(1)(a)(iv)

Crimes Act 1958 (Vic) s69

¹⁴ *Crimes Act 1958* (Vic) s68; s69

¹⁵ *Crimes Act 1958* (Vic) s70

¹⁶ *Criminal Code Act 1995* (Cth) s 474.19(1)(a)(iii)

¹⁷ *Criminal Code Act 1995* (Cth) s473.1; s 474.21 defence – there is no defence on grounds of consent

Crimes Act 1958 (Vic) s68 & s69 – For offences of production and procurement of child pornography, there is no defence on grounds of consent; s70(2)(d) – For offence of possession of child pornography there is a limited defence on the ground of consent

¹⁸ *Criminal Code Act 1995* (Cth) s473.1 "child pornography material" – "appears to be, under 18 years of age"

Crimes Act 1958 (Vic) s67A "child pornography" defined as depictions of a "person who is, or appears to be, a minor", "minor" defined as "person under the age of 18 years"

¹⁹ *Crimes Act 1958* (Vic) s47; s49. But note there are limited defences on grounds of consent – s47(2) & s49(2)

²⁰ *Eades v DPP* (NSW) [2010] NSWCA 241 [39], quoting *R v Mason* (NSWCCA, 17 February 1993, unreported)

* Not his real name

²¹ This case was reported in: Nicole Brady, "'Sexting' youths placed on sex offenders register", 24 July 2011, *The Age*. Available at: <http://www.theage.com.au/victoria/sexting-youths-placed-on-sex-offenders-register-20110723-1hugu.html>. Accessed 8 January 2013

²² *Criminal Code Act 1995* (Cth) s474.19

involves a person under 16.²³ If the indecent act involves a person who is 16 or 17, the maximum penalty is 5 years in gaol.²⁴ The penalties are high because the laws were meant to stop adults from sexually abusing children. When the laws were passed, nobody realised that they might also be used against young people who took pictures of themselves or other people of their own age.

In some sexting cases, instead of using child pornography laws, the police might decide to:

- charge you with a less serious crime;
- send you to youth justice conferencing;
- give you a warning or caution; or
- let your parents or school decide your punishment.

The more serious the sexting incident, for example if it involves harassment or threats, the more likely that police will press serious charges that could lead to sex offender registration.²⁵

If the person is under 18 when they commit the child pornography crime, the police must get the Attorney General's permission before they can make child pornography charges under the national law.²⁶ The police do not need to get this permission before making charges under the state law.

What is the child sex offender register?

You may be placed on the Australian National Child Offender Register if you are found guilty of a child pornography or indecency crime.²⁷ People on this Register have to give their contact details to the police and inform them of any changes (like moving houses or switching jobs).²⁸ They are not allowed to apply for or work in jobs involving children.²⁹ For example, they are not allowed to coach junior sports teams or babysit children through a babysitting agency.³⁰

If you are under 18 when you commit a child pornography or indecency offence, and you are not on a Sex Offender Register in another Australian state or overseas, you will not be placed on the Register.³¹

But if you are over 18 and found guilty of a child pornography offence because, for example, you took a naked/sexy photo of your girlfriend or boyfriend who was under 18, you will be placed on the Register.³²

What should you do?

If you receive nude/sexy pictures or videos on the internet or on your mobile, you may not get into trouble if:

²³ *Crimes Act 1958* (Vic) s47(1)

²⁴ *Crimes Act 1958* (Vic) s49(1)

²⁵ The Victorian Police do not appear to have released guidelines on sexting, but in a news release from Detective Superintendent Neil Paterson on 29 November 2012 he stated that "school kids" examples of sexting, where young people send their partners sexy images of themselves at school, will generally be dealt with by a warning or caution from the police and it is highly unlikely that they would be charged and placed on the Sex Offenders Register. But the more serious offences of producing and accessing child pornography images (which sexting arguably crosses over to in cases of harassment and threats) would be dealt with more seriously. See: Detective Superintendent Neil Paterson, "'Sexting' and the Sex Offenders Register", Victorian Police News Release, 29 November 2012. Available at: <http://www.vicpolice.com.au/our-say/10983-sexting-and-the-sex-offenders-register.html>. Accessed 31 January 2013.

²⁶ *Criminal Code Act 1995* (Cth) s474.24C

²⁷ *Sex Offenders Registration Act 2004* (Vic) s6; s7; Schedule 2

²⁸ *Sex Offenders Registration Act 2004* (Vic) Part 3 – Reporting Obligations. See, in particular, ss14(1) and 17

²⁹ *Sex Offenders Registration Act 2004* (Vic) s68 and s67(1) "child-related employment" & "employment"

³⁰ *Sex Offenders Registration Act 2004* (Vic) s67(1) "child-related employment" (j), (m)

³¹ *Sex Offenders Registration Act 2004* (Vic) s3 "child"; s6(3)(a); s9; s10

³² *Sex Offenders Registration Act 2004* (Vic) s3 "sentence"; s6(1), Note 4

- you delete the pictures/videos immediately and you let the sender know that you don't want to receive any more of these pictures/videos;³³
- you took the photo or got it from the person in the photo, and at the time the videos/pictures were received, you were no more than 2 years older than the underage person in the photo at that person agreed to let you have the photo;³⁴ or
- the pictures/videos are of you and you are under 18.³⁵

You should NEVER forward these images onto other people.³⁶

When sexting involves harassment...

Sexting can also be a form of harassment.³⁷ For example, someone might keep bothering you with requests for a naked picture. Or they might send you a naked picture that you don't want. Or they might threaten to send a naked picture of you to other people without your permission.

Sexting that involves harassment can also be considered stalking³⁸ or a menacing, harassing, or offensive use of the internet or a mobile phone³⁹.

What is menacing, harassing or offensive use of the internet or a mobile?

It is a crime to use your mobile phone or the internet in an offensive way or to harass somebody.⁴⁰ Something could be offensive or harassing if it makes a person feel disgusted, humiliated⁴¹ or threatened⁴². When sexting is used to threaten or bother someone, it is against the law. The maximum penalty is 3 years in jail.⁴³

Real life examples:

20 year old Ronnie posted 6 nude photos of his 18 year old ex-girlfriend on Facebook as revenge for breaking up with him. Ronnie's ex-girlfriend reported this to the police and he removed the photos for a short time. When Ronnie re-posted those photos later that day, the Police arrested and charged Ronnie with posting indecent pictures. Ronnie was given 6 months home detention and was left with a criminal record.⁴⁴

Jason repeatedly sent unwanted sexy pictures to a new friend by SMS on his mobile. His friend was intimidated by the pictures he sent. Jason was charged with menacing, harassing or offensive use of a mobile for each SMS he sent. He was sent to gaol for 12 months.⁴⁵

What if you didn't know or agree to your picture or video being taken in the first place?

³³ *Crimes Act 1958* (Vic) s 70(1) – it is an offence to "knowingly" possess child pornography

³⁴ *Crimes Act 1958* (Vic) s70(2)(d)

³⁵ *Crimes Act 1958* (Vic) s70(2)(e)

³⁶ *Criminal Code Act 1995* (Cth) s474. 19 (Note: Distribution of child pornography material is not a crime under the Victorian Act)

³⁷ *Criminal Code Act 1995* (Cth) s474. 17

³⁸ *Crimes Act 1958* (Vic) ss 21A(2)(b) and 21A(2)(ba) – Stalking laws apply to harassing electronic communication.

³⁹ *Criminal Code Act 1995* (Cth) s474. 17

⁴⁰ *Criminal Code Act 1995* (Cth) s474. 17

⁴¹ *Sexual Discrimination Act 1984* (Cth) s28A(1); *Johanson v Michael Blackledge Meats* [2001] FMCA 6 at [22]

⁴² *Crowther v Sala* [2007] QCA 133 at [25]

⁴³ *Criminal Code Act 1995* (Cth) s474. 17

⁴⁴ *Police v Ravshan USMANOV* [2011] NSWLC 40

⁴⁵ *R v Vaughan* [2011] QCA 224

It is a crime for someone to take a picture or video of you doing a private activity if you didn't know or didn't agree.⁴⁶ Private activities are things that you do in private when you don't expect to be watched.⁴⁷ They include:

- undressing;
- using the toilet;
- taking a shower or bath; or
- having sex or doing a sexual act.

The maximum penalty for taking a picture or video of someone doing a private activity is 2 years in gaol or a fine or both.⁴⁸

Other laws that can apply to sexting

When sexting is unwanted and happens at work or at school, it could also be a form of sexual harassment.⁴⁹

The courts in Victoria have also held that passing around sexual videos that were intended to be private can be a 'breach of confidence', and have awarded money damages to victims.⁵⁰

What can I do to stop people from sending images of me around the internet or through mobiles?

There are a number of things you can do to stop these pictures being sent around:

- Don't take or send a naked picture of yourself – no matter who asks or how much you trust them.
- If a picture is on a social networking site like Facebook, you may be able to report the picture and have it taken off the site. You can report something on Facebook here: <http://www.facebook.com/help/263149623790594/>.
 - For images of children under 13, parents can fill out a form to have that photo removed. Facebook will comply provided the image does contain the child, he or she is under 13 and the form has been correctly filled. See here for more details: <http://www.facebook.com/help#!/help/441374602560317/>
 - Set privacy settings to allow you to review photo tags before they appear on your profile and your friends' newsfeeds.
- You can also make a report to your mobile phone company if you are receiving unwanted pictures or requests for pictures. Call your mobile phone company or go to their website.
- Apply for a protection order to stop a person from contacting you or sending out images to harass you.
- Send us a *Lawmail*. We can tell you what your options are, help you make a complaint, or write a letter to the person threatening to share your picture.
- Tell someone you trust – a parent, friend, school counsellor or teacher.
 - You may also wish speak to someone from the **Kids Helpline on 1800 55 1800**.

⁴⁶ *Surveillance Devices Act 1999* (Vic) s7

⁴⁷ *Surveillance Devices Act 1999* (Vic) s3 "private activity"

⁴⁸ *Surveillance Devices Act 1999* (Vic) s7

⁴⁹ *Equal Opportunity Act 2010* (Vic) ss92-102

⁵⁰ *Giller v Procopets*[2008] VSCA 236

- Be aware that your teacher may feel that they have to report the incident to the police.
- Contact the police if the images are being spread without your consent, or if you feel unsafe or threatened.
 - Be aware that it is possible for you to be charged if you took and sent the picture. But this is less likely to happen in Victoria because there is a legal defence that applies to young people who take selfies.

What should I do if I have a picture or text I am unsure about?

It's important to protect yourself by deleting any pictures you are uncomfortable with straight away.⁵¹
NEVER forward these images on to anyone else.

If you're worried you may have committed a crime, you can send a *Lawmail* at www.lawstuff.org.au or call the Youth Hotline on 1800 10 18 10

You should also have a look at our Lawstuff factsheet on self incrimination:
http://www.lawstuff.org.au/data/assets/pdf_file/0010/14887/SelfIncrimination-fact-sheet.pdf

⁵¹ *Crimes Act 1958 (Cth) s70(1)*

SEXTING – WESTERN AUSTRALIA

WHAT YOU NEED TO KNOW

- Sexting can be a crime
- The penalties can include gaol sentences and sex offender registration
- If your pic has been shared – or if you're nervous that it might be – there are a number of things you can do to stop these pictures being sent around

What is sexting?

Sexting is using the internet or your mobile to share nude/sexy pictures.

Is sexting a crime?

Sexting is a crime when it involves people under 18.¹ It's also a crime when it involves harassing people of any age.²

Why 18?

In Western Australia, the law says you can consent to both sex and sexting at the age of 16.³ But WA law is not the only law that applies.⁴ When you use the internet or a mobile phone, the national law of Australia also applies, even though you are in WA.⁵ The national law bans sexting for anyone under 18.⁶

When sexting involves someone under 18...

When sexting involves someone under 18, it can be 'child pornography',⁷ an 'indecent act'⁸ or an 'indecent recording'.⁹

What is child pornography?

Child pornography is a picture of a young person who is:

- showing their private parts (including their genitals,¹⁰ anus¹¹ or breasts^{12,13});

¹ *Criminal Code Act 1995 (Cth)* s473.1; s474.19

Criminal Code Act Compilation Act 1913 (WA) s217A; s218; s219; s220

² *Criminal Code Act 1995 (Cth)* s474.17

³ *Criminal Code Act Compilation Act 1913 (WA)* s321, s217A

⁴ *Criminal Code Act 1995 (Cth)* s474.19

⁵ *Criminal Code Act 1995 (Cth)* s474.19

⁶ *Criminal Code Act 1995 (Cth)* s473.1 (definition of child pornography = under 18)

⁷ *Criminal Code Act 1995 (Cth)* s473.1 "child pornography"

Criminal Code Act Compilation Act 1913 (WA) s217A "child pornography"

⁸ *Criminal Code Act Compilation Act 1913 (WA)* s319 "indecent act"; s320(5); s321(5)

⁹ *Criminal Code Act Compilation Act 1913 (WA)* s320(6); s321(6)

¹⁰ *Criminal Code Act 1995 (Cth)* s473.1 "child pornography material" (b)(i), (b)(ii)

¹¹ *Criminal Code Act 1995 (Cth)* s473.1 "child pornography material" (b)(i), (b)(ii)

- posing in a sexual way;¹⁴
- doing a sexual act;¹⁵ or
- in the presence of someone who is doing a sexual act or pose.¹⁶

Child pornography can include real pictures,¹⁷ photo-shopped pictures,¹⁸ videos¹⁹, cartoons²⁰ and more.²¹ But a picture is only child pornography if it is offensive to the average person.²² That's why a picture of a naked baby in a bath isn't child pornography, but a picture of a naked teenager in a bed could be.

What is illegal about it?

Child pornography pictures are illegal if they are:

- asked for;²³
- taken or created;²⁴
- received and kept;²⁵
- sent, passed around or uploaded to the internet;²⁶

These actions are crimes even if the picture is only of you, your boyfriend/girlfriend or someone else who says it's ok.²⁷ Remember the national law says a person under 18 can't agree to sexting.²⁸ It can also be a crime to share a nude/sexy picture of someone who looks like they are under 18,²⁹ even if they are actually over 18 when the picture was taken.

¹² *Criminal Code Act 1995 (Cth)* s473.1 "child pornography material" (b)(iii)

¹³ *Criminal Code Act 1995 (Cth)* s473.1 "child pornography material" (b)(ii)

¹⁴ *Criminal Code Act 1995 (Cth)* s473.1 "child pornography material" (a)(i)

Criminal Code Act Compilation Act 1913 (WA) s217A "child pornography" (b)

¹⁵ *Criminal Code Act 1995 (Cth)* s473.1 "child pornography material" (a)(i)

Criminal Code Act Compilation Act 1913 (WA) s217A "child pornography" (a)

¹⁶ *Criminal Code Act 1995 (Cth)* s473.1 "child pornography material" (a)(ii)

¹⁷ *Criminal Code Act Compilation Act 1913 (WA)* s217A "material" (a)

¹⁸ *Criminal Code Act Compilation Act 1913 (WA)* s217A "material" (a); "picture" – has the meaning given in s204B of this Act, which includes computer-generated image

¹⁹ *Criminal Code Act Compilation Act 1913 (WA)* s217A "material" (a)

²⁰ *Criminal Code Act 1995 (Cth)* s473.1 "child pornography material" and "material"

Criminal Code Act Compilation Act 1913 (WA) s217A "material" (a) – includes written or printed matter

²¹ *Criminal Code Act Compilation Act 1913 (WA)* s217A "material" (b)

²² *Criminal Code Act 1995 (Cth)* s473.1 "child pornography material"

Criminal Code Act Compilation Act 1913 (WA) s217A "child pornography"

²³ *Criminal Code Act Compilation Act 1913 (WA)* s217(1)(a); *Criminal Code Act 1995 (Cth)* s474.19(1)(a)(iv)

²⁴ *Criminal Code Act Compilation Act 1913 (WA)* s218

²⁵ *Criminal Code Act Compilation Act 1913 (WA)* s220

²⁶ *Criminal Code Act Compilation Act 1913 (WA)* s219

²⁷ *Criminal Code Act 1995 (Cth)* s473.1; s474.21 there is no defence on the grounds of consent
Criminal Code Act Compilation Act 1913 (WA) s221A there is no defence on the grounds of consent

²⁸ *Criminal Code Act 1995 (Cth)* s473.1; s474.19

²⁹ *Criminal Code Act 1995 (Cth)* s473.1 "child pornography material" – "appears to be, under 18 years of age"

Criminal Code Act Compilation Act 1913 (WA) s217A "child pornography" – "appears to be, a child"; "child" – "person under 16 years of age"

definitions of "child pornography", "child exploitation material"

Even if a picture is not child pornography, asking for, taking, sending or showing someone under 16 a nude/sexy photo can be an indecent act and this is a crime.³⁰

Real life examples

13 year old Chelsea* sent sexy images of herself to a friend and two boys. Police found out about the images. Chelsea and her friends ended up receiving a caution from the police, but could have been charged with creation and distribution of child pornography.³¹

14 year old Matthew downloaded a video to his mobile of a girl his age having sex with two boys. The video was passed around his school. Matthew was charged with child pornography offences.³²

What are the penalties?

The maximum penalties for child pornography can be up to 15 years in gaol³³ and being placed on the sex offender register³⁴ (see below).

The penalties are high because the laws were meant to stop adults from sexually abusing children. When the laws were passed, nobody realised that they might also be used against young people who took pictures of themselves or other people of their own age.

In some sexting cases, instead of using child pornography laws, the police might decide to:

- charge you with a less serious crime (like posting an indecent picture, which has a maximum penalty of a \$10,000 fine);³⁵
- send you to youth justice conferencing;
- give you a warning or caution; or
- let your parents or school decide your punishment.

In Western Australia, the police have not released guidelines on how they will deal with sexting offences. But it seems that the police are more likely to press serious charges that would lead to sex offender registration if the sexting involves harassment or threats. Although it is rare, a WA boy was put on the sex offenders register after filming his friends having sex with a girl and then sending it to someone else.³⁶

³⁰ *Criminal Code Act Compilation Act 1913 (WA)* s320(3)-(6) and s321(3)-(6)

* Not her real name

³¹ Facts from Josh Jerga's 'WA Police crackdown on teenage sexting', Sydney Morning Herald, 22 March 2011. Available at: <http://news.smh.com.au/breaking-news-national/wa-police-crackdown-on-teenage-sexting-20110322-1c4w5.html>. Accessed 18 January 2013.

³² Adam Carey, "'Sexting' teens breach child porn laws", *WA Today*, 10 December 2010. Available at: <http://www.watoday.com.au/national/sexting-teens-breach-child-porn-law-20101209-18req.html>. Accessed 18 January 2013.

³³ *Criminal Code Act 1995 (Cth)* s474.19

³⁴ *Community Protection (Offender Reporting) Act 2004 (WA)* s10, s11, Schedule 1 and Schedule 2 (see also the whole of Part 2 – Offenders to whom Act applies)

³⁵ *Classification (Publications, Films and Computer Games) Enforcement Act 1996 (WA)* s59

³⁶ Lucy Martin, 'Sexting on the increase as teens exchange photos', ABC News, 11 September 2012. Available at: <http://www.abc.net.au/news/2012-09-11/sexting-damages-teens-if-caught-feature/4254724>. Accessed 18 January 2013.

If a sexting incident occurs while you are at school, your teacher is likely to confiscate or turn off your phone, take it straight to your Principal and report it to the police.³⁷

If the person is under 18 when they commit the child pornography crime, the police must get the Attorney-General's permission before they can make child pornography charges under the national law.³⁸ The police do not need to get this permission before making charges under the state law.

What is the child sex offender register?

You may be put on the Australian National Child Offender Register if you are found guilty of a child pornography or indecency crime.³⁹ People on this Register have to give their contact details to the police and inform them of any changes, like if they move house or change jobs.⁴⁰

If you are under 18, you can't be placed on the Register for committing just one child pornography crime.⁴¹ But when the pictures or films show more than one person or are sent on multiple days, this can be more than one crime, and you could be placed on the Register.

Even if you are not placed on the Register, if you have been charged or convicted of a sexting offence, you are not allowed to work or volunteer in places where there are children.⁴² For example, coaching junior sports teams or becoming a surf lifesaver.

Western Australia also maintains a separate Community Protection Offender Register for the most serious offenders.⁴³ The Register is publicly accessible, the first of its kind in Australia. It provides the public with photos, names and suburbs of the registered offender but not exact addresses.⁴⁴

What should you do?

If you receive nude/sexy pictures or videos on the internet or on your mobile, you can avoid getting into trouble by:⁴⁵

- deleting the pictures/videos immediately;⁴⁶ and

³⁷ Western Australia Department of Health, "Technology/cyber safety". Available at: <http://qdhr.wa.gov.au/background-info/technology/view>. Accessed 18 January 2013

The Government of Western Australia, *Social Media in Schools: guidelines for school staff using social media and other technologies*, (2010), p6. Available from the Department of Education website <https://www.det.wa.edu.au/>. Accessed 18 January 2013

³⁸ *Criminal Code Act 1995 (Cth)* s474.24C

³⁹ See definition of ANCOR as used by the Western Australia police. Western Australia Police, "Police Terminology and acronyms". Available at: <http://www.police.wa.gov.au/WAPoliceNews/MediaGuides/PoliceTerminologyandAcronyms/tabid/11496/Default.aspx#ANCOR>. Accessed 22 January 2013

⁴⁰ *Community Protection (Offender Reporting) Act 2004 (WA)* s29; Part 3 – Reporting obligations

⁴¹ *Community Protection (Offender Reporting) Act 2004 (WA)* s6(4); *Community Protection (Offender Reporting) Regulations 2004 (WA)* r8 – only relevant for ss218, 219 and 220 of the *Criminal Code Act Compilation Act 1913 (WA)*

⁴² *Working with Children (Criminal Record Checking) Act 2004 (WA)* s12(3), items 6, 9, 10 & 11; s22; Schedule 1; Schedule 2 – child pornography and indecency crimes are Class 2 offences under Schedule 2

⁴³ *Community Protection (Offender Reporting) Act 2004 (WA)* s3 "Register"; s6; s10; s11; s80; Schedule 1; Schedule 2

⁴⁴ "Sex offender register goes live", WA Today, 15 October 2012. Available at: <http://www.watoday.com.au/wa-news/sex-offender-register-goes-live-20121015-27lw6.html>. Accessed 22 January 2013.

⁴⁵ *Criminal Code Act Compilation Act 1913 (WA)* s221A

- letting the sender know that you don't want to receive any more of these pictures/videos.

You should NEVER forward these images onto other people because this is a crime.⁴⁷

When sexting involves harassment...

Sexting can also be a form of harassment.⁴⁸ For example, someone might keep bothering you with requests for a naked picture. Or they might send you a naked picture you don't want. Or they might threaten to send a naked picture of you to other people without your permission.

Sexting that involves harassment can be considered a menacing, harassing or offensive use of the internet or a mobile phone.⁴⁹

What is menacing, harassing or offensive use of the internet or a mobile?

It is a crime to use your mobile phone or the internet in an offensive way or to harass somebody.⁵⁰ Something could be offensive or harassing if it makes a person feel disgusted, humiliated⁵¹ or threatened⁵². When sexting is used to threaten or bother someone, it is against the law. The maximum penalty is 3 years in gaol.⁵³

A Real Life Example

20 year old Ronnie posted 6 nude photos of his 18 year old ex-girlfriend on Facebook as revenge for breaking up with him. Ronnie's ex-girlfriend reported this to the police and he removed the photos for a short time. When Ronnie re-posted the photos later that day, the police arrested and charged Ronnie with posting indecent pictures. Ronnie was given a 6 month home-detention order and left with a criminal record.⁵⁴ This was largely because of the embarrassment, humiliation and anxiety Ronnie's actions caused his ex-girlfriend – something the court takes very seriously.⁵⁵

Other laws that can apply to sexting...

It is a crime for someone to take an indecent picture or video of you if you are under 16.⁵⁶ There is no set meaning for 'indecent', but in WA it is usually something sexual that is offensive to an average person.⁵⁷

⁴⁶ *Criminal Code Act Compilation Act 1913 (WA) s221A(2)*

⁴⁷ *Criminal Code Act Compilation Act 1913 (WA) s219*

⁴⁸ *Criminal Code Act 1995 (Cth) s474.17*

⁴⁹ *Criminal Code Act 1995 (Cth) s474.17*

⁵⁰ *Criminal Code Act 1995 (Cth) s474.17*

⁵¹ *Sexual Discrimination Act 1984 (Cth) s28A(1); Johanson v Michael Blackledge Meats [2001] FMCA 6 [22]*

⁵² *Crowther v Sala [2007] QCA 133 [25]*

⁵³ *Criminal Code Act 1995 (Cth) s474.17*

⁵⁴ *Police v Ravshan USMANOV [2011] NSWLC 40*

⁵⁵ *Police v Ravshan USMANOV [2011] NSWLC 40*. See also Heath Aston, "Ex-lover punished for Facebook revenge" *Canberra Times* 22 April 2012. Available at: <http://www.canberratimes.com.au/technology/technology-news/exlover-punished-for-facebook-revenge-20120421-1xdpy.html>. Accessed 21 January 2013.

⁵⁶ *Criminal Code Act Compilation Act 1913 (WA) s320(6); s321(6)*

⁵⁷ *Drago v The Queen (1992) 8 WAR 488 and Criminal Code Act 1995 (Cth) s474.27A(3)*

When sexting involves a person who is under 16 and a person who is over 18, the person who is over 18 could be committing some other very serious crimes.⁵⁸

When sexting is unwanted and happens at work or at school, it could also be a form of sexual harassment.⁵⁹

What can I do to stop people from sending images of me around the Internet or through mobiles?

There are a number of things you can do to stop these pictures being sent out:

- Don't take or send a naked picture of yourself – no matter who asks or how much you trust them.
- If the picture is on a social networking site such as Facebook, you may be able to report the picture and have it taken off the site. You can report something on Facebook here: <http://www.facebook.com/help/?faq=167722253287296>.
 - For images of children under 13, parents can fill out a form to have that photo removed. Facebook will comply provided the image does contain the child, he or she is under 13 and the form has been correctly filled. See here for more details: <http://www.facebook.com/help#!/help/441374602560317/>
 - Set privacy settings to allow you to review photo tags before they appear on your profile and your friends' newsfeeds.
- You can also make a report to your mobile phone company if you are receiving unwanted pictures or requests for pictures. Call your mobile phone company or go to their website.
- Apply for a protection order to stop a person from contacting you or sending out images to harass you.
- Send us a *Lawmail*. We can tell you what your options are, help you make a complaint or write a letter to the person threatening to share your picture.
- Tell someone you trust – a parent, friends, school counsellor or teacher.
 - You may also wish to speak to someone from the **Kids Helpline on 1800 55 1800**.
 - **Be aware** that your teacher may feel the need to report to the police.
- Contact the police if images are being spread without your consent or if you feel unsafe.
 - **Be aware** that you may be charged if you took and sent the picture. But police have discretion not to charge victims of unwanted sexting.

What should I do if I have a picture or text I am unsure about?

It's important to protect yourself by deleting any pictures you are uncomfortable with straight away.⁶⁰ **NEVER forward these images on to anyone else.**

⁵⁸ *Criminal Code Act 1995 (Cth)* s474.25A; 474.26; 474.27; *Criminal Code Act Compilation Act 1913 (WA)* s204B

⁵⁹ *Equal Opportunity Act 1984 (WA)* ss24-26

If you are worried you may have committed a crime, you can send us a *Lawmail* at www.lawstuff.org.au or call the *Youth Hotline* on 1800 10 18 10.

You should also have a look at our Lawstuff fact sheet on self-incrimination: http://www.lawstuff.org.au/data/assets/pdf_file/0010/14887/Selfincrimination-fact-sheet.pdf.

⁶⁰ *Criminal Code Act Compilation Act 1913 (WA)* s220 – possession of child pornography is a crime with a maximum penalty of 7 years in gaol

SEXTING- Australian Capital Territory

What is sexting?

Sexting is using the internet or your mobile to share nude/sexy pictures.

Is sexting a crime?

Sexting is a crime when it involves people under 18¹. It's also a crime when it involves harassing people of any age².

Why 18?

In ACT, the law says you can consent to sex at age 16, and to sexting at age 18.³ But ACT law is not the only law that applies.⁴ When you use the internet or a mobile phone, the national law of Australia also applies, even though you are in ACT⁵. The national law also bans sexting for anyone under 18.⁶

When sexting involves someone under 18...

When sexting involves someone under 18, it can be 'child pornography'⁷, a 'pornography performance' (such as a "striptease")⁸, an act of depravity⁹, or an 'indecent act'¹⁰.

What is child pornography?

Child pornography is a picture of a young person who is:

- showing their private parts (genitals¹¹, anus¹² or breasts¹³)¹⁴;
- posing in a sexual way¹⁵;
- doing a sexual act¹⁶; or
- in the presence of someone who is doing a sexual act or pose¹⁷.

¹ *Criminal Code Act 1995 (Cth)* s473.1; s474.19

² *Criminal Code Act 1995 (Cth)* S474.17

³ *Crimes Act 1900 (ACT)* s64; *Crimes Legislation Amendment Bill 2004 (Explanatory Statement) (ACT)* clause 5, s64; *Crimes Act 1900 (ACT)* s55 (age of consent = 16)

⁴ *Criminal Code Act 1995 (Cth)* S474.19

⁵ *Criminal Code Act 1995 (Cth)* S474.19

⁶ *Criminal Code Act 1995 (Cth)* s473.1 (definition of child pornography = under 18); *Criminal Code Act 1995 (Cth)* S474.19

⁷ *Criminal Code Act 1995 (Cth)* s 473.1; *Crimes Act 1900 (ACT)* s64.1

⁸ *Crimes Act 1900 (ACT)* s64.1

⁹ *Crimes Act 1900 (ACT)* s66 – using the internet to deprave young people under 16 is a crime

¹⁰ *Crimes Act 1900 (ACT)* s61

¹¹ *Criminal Code Act 1995 (Cth)* s 473.1 "child pornography material" (b)(i), (b)(ii)

¹² *Criminal Code Act 1995 (Cth)* s 473.1 "child pornography material" (b)(i), (b)(ii)

¹³ *Criminal Code Act 1995 (Cth)* s 473.1 "child pornography material" (b)(i), (b)(iii)

¹⁴ *Crimes Act 1900 (ACT)* s64.5 "child pornography" (a) - "sexual parts of a child"

¹⁵ *Criminal Code Act 1995 (Cth)* s 473.1 "child pornography material" (a)(i)

¹⁶ *Criminal Code Act 1995 (Cth)* s 473.1 "child pornography material" (a)(i); *Crimes Act 1900 (ACT)* s64.5 (b)

¹⁷ *Criminal Code Act 1995 (Cth)* s 473.1 "child pornography material" (a)(ii); *Crimes Act 1900 (ACT)* s64.5 (c)

Child pornography can include real pictures¹⁸, photo-shopped pictures¹⁹, videos²⁰ and cartoons²¹. But a picture is only child pornography if it is offensive to the average person²², or if it was made for the sexual arousal or gratification of someone other than the person in the picture²³. That's why a picture of a naked baby in a bath isn't child pornography, but a picture of a naked teenager in a bed could be.

What is illegal about it?

Child pornography pictures are illegal if they are:

- asked for²⁴;
- made or taken²⁵;
- received and kept²⁶; or
- sent, posted or passed around.²⁷

These actions are crimes even if the picture is only of you, your boyfriend/girlfriend or someone else who says it's ok²⁸. Remember, the national law says a person under 18 can't agree to sexting²⁹. It can also be a crime to share a nude/sexy picture of someone who looks like they are under 18³⁰, even if they are actually over 18 when the picture was taken.

Even if a picture is not child pornography, asking for or sending a nude/sexy to someone under 16 using a mobile or the internet can be an act of depravity and this is a crime³¹. It can also be an indecent act³², which is usually a sexual act that a respectable person would find offensive³³.

A real life example:

18 year old Damien³⁴ texted a 13 year old girl and asked her for a "hot steamy" picture. The girl texted back to Damien a nude picture of herself. The girl's father found the picture on her phone and called the police. Damien was charged with possessing child pornography and causing the girl to do

¹⁸ *Crimes Act 1900 (ACT)* s64 "represent" includes photographs

¹⁹ *Crimes Act 1900 (ACT)* s64 "represent" means depict or otherwise represent in any medium

²⁰ *Crimes Act 1900 (ACT)* s64 "represent" includes depict or otherwise represent in film or videotape

²¹ *Criminal Code Act 1995 (Cth)* s 473.1 "child pornography material"; *Crimes Act 1900 (ACT)* s64 "represent" includes drawings

²² *Criminal Code Act 1995 (Cth)* s 473.1 "child pornography material"

²³ *Crimes Act 1900 (ACT)* s64.5 "child pornography"

²⁴ *Criminal Code Act 1995 (Cth)* s 473

²⁵ *Crimes Act 1900 (ACT)* s64, s64A

²⁶ *Crimes Act 1900 (ACT)* s65

²⁷ *Crimes Act 1900 (ACT)* s64A, s66 (send to a child)

²⁸ *Criminal Code Act 1995 (Cth)* s473.1; s473.21 defence – there is no defence on grounds of consent; *Crimes Act 1900 (ACT)* s66.4 – consent is not a defence to using the internet to deprave a young person by sending them pornographic material

²⁹ *Criminal Code Act 1995 (Cth)* s473.1; s474.19

³⁰ *Criminal Code Act 1995 (Cth)* s 473.1 "child pornography material" – "appears to be, under 18 years of age"

³¹ *Crimes Act 1900 (ACT)* s65

³² *Crimes Act 1900 (ACT)* s61

³³ *R v. Forsti* [2010] ACTSC 85 (19 August 2010), para. 8

³⁴ Facts of *Eades v DPP (NSW)* [2010] NSWCA 241

an act of indecency. He was found guilty of the indecency charge and was placed on a good behaviour bond.

The girl also broke the law by taking and sending the picture³⁵. In this case, she was not charged (probably because she was so much younger than him, Damien was considered more at fault).

What are the penalties?

The maximum penalties for child pornography can be up to 15 years in gaol³⁶ and being placed on the sex offender register³⁷ (see below). The maximum penalty for an act of indecency is 12 years in gaol if the person in the picture is under 10, or 10 years if the person is under 16³⁸. The penalties are high because the laws were meant to stop adults from sexually abusing children. When the laws were passed, nobody realised that they might also be used against young people who took pictures of themselves or other people of their own age.

In some sexting cases, instead of using child pornography laws, the police might decide to:

- charge you with a less serious crime (like possessing child pornography or using the internet to deprave young people, which each have a maximum penalty of 7 years in gaol)³⁹;
- send you to youth justice conferencing;
- give you a warning or caution; or
- let your parents or school decide your punishment.

If the person is under 18 when they commit the child pornography crime, the police must get the Attorney General's permission before they can make child pornography charges under the national law⁴⁰. The police do not need to get this permission before making charges under the state law.

What is the child sex offender register?

You may be placed on the child sex offender register if you are found guilty of a child pornography or indecency crime.⁴¹ People on this Register have to give their contact details to the police and inform them of any changes (like moving houses or switching jobs)⁴². They are not allowed to work or volunteer in places involving children⁴³. For example, they are not allowed to coach junior sports teams or become a surf lifesaver.

If you are under 18, you can't be placed on the Register for committing just one child pornography or indecency crime.⁴⁴ But when sexted pictures show more than one person or are sent on multiple

³⁵ *Crimes Act 1900 (ACT)* s64A, s66

³⁶ *Criminal Code Act 1995 (Cth)* s 474.19; *Crimes Act 1900 (ACT)* s64.1 – under ACT law if the child is 12 or younger

³⁷ *Crimes (Child Sex Offender) Bill 2005* s10, Schedule 2 s2.1

³⁸ *Crimes Act 1900 (ACT)* s61

³⁹ *Crimes Act 1900 (ACT)* s65, s66

⁴⁰ *Criminal Code Act 1995 (Cth)* s 474.24C(2)

⁴¹ *Crimes (Child Sex Offender) Bill 2005* s10, Schedule 2 s2.1

⁴² *Crimes (Child Sex Offender) Bill 2005* s55, s59

⁴³ *Crimes (Child Sex Offender) Bill 2005* s123-31

⁴⁴ *Crimes (Child Sex Offender) Bill 2005* s9.1 (c)

days, this can be more than one crime⁴⁵. This means if you are under 18 but are involved in sexting with more than one person or on more than one day, you could still be placed on the register.

What should you do?

If you receive nude/sexy pictures or videos on the internet or on your mobile, you can avoid getting into trouble if you had no reasonable way to know that the picture was child pornography (for example, if the person in the picture really looked like they were over 16)⁴⁶.

You should also:

- Delete the pictures/videos immediately and
- Let the sender know that you don't want to receive any more of these pictures/videos.

You should NEVER forward these images onto other people because this is a crime⁴⁷.

When sexting involves harassment...

Sexting can also be a form of harassment⁴⁸. For example, someone might keep bothering you with requests for a naked picture. Or they might send you a naked picture that you don't want. Or they might threaten to send a naked picture of you to other people without your permission.

Sexting that involves harassment can be considered a menacing, harassing or offensive use of the internet or a mobile phone⁴⁹.

What is menacing, harassing or offensive use of the internet or a mobile?

It is a crime to use your mobile phone or the internet in an offensive way or to harass somebody⁵⁰. Something could be offensive or harassing if it makes a person feel disgusted, humiliated⁵¹ or threatened⁵². When sexting is used to threaten or bother someone, it is against the law. The maximum penalty is 3 years in gaol⁵³.

Real life examples:

20 year old Ronnie⁵⁴ posted 6 nude photos of his 18 year old ex-girlfriend on Facebook as a revenge for breaking up with him. Ronnie's ex-girlfriend reported this to the police and he removed the photos for a short time. When Ronnie re-posted those photos later that day, the Police arrested and charged Ronnie with posting indecent pictures. Ronnie was given a 6 months home detention and was left with a criminal record.

⁴⁵ *Crimes (Child Sex Offender) Bill 2005* s9.3

⁴⁶ *Crimes Act 1900 (ACT)* s64A, s65.3

⁴⁷ *Crimes Act 1900 (ACT)* s64A, s64A, s66

⁴⁸ *Criminal Code Act 1995 (Cth)* s 474.17; *Crimes Act 1900 (ACT)* s35.2 (e), (f), (g), and (h)

⁴⁹ *Criminal Code Act 1995 (Cth)* s 474.17

⁵⁰ *Criminal Code Act 1995 (Cth)* s 474.17; *Crimes Act 1900 (ACT)* s64A, s35.2

⁵¹ *Sexual Discrimination Act 1984 (Cth)* s28A(1); *Johanson v Michael Blackledge Meats* [2001] FMCA 6 para 22

⁵² *Crowther v Sala* [2007] QCA 133 [25]

⁵³ *Criminal Code Act 1995 (Cth)* s 474.17

⁵⁴ *Police v Ravshan USMANOV* [2011] NSWLC 40

Jason⁵⁵ repeatedly sent unwanted sexy pictures to a new friend by SMS on his mobile. His friend was intimidated by the pictures he sent. Jason was charged with menacing, harassing or offensive use of a mobile for each SMS he sent. He was sent to jail for 12 months.

What if you didn't know or agree to your picture or video being taken in the first place?

[INSERT]

Other laws that can apply to sexting...

When sexting involves a person who is under 16 and a person who is over 18, the person who is over 18 could be committing some other very serious crimes.⁵⁶

When sexting is unwanted, it could also be a form of sexual harassment⁵⁷, invasion of privacy⁵⁸ or defamation⁵⁹.

You can find out more on our Lawstuff factsheets:

Sexual harassment: http://www.lawstuff.org.au/nsw_law/topics/sexual-assault-and-sexual-harassment/sexual-harassment

Privacy: http://www.lawstuff.org.au/nsw_law/topics/privacy

Defamation: http://www.lawstuff.org.au/nsw_law/topics/defamation

What can I do to stop people from sending images of me around the Internet or through mobiles?

There are a number of things you can do to stop these pictures being sent out:

- If the picture is on a social networking site such as Facebook, you may be able to report the picture and have it taken off the site. You can report something on Facebook here: <http://www.facebook.com/help/?faq=167722253287296>.
- You can also make a report to your mobile phone company if you are receiving unwanted pictures or requests for pictures. Call your mobile phone company or go to their website.
- Apply for a protection order to stop a person from contacting you or sending out images to harass you.

⁵⁵ R v Vaughan [2011] QCA 224

⁵⁶ Criminal Code Act 1995 (Cth) s474.25A; 474.26; 474.27

⁵⁷ Crimes Act 1900 (ACT) s35.2 (e), (f), (g), and (h)

⁵⁸ United Nations Convention on the Rights of the Child, Article 16 – protection of basic human right

⁵⁹ Crimes Act 1900 (ACT) s439.1

- Send us a *Lawmail*. We can tell you what your options are, help you make a complaint or write a letter to the person threatening to share your picture.
- Tell someone you trust – a parent, friends, school counsellor or teacher.
 - You may also wish to speak to someone from the Kids Helpline on 1800 55 1800.
 - Be aware that your teacher may feel the need to report to the police.
- Contact the police if images are being spread without your consent or if you feel unsafe.
 - Be aware you may be charged if you took and sent the picture. But police have discretion not to charge victims of unwanted sexting.

What should I do if I have a picture or text I am unsure about?

It's important to protect yourself by deleting any pictures you are uncomfortable with straight away.⁶⁰ **NEVER forward these images on to anyone else.**

If you're worried you may have committed a crime, you can send a *Lawmail* at www.lawstuff.org.au or call the *Youth Hotline* on 1800 10 18 10.

You should also have a look at our Lawstuff factsheet on self incrimination: _____.

⁶⁰ *Crimes Act 1900 (ACT)* s65 – prohibits possession of child pornography

SEXTING- Northern Territory

What is sexting?

Sexting is using the internet or your mobile to share nude/sexy pictures.

Is sexting a crime?

Sexting is a crime when it involves people under 18¹. It's also a crime when it involves harassing people of any age².

Why 18?

In NT, the law says you can consent to sex and sexting at age 16.³ But NT law is not the only law that applies.⁴ When you use the internet or a mobile phone, the national law of Australia also applies, even though you are in NT⁵. The national law bans sexting for anyone under 18.⁶

When sexting involves someone under 18...

When sexting involves someone under 18, it can be 'child pornography',⁷ an 'indecent dealing',⁸ a 'pornographic performance',⁹ or an 'indecent article'.¹⁰

What is child pornography?

Child pornography is a picture or film of a young person who is:

- showing their private parts (genitals¹¹, anus¹² or breasts¹³);
- posing in a sexual way¹⁴;
- doing a sexual act¹⁵; or
- in the presence of someone who is doing a sexual act or pose¹⁶.

¹ *Criminal Code Act 1995 (Cth)* s473.1; s474.19; *Criminal Code Act 1983 (NT)* Schedule 1 s125A.1, s132.2(F), s125E

² *Criminal Code Act 1995 (Cth)* S474.17

³ *Criminal Code Act 1983 (NT)* Schedule 1 s1.1 (definition of child = under 18); *Criminal Code Act 1983 (NT)* Schedule 1 s127 (age of consent= 16)

⁴ *Criminal Code Act 1995 (Cth)* S474.19

⁵ *Criminal Code Act 1995 (Cth)* S474.19

⁶ *Criminal Code Act 1995 (Cth)* s473.1 (definition of child pornography = under 18); *Criminal Code Act 1995 (Cth)* S474.19

⁷ *Criminal Code Act 1995 (Cth)* s 473.1; *Criminal Code Act 1983 (NT)* Schedule 1 s125A.1 "child abuse material."

⁸ *Criminal Code Act 1983 (NT)* Schedule 1 s132.2(F)– for 16 or under

⁹ *Criminal Code Act 1983 (NT)* Schedule 1 s125E

¹⁰ *Criminal Code Act 1983 (NT)* Schedule 1 s125A.1 "indecent article" (b)(vi)

¹¹ *Criminal Code Act 1995 (Cth)* s 473.1 "child pornography material" (b)(i), (b)(ii)

¹² *Criminal Code Act 1995 (Cth)* s 473.1 "child pornography material" (b)(i), (b)(ii)

¹³ *Criminal Code Act 1995 (Cth)* s 473.1 "child pornography material" (b)(i), (b)(iii)

¹⁴ *Criminal Code Act 1995 (Cth)* s 473.1 "child pornography material" (a)(i); *Criminal Code Act 1983 (NT)* Schedule 1 s125A.1 "child abuse material" (b)

¹⁵ *Criminal Code Act 1995 (Cth)* s 473.1 "child pornography material" (a)(i); *Criminal Code Act 1983 (NT)* Schedule 1 s125A.1 "child abuse material" (a)

¹⁶ *Criminal Code Act 1995 (Cth)* s 473.1 "child pornography material" (a)(ii)

Child pornography can include real pictures¹⁷, photo-shopped pictures¹⁸, videos¹⁹ and cartoons²⁰. But a picture is only child pornography if it is offensive to the average person²¹. That's why a picture of a naked baby in a bath isn't child pornography, but a picture of a naked teenager in a bed could be.

What is illegal about it?

Child pornography pictures are illegal if they are:

- asked for²²;
- taken²³;
- received and kept²⁴; or
- sent, posted or passed around.²⁵

These actions are crimes even if the picture is only of you, your boyfriend/girlfriend or someone else who says it's ok²⁶. Remember, the national law says a person under 18 can't agree to sexting²⁷.

It can also be a crime to share a nude/sexy picture, of someone who looks like they are under 18²⁸, even if they are actually over 18 when the picture was taken.

Even if a picture is not child pornography, a nude/sexy photo can be an "indecent article" and sending it is a crime²⁹. An indecent article is a picture that shows a child under 16 in a way that the average person finds offensive³⁰.

A real life example:

18 year old Damien³¹ texted a 13 year old girl and asked her for a "hot steamy" picture. The girl texted back to Damien a nude picture of herself. The girl's father found the picture on her phone and called the police. Damien was charged with possessing child pornography and causing the girl to do

¹⁷ *Criminal Code Act 1983 (NT) Schedule 1 s125A "article", "indecent article", "child abuse material"*

¹⁸ *Criminal Code Amendment (Child Abuse Material) 2004, Second Reading Speech- "computer generated representation of children"*

¹⁹ *Criminal Code Act 1995 (Cth) s 473.1 "child pornography material"; Criminal Code Act 1983 (NT) Schedule 1 s125B*

²⁰ *Criminal Code Act 1995 (Cth) s 473.1 "child pornography material"; Criminal Code Amendment (Child Abuse Material) 2004, Second Reading Speech*

²¹ *Criminal Code Act 1995 (Cth) s 473.1 "child pornography material"; Criminal Code Act 1983 (NT) Schedule 1 s125A "child abuse material," "indecent article" (b), "pornographic or abusive performance"*

²² *Criminal Code Act 1995 (Cth) s 473*

²³ *Criminal Code Act 1983 (NT) Schedule 1 s132.2(f); s125B.1; s125E*

²⁴ *Criminal Code Act 1983 (NT) Schedule 1 s125B.1*

²⁵ *Criminal Code Act 1983 (NT) Schedule 1 s125B.1; s125C.1*

²⁶ *Criminal Code Act 1995 (Cth) s473.1; s473.21 defence – there is no defence on grounds of consent; Criminal Code Act 1983 (NT) Schedule 1 s139A – no defence to "indecent dealing" on grounds of consent*

²⁷ *Criminal Code Act 1995 (Cth) s473.1; s474.19*

²⁸ *Criminal Code Act 1995 (Cth) s 473.1 "child pornography material" – "appears to be, under 18 years of age"; Criminal Code Act 1983 (NT) Schedule 1 s125A.1 "child abuse material" – "appears to be a child," "indecent article" – "who looks like a child"*

²⁹ *Criminal Code Act 1983 (NT) Schedule 1 s125A "indecent article" (b)(vi) – "whether or not engaged in sexual activity"*

³⁰ *Criminal Code Act 1983 (NT) Schedule 1 s125A "indecent article" (b)(vi)*

³¹ *Facts of Eades v DPP (NSW) [2010] NSWCA 241*

an act of indecency. He was found guilty of the indecency charge and was placed on a good behaviour bond.

The girl also broke the law by taking and sending the picture³². In this case, she was not charged (probably because she was so much younger than him, Damien was considered more at fault).

What are the penalties?

The maximum penalties for child pornography can be up to 15 years in gaol³³ and being placed on the sex offender register³⁴ (see below). The maximum penalty for an indecent dealing is 14 years in gaol if the person in the picture is under 10.³⁵ If the person is over 10 but under 16, the maximum penalty is 10 years in gaol.³⁶ The penalties are high because the laws were meant to stop adults from sexually abusing children. When the laws were passed, nobody realised that they might also be used against young people who took pictures of themselves or other people of their own age.

In some sexting cases, instead of using child pornography laws, the police might decide to:

- charge you with a less serious crime (like posting an indecent picture), which has a maximum penalty of 2 years in gaol³⁷;
- send you to youth justice conferencing;
- give you a warning or caution; or
- let your parents or school decide your punishment.

When sexting involves harassment and threats, it's much more likely that police will press serious charges that could lead to sex offender registration.³⁸ In the Northern Territory, the police have not released guidelines on how they will deal with sexting offences. However, it seems the police are more likely to press serious charges that would lead to sex offender registration if the sexting involves harassment or threats.

If the person is under 18 when they commit the child pornography crime, the police must get the Attorney General's permission before they can make child pornography charges under the national law³⁹. The police do not need to get this permission before making charges under the state law.

What is the child sex offender register?

³² *Criminal Code Act 1995* (Cth) s 473.1; s474.19 – sending child pornography material using a carriage service

³³ *Criminal Code Act 1995* (Cth) s 474.19

³⁴ Child Protection (Offender Reporting and Registration) Act Schedule 1, s1A; Schedule 2, s1, s2, s5

³⁵ *Criminal Code Act 1983 (NT)* Schedule 1 s132.4

³⁶ *Criminal Code Act 1983 (NT)* Schedule 1 s132.2

³⁷ *Criminal Code Act 1983 (NT)* Schedule 1 s125C

³⁸ Per email from John Kerlatec to Kelly Tallon dated 19 Jul 2012 - In a situation where the behaviour crosses the line from "stupid" to "malicious", the NSW police have emphasised that they would be far more inclined to press charges.⁷⁷ For example, where the motive for dissemination is retribution or serious damage to a person's reputation, where the photo was the product of coercion or where the subject of the photo did not consent to being filmed, the offenders would likely be charged under child pornography laws

³⁹ *Criminal Code Act 1995* (Cth) s 474.24C(2)

You may be placed on a Child Protection Offender Register if you are found guilty of a child pornography or indecency crime.⁴⁰ People on this Register have to give their contact details to the police and inform them of any changes (like moving houses or switching jobs)⁴¹. They are even required to notify the police if they change their hair colour or get a drastic haircut⁴². They are also not allowed to work or volunteer in places involving children⁴³. For example, they are not allowed to coach junior sports teams or become a surf lifesaver.

If you are under 18, you can't be placed on the Register unless the court is satisfied that you are a continuing risk to the lives or sexual safety of children.⁴⁴ The court doesn't need to think that you are a risk to any specific child or group of children in order to place you on the list.⁴⁵ If you have sexy/nude pictures of someone under 18 and keep the pictures until after you turn 18, you could be put on the Register at that point.

What should you do?

If you receive nude/sexy pictures or videos on the internet or on your mobile, you can avoid getting into trouble by⁴⁶:

- Deleting the pictures/videos immediately and
- Letting the sender know that you don't want to receive any more of these pictures/videos⁴⁷.

You should NEVER forward these images onto other people because this is a crime⁴⁸.

When sexting involves harassment...

Sexting can also be a form of harassment⁴⁹. For example, someone might keep bothering you with requests for a naked picture. Or they might send you a naked picture that you don't want. Or they might threaten to send a naked picture of you to other people without your permission.

Sexting that involves harassment can be a crime even if everyone is over 18 if the person tries to and does hurt the other person in some way, including emotionally.⁵⁰ It can also be considered a menacing, harassing or offensive use of the internet or a mobile phone⁵¹.

What is menacing, harassing or offensive use of the internet or a mobile?

It is a crime to use your mobile phone or the internet in an offensive way or to harass somebody⁵². Something could be offensive or harassing if it makes a person feel disgusted, humiliated⁵³ or

⁴⁰ Child Protection (Offender Reporting and Registration) Act Schedule 1, s1A; Schedule 2, s1, s2, s5

⁴¹ Child Protection (Offender Reporting and Registration) Act s16, s19

⁴² Child Protection (Offender Reporting and Registration) Act s19

⁴³ Child Protection (Offender Reporting and Registration) Act s91, s92

⁴⁴ Child Protection (Offender Reporting and Registration) Act s11, s13

⁴⁵ Child Protection (Offender Reporting and Registration) Act s13

⁴⁶ *Criminal Code Act 1983 (NT)* Schedule 1, 125B – possession is illegal

⁴⁷ *Criminal Code Act 1983 (NT)* Schedule 1, 125B – possession is illegal

⁴⁸ *Criminal Code Act 1983 (NT)* Schedule 1, 125B – distribution is illegal

⁴⁹ *Criminal Code Act 1995 (Cth)* s 474.17

⁵⁰ *Criminal Code Act 1983 (NT)* Schedule 1 s189.1(b)

⁵¹ *Criminal Code Act 1995 (Cth)* s 474.17

⁵² *Criminal Code Act 1995 (Cth)* s 474.17

threatened⁵⁴. When sexting is used to threaten or bother someone, it is against the law. The maximum penalty is 3 years in gaol, or 5 years if the sexting violates a condition of bail or a court order⁵⁵.

Real life examples:

20 year old Ronnie⁵⁶ posted 6 nude photos of his 18 year old ex-girlfriend on Facebook as a revenge for breaking up with him. Ronnie's ex-girlfriend reported this to the police and he removed the photos for a short time. When Ronnie re-posted those photos later that day, the Police arrested and charged Ronnie with posting indecent pictures. Ronnie was given a 6 months home detention and was left with a criminal record.

Jason⁵⁷ repeatedly sent unwanted sexy pictures to a new friend by SMS on his mobile. His friend was intimidated by the pictures he sent. Jason was charged with menacing, harassing or offensive use of a mobile for each SMS he sent. He was sent to jail for 12 months.

What if you didn't know or agree to your picture or video being taken in the first place?

[INSERT]

Other laws that can apply to sexting...

When sexting involves a person who is under 16 and a person who is over 18, the person who is over 18 could be committing some other very serious crimes.⁵⁸

When sexting is unwanted, it could also be a form of stalking⁵⁹, invasion of privacy⁶⁰ or defamation⁶¹.

You can find out more on our Lawstuff factsheets:

Sexual harassment: http://www.lawstuff.org.au/nsw_law/topics/sexual-assault-and-sexual-harassment/sexual-harassment

Privacy: http://www.lawstuff.org.au/nsw_law/topics/privacy

Defamation: http://www.lawstuff.org.au/nsw_law/topics/defamation

⁵³ Sexual Discrimination Act 1984 (Cth) s28A(1); *Johanson v Michael Blackledge Meats* [2001] FMCA 6 para 22

⁵⁴ *Crowther v Sala* [2007] QCA 133 [25]

⁵⁵ *Criminal Code Act 1995* (Cth) s 474.17

⁵⁶ *Police v Ravshan USMANOV* [2011] NSWLC 40

⁵⁷ *R v Vaughan* [2011] QCA 224

⁵⁸ *Criminal Code Act 1995* (Cth) s474.25A; 474.26; 474.27; *Criminal Code Act 1983 (NT)* Schedule 1 s

⁵⁹ *Criminal Code Act 1983 (NT)* Schedule 1 s189.1(b)

⁶⁰ United Nations Convention on the Rights of the Child, Article 16 – protection of basic human right

⁶¹ *Criminal Code Act 1983 (NT)* Schedule 1 s204

What can I do to stop people from sending images of me around the Internet or through mobiles?

There are a number of things you can do to stop these pictures being sent out:

- If the picture is on a social networking site such as Facebook, you may be able to report the picture and have it taken off the site. You can report something on Facebook here: <http://www.facebook.com/help/?faq=167722253287296>.
- You can also make a report to your mobile phone company if you are receiving unwanted pictures or requests for pictures. Call your mobile phone company or go to their website.
- Apply for a protection order to stop a person from contacting you or sending out images to harass you.
- Send us a *Lawmail*. We can tell you what your options are, help you make a complaint or write a letter to the person threatening to share your picture.
- Tell someone you trust – a parent, friends, school counsellor or teacher.
 - You may also wish to speak to someone from the **Kids Helpline on 1800 55 1800**.
 - **Be aware** that your teacher may feel the need to report to the police.
- Contact the police if images are being spread without your consent or if you feel unsafe.
 - **Be aware** you may be charged if you took and sent the picture. But police have discretion not to charge victims of unwanted sexting.

What should I do if I have a picture or text I am unsure about?

It's important to protect yourself by deleting any pictures you are uncomfortable with straight away.⁶² **NEVER forward these images on to anyone else.**

If you're worried you may have committed a crime, you can send a *Lawmail* at www.lawstuff.org.au or call the *Youth Hotline* on 1800 10 18 10.

You should also have a look at our Lawstuff factsheet on self incrimination: _____.

⁶² *Criminal Code Act 1983 (NT)* Schedule 1 s125B.1 – prohibits possession of child pornography images.

SEXTING- South Australia

What is sexting?

Sexting is using the internet or your mobile to share nude/sexy pictures.

Is sexting a crime?

Sexting is a crime when it involves people under 18¹. It's also a crime when it involves harassing people of any age².

Why 18?

In SA, the law says you can consent to both sex and sexting at age 17.³ But SA law is not the only law that applies.⁴ When you use the internet or a mobile phone, the national law of Australia also applies, even though you are in SA⁵. The national law bans sexting for anyone under 18.⁶

When sexting involves someone under 18...

When sexting involves someone under 18, it can be 'child pornography'⁷, 'indecent filming'⁸, or an 'indecent act'⁹.

What is child pornography?

Child pornography is a picture of a young person who is:

- showing their private parts (genitals¹⁰, anus¹¹ or breasts¹²)¹³;
- posing in a sexual way¹⁴;
- doing a sexual act¹⁵; or
- in the presence of someone who is doing a sexual act or pose¹⁶.

¹ *Criminal Code Act 1995 (Cth)* s473.1, s474.19; *Criminal Law Consolidation Act 1935 (SA)* s62 "

² *Criminal Code Act 1995 (Cth)* S474.17

³ *Criminal Law Consolidation Act 1935 (SA)* s62 (definition of child pornography = under 17), s49 (sex with a person under 17 is an offense)

⁴ *Criminal Code Act 1995 (Cth)* S474.19

⁵ *Criminal Code Act 1995 (Cth)* S474.19

⁶ *Criminal Code Act 1995 (Cth)* s473.1 (definition of child pornography = under 18)

Criminal Code Act 1995 (Cth) S474.19

⁷ *Criminal Code Act 1995 (Cth)* s 473.1; *Criminal Law Consolidation Act 1935 (SA)* s62 (under 17)

⁸ *South Australian Summary Offenses Act (SA)* s23AA

⁹ *Criminal Law Consolidation Act 1935 (SA)* s63

B (under 17)

¹⁰ *Criminal Code Act 1995 (Cth)* s 473.1 "child pornography material" (b)(i), (b)(ii)

¹¹ *Criminal Code Act 1995 (Cth)* s 473.1 "child pornography material" (b)(i), (b)(ii)

¹² *Criminal Code Act 1995 (Cth)* s 473.1 "child pornography material" (b)(i), (b)(iii)

¹³ *Criminal Law Consolidation Act 1935 (SA)* s62 "child pornography" (a)(ii) (if intended to excite sexual interest)

¹⁴ *Criminal Code Act 1995 (Cth)* s 473.1 "child pornography material" (a)(i)

¹⁵ *Criminal Code Act 1995 (Cth)* s 473.1 "child pornography material" (a)(i); *Criminal Law Consolidation Act 1935 (SA)* s62 "child pornography" (a)(i)

¹⁶ *Criminal Code Act 1995 (Cth)* s 473.1 "child pornography material" (a)(ii)

Child pornography can include real pictures¹⁷, photo-shopped pictures¹⁸, videos¹⁹, sculptures²⁰ and cartoons²¹. But a picture is only child pornography if it is intended to be sexual, violent, perverted, or cruel²², or offensive to the average person²³. That's why a picture of a naked baby in a bath isn't child pornography, but a picture of a naked teenager in a bed could be.

What is illegal about it?

Child pornography pictures are illegal if they are:

- asked for²⁴;
- taken²⁵;
- received and kept²⁶;
- looks up online²⁷; or
- sent, posted or passed around.²⁸

These actions are crimes even if the picture is only of you, your boyfriend/girlfriend or someone else who says it's ok²⁹. Remember, the national law says a person under 18 can't agree to sexting³⁰. It can also be a crime to share a nude/sexy picture of someone who looks like they are under 18³¹, even if they are actually over 18 when the picture was taken.

Even if a picture is not child pornography, asking for or sending a nude/sexy photo can be an indecent act and this is a crime, unless the child is over 16 and the accused is under 17³². An indecent act can include convincing a young person to expose their body, taking a picture of a child engaged in a private act, or causing a young person to commit an indecent act like taking a naked picture of them³³.

A real life example:

¹⁷ *Criminal Law Consolidation Act 1935 (SA)* s62 "material" (b), (d)

¹⁸ *Criminal Law Consolidation Act 1935 (SA)* s62 "material" (b), (d)

¹⁹ *Criminal Law Consolidation Act 1935 (SA)* s62 "material" (e) – "material" includes film

²⁰ *Criminal Law Consolidation Act 1935 (SA)* s62 "material" (c)

²¹ *Criminal Code Act 1995 (Cth)* s 473.1 "child pornography material"; *Criminal Law Consolidation Act 1935 (SA)* s62 "material" (b)

²² *Criminal Law Consolidation Act 1935 (SA)* s62 "child pornography" (b)

²³ *Criminal Code Act 1995 (Cth)* s 473.1 "child pornography material";

²⁴ *Criminal Law Consolidation Act 1935 (SA)* s63B(3); *Criminal Code Act 1995 (Cth)* s 473

²⁵ *Criminal Law Consolidation Act 1935 (SA)* s62 "material" (b)

²⁶ *Criminal Law Consolidation Act 1935 (SA)* s63A.1(a)

²⁷ *Criminal Law Consolidation Act 1935 (SA)* s63A.1(a)

²⁸ *Criminal Law Consolidation Act 1935 (SA)* s63(b)

²⁹ *Criminal Code Act 1995 (Cth)* s473.1; s473.21 defence – there is no defence on grounds of consent; *Criminal Law Consolidation Act 1935 (SA)* s63A(2) – consent not included in available defences

³⁰ *Criminal Code Act 1995 (Cth)* s473.1; s474.19

³¹ *Criminal Code Act 1995 (Cth)* s 473.1 "child pornography material" – "appears to be, under 18 years of age"; *Criminal Law Consolidation Act 1935 (SA)* s62 "child pornography" (a) "under, or apparently under, the age of 17..."

³² *Criminal Law Consolidation Act 1935 (SA)* s63B.1(b), s63B.4

³³ *Criminal Law Consolidation Act 1935 (SA)* s63B.1(a) and (b)

18 year old Damien³⁴ texted a 13 year old girl and asked her for a “hot steamy” picture. The girl texted back to Damien a nude picture of herself. The girl’s father found the picture on her phone and called the police. Damien was charged with possessing child pornography and causing the girl to do an act of indecency. He was found guilty of the indecency charge and was placed on a good behaviour bond.

The girl also broke the law by taking and sending the picture³⁵. In this case, she was not charged (probably because she was so much younger than him, Damien was considered more at fault).

Examples such as this are not that uncommon. In 2009 alone, at least 13 children ages 14-17 faced criminal charges for sexting.³⁶

What are the penalties?

The maximum penalties for child pornography can be up to 15 years in gaol³⁷ and being placed on the sex offender register³⁸ (see below). The maximum penalty for an act of indecency is 12 years in goal if the person in the picture is under 12³⁹. If the person is over 12 but under 17, the maximum penalty is 10 years in gaol.⁴⁰ The penalties are high because the laws were meant to stop adults from sexually abusing children. When the laws were passed, nobody realised that they might also be used against young people who took pictures of themselves or other people of their own age.

In some sexting cases, instead of using child pornography laws, the police might decide to:

- send you to youth justice conferencing;
- give you a warning or caution; or
- let your parents or school decide your punishment.

If the person is under 18 when they commit the child pornography crime, the police must get the Attorney General’s permission before they can make child pornography charges under the national law⁴¹. The police do not need to get this permission before making charges under the state law.

What is the child sex offender register?

A court may decide to place you on the Register of Child Sex Offenders if you are found guilty of a child pornography or indecency crime and are considered a danger to children⁴². People on this Register have to give their contact details to the police and inform them of any changes (like moving

³⁴ Facts of *Eades v DPP (NSW)* [2010] NSWCA 241

³⁵ *Criminal Code Act 1995 (Cth)* s 473.1; s474.19 – sending child pornography material using a carriage service; *Criminal Law Consolidation Act 1935 (SA)* s63

³⁶ Amy Noonan Maria Moscaritolo, “Police Warn Teens- Sexting is a Crime” *Adelaide Now*, 12 May 2009, available at: <http://www.adelaidenow.com.au/news/police-warn-teens-sexting-is-a-crime/story-e6frebvu-1225716596372>

³⁷ *Criminal Code Act 1995 (Cth)* s 474.19;

³⁸ *Child Sex Offenders Registration Act 2006 (SA)* s9.3(1) and (3), schedule 1 s3(f), (g), and (h)

³⁹ *Criminal Law Consolidation Act 1935 (SA)* s5AA.1(e)(ii), s62B

⁴⁰ *Criminal Law Consolidation Act 1935 (SA)* s5AA.1(e)(ii), s62B

⁴¹ *Criminal Code Act 1995 (Cth)* s 474.24C(2)

⁴² *Child Sex Offenders Registration Act 2006 (SA)* s9.3

houses or switching jobs)⁴³. They are not allowed to work or volunteer in places involving children⁴⁴. For example, they are not allowed to coach junior sports teams or become a surf lifesaver.

If you are under 18, you can't be placed on the Register unless you are considered to be a danger to children⁴⁵. So far, no young people under 18 have been put on the register, but it is still a possibility⁴⁶.

What should you do?

If you receive nude/sexy pictures or videos on the internet or on your mobile, you can avoid getting into trouble by⁴⁷:

- Deleting the pictures/videos immediately
- IF you didn't ask for the photos in the first place⁴⁸.

You should NEVER forward these images onto other people because this is a crime⁴⁹.

When sexting involves harassment...

Sexting can also be a form of harassment⁵⁰. For example, someone might keep bothering you with requests for a naked picture. Or they might send you a naked picture that you don't want. Or they might threaten to send a naked picture of you to other people without your permission.

Sexting that involves harassment can be a crime, even if everyone is over 18.⁵¹ It can also be considered a menacing, harassing or offensive use of the internet or a mobile phone⁵².

What is menacing, harassing or offensive use of the internet or a mobile?

It is a crime to use your mobile phone or the internet in an offensive way or to harass somebody⁵³. Something could be offensive or harassing if it makes a person feel disgusted, humiliated⁵⁴ or threatened⁵⁵. When sexting is used to threaten or bother someone, it is against the law. The maximum penalty is 3 years in gaol⁵⁶, or 5 years if the harassment is against someone under 12⁵⁷.

⁴³ *Child Sex Offenders Registration Act 2006 (SA)* s13

⁴⁴ *Child Sex Offenders Registration Act 2006 (SA)* s65

⁴⁵ *Child Sex Offenders Registration Act 2006 (SA)* s6.3(a), s9.3

⁴⁶ Letter from Malcom A. Hyde, Commissioner of Police for South Australia, to Parliament of Victoria Law Reform Commission, available at:

http://www.parliament.vic.gov.au/images/stories/committees/lawrefrom/isexting/subs/S45_-_South_Australia_Police.pdf

⁴⁷ *Criminal Law Consolidation Act 1935 (SA)* s63A.2

⁴⁸ *Criminal Law Consolidation Act 1935 (SA)* s63A.2

⁴⁹ *Criminal Law Consolidation Act 1935 (SA)* s63

⁵⁰ *Criminal Code Act 1995 (Cth)* s 474.17; *Criminal Law Consolidation Act 1935 (SA)* s19AA

⁵¹ *Criminal Law Consolidation Act 1935 (SA)* s19AA

⁵² *Criminal Code Act 1995 (Cth)* s 474.17

⁵³ *Criminal Code Act 1995 (Cth)* s 474.17, *Criminal Law Consolidation Act 1935 (SA)* s19AA

⁵⁴ *Sexual Discrimination Act 1984 (Cth)* s28A(1); *Johanson v Michael Blackledge Meats* [2001] FMCA 6 para 22

⁵⁵ *Crowther v Sala* [2007] QCA 133 [25]

⁵⁶ *Criminal Code Act 1995 (Cth)* s 474.17

⁵⁷ *Criminal Law Consolidation Act 1935 (SA)* s19AA.2(b)

Real life examples:

A 17 year old boy was unable to accept that his girlfriend broke up with him. The boy used naked pictures of his 15 year old girlfriend to blackmail and manipulate her into having sex with him. The boy was convicted of non-consensual sex and possession of child pornography⁵⁸.

20 year old Ronnie⁵⁹ posted 6 nude photos of his 18 year old ex-girlfriend on Facebook as a revenge for breaking up with him. Ronnie's ex-girlfriend reported this to the police and he removed the photos for a short time. When Ronnie re-posted those photos later that day, the Police arrested and charged Ronnie with posting indecent pictures. Ronnie was given a 6 months home detention and was left with a criminal record.

Jason⁶⁰ repeatedly sent unwanted sexy pictures to a new friend by SMS on his mobile. His friend was intimidated by the pictures he sent. Jason was charged with menacing, harassing or offensive use of a mobile for each SMS he sent. He was sent to jail for 12 months.

What if you didn't know or agree to your picture or video being taken in the first place?

It is a crime for someone to take a picture or video of your private parts⁶¹ or private actions if you are under 17 years of age.⁶² It is still a crime, even if you or your parent or guardian agreed to the picture being taken.

Private actions include:⁶³

- Undressing down to underwear;
- Using the toilet;
- Exposure or partial exposure of sexual organs, buttocks or a female's breasts; or
- Having sex or doing a sexual act.

The maximum penalty for possessing child pornography is 5 years in prison.⁶⁴ The maximum penalty for distributing child pornography, or an image of a child engaging in a "private act," (via text messaging, over the internet, or face-to-face) is 10 years in prison.⁶⁵ You will **not** be charged with any of these crimes if you can prove that the person in the image was 16 years or older, and you were under the age of 17 years old, at the time the image was taken.⁶⁶

Other laws that can apply to sexting

⁵⁸ Hannah Silverman, "Now Kids are Sexting in Primary School", *Adelaidenow*, 27 May, 2012, available at: <http://www.adelaidenow.com.au/news/south-australia/now-kids-are-sexting-in-primary-school/story-e6frea83-1226368744025>

⁵⁹ *Police v Ravshan USMANOV* [2011] NSWLC 40

⁶⁰ *R v Vaughan* [2011] QCA 224

⁶¹ *Criminal Law Consolidation Act 1935 (SA)* s62 "child pornography" (a)(ii)

⁶² *Criminal Law Consolidation Act 1935 (SA)* s63B(1)(b)(ii)

⁶³ *Criminal Law Consolidation Act 1935 (SA)* s 62 under the "private act" heading. Note that in the SA legislation, the emphasis is on the "prurient" intentions of the accused.

⁶⁴ *Criminal Law Consolidation Act 1935 (SA)* s63B(1)(a).

⁶⁵ *Criminal Law Consolidation Act 1935 (SA)* s63B(1)(b).

⁶⁶ *Criminal Law Consolidation Act 1935 (SA)* s63B(4)(a)-(b).

When sexting involves a person who is under 16 and a person who is over 18, the person who is over 18 could be committing some other very serious crimes.⁶⁷

When sexting is unwanted, it could also be a form of sexual harassment⁶⁸, invasion of privacy⁶⁹ or defamation⁷⁰.

You can find out more on our Lawstuff factsheets:

Sexual harassment: http://www.lawstuff.org.au/nsw_law/topics/sexual-assault-and-sexual-harassment/sexual-harassment

Privacy: http://www.lawstuff.org.au/nsw_law/topics/privacy

Defamation: http://www.lawstuff.org.au/nsw_law/topics/defamation

What can I do to stop people from sending images of me around the Internet or through mobiles?

There are a number of things you can do to stop these pictures being sent out:

- If the picture is on a social networking site such as Facebook, you may be able to report the picture and have it taken off the site. You can report something on Facebook here: <http://www.facebook.com/help/?faq=167722253287296>.
- You can also make a report to your mobile phone company if you are receiving unwanted pictures or requests for pictures. Call your mobile phone company or go to their website.
- Apply for a protection order to stop a person from contacting you or sending out images to harass you.
- Send us a *Lawmail*. We can tell you what your options are, help you make a complaint or write a letter to the person threatening to share your picture.
- Tell someone you trust – a parent, friends, school counsellor or teacher.
 - You may also wish to speak to someone from the **Kids Helpline on 1800 55 1800**.
 - Be aware that your teacher may feel the need to report to the police.
- Contact the police if images are being spread without your consent or if you feel unsafe.
 - Be aware you may be charged if you took and sent the picture. But police have discretion not to charge victims of unwanted sexting.

⁶⁷ *Criminal Code Act 1995 (Cth)* s474.25A; 474.26; 474.27

⁶⁸ *Criminal Law Consolidation Act 1935 (SA)* s19AA “unlawful stalking”

⁶⁹ United Nations Convention on the Rights of the Child, Article 16 – protection of basic human right

⁷⁰ *Criminal Law Consolidation Act 1935 (SA)* s257

What should I do if I have a picture or text I am unsure about?

It's important to protect yourself by deleting any pictures you are uncomfortable with straight away.⁷¹ **NEVER forward these images on to anyone else.**

If you're worried you may have committed a crime, you can send a *Lawmail* at www.lawstuff.org.au or call the *Youth Hotline* on 1800 10 18 10.

You should also have a look at our Lawstuff factsheet on self incrimination: _____.

⁷¹ *Criminal Law Consolidation Act 1935 (SA)* s63A – prohibits possession of child pornography

SEXTING- Tasmania

What is sexting?

Sexting is using the internet or your mobile to share nude/sexy pictures.

Is sexting a crime?

Sexting is a crime when it involves people under 18¹. It's also a crime when it involves harassing people of any age².

Why 18?

In Tasmania, the law says you can generally consent to sex at the age of 17.³ You may also consent to sex at the age of 15 if your partner is not more than 5 years older than you are, or at the age of 12 if your partner is not more than 3 years older than you are.⁴ You may consent to sexting in Tasmania at age 18.⁵ When you use the internet or a mobile phone, the national law of Australia also applies, even though you are in Tasmania⁶. The national law also bans sexting for anyone under 18⁷.

When sexting involves someone under 18...

When sexting involves someone under 18, it can be 'child pornography,'⁸ an 'obscene publication,' or an 'indecent act'⁹.

What is child pornography?

Child pornography is a picture of a young person who is:

- showing their private parts (genitals¹⁰, anus¹¹ or breasts¹²);
- posing in a sexual way¹³;
- doing a sexual act¹⁴; or

¹ *Criminal Code Act 1995 (Cth)* s473.1; s474.19; *Criminal Code Act 1924 (Tas)* Sched. 1 s1A

² *Criminal Code Act 1995 (Cth)* S474.17; *Criminal Code Act 1924 (Tas)* Sched. 1 s192

³ *Criminal Code Act 1924 (Tas)* Sched. 1 s124.1

⁴ *Criminal Code Act 1924 (Tas)* Sched. 1 s124.3(a) and (b) – available defences to sex with someone under 17

⁵ *Criminal Code Act 1924 (Tas)* Sched. 1 s1A (definition of child exploitation material = under 18)

Crimes Act 1900 (NSW) s66C (age of consent)

⁶ *Criminal Code Act 1995 (Cth)* S474.19

⁷ *Criminal Code Act 1995 (Cth)* s473.1 (definition of child pornography = under 18)

Criminal Code Act 1995 (Cth) S474.19

⁸ *Criminal Code Act 1995 (Cth)* s 473.1; *Criminal Code Act 1924 (Tas)* s1A

⁹ *Criminal Code Act 1924 (Tas)* Sched. 1 s125B – 'indecent act' for 17 or under generally, 15 and under if the offender is less than 5 years older than the child, or 12 and under if the person is more than three years older than the child, *Criminal Code Act 1924 (Tas)* Sched. 1 s137 'indecency'

¹⁰ *Criminal Code Act 1995 (Cth)* s 473.1 "child pornography material" (b)(i), (b)(ii)

¹¹ *Criminal Code Act 1995 (Cth)* s 473.1 "child pornography material" (b)(i), (b)(ii)

¹² *Criminal Code Act 1995 (Cth)* s 473.1 "child pornography material" (b)(i), (b)(iii)

¹³ *Criminal Code Act 1995 (Cth)* s 473.1 "child pornography material" (a)(i); *Criminal Code Act 1924 (Tas)* Sched. 1 s1A(b); *Classification (Publications, Films and Computer Games) Enforcement Act 1995 (Tas)*, s71 'child exploitation material' (b)

- in the presence of someone who is doing a sexual act or pose¹⁵.

Child pornography can include real pictures¹⁶, photo-shopped pictures¹⁷, videos¹⁸ and cartoons¹⁹. But a picture is only child pornography if it is offensive to the average person²⁰. That's why a picture of a naked baby in a bath isn't child pornography, but a picture of a naked teenager in a bed could be.

What is illegal about it?

Child pornography pictures are illegal if they are:

- asked for²¹;
- looked up online²²;
- taken²³;
- received and kept²⁴; or
- sent, posted or passed around.²⁵

These actions can be crimes even if the picture is only of you, your boyfriend/girlfriend or someone else who says it's ok²⁶. It is always a crime for you to send, post, or pass around a sexy/nude picture of someone under 18.²⁷ Under the laws of Tasmania, it is not always a crime to receive, keep, take, or look up a sexy/nude picture if the picture is of a legal sexual act, such as between a 15 year old and someone who is not more than 5 years older than they are.²⁸ But remember, the national law says a person under 18 can't agree to sexting²⁹.

It can also be a crime to share a nude/sexy picture of someone who looks like they are under 18³⁰, even if they are actually over 18 when the picture was taken.

¹⁴ *Criminal Code Act 1995 (Cth)* s 473.1 "child pornography material" (a)(i); *Criminal Code Act 1924 (Tas)* Sched. 1 s1A(a); *Classification (Publications, Films and Computer Games) Enforcement Act 1995 (Tas)*, s71 'child exploitation material' (a)

¹⁵ *Criminal Code Act 1995 (Cth)* s 473.1 "child pornography material" (a)(ii)

¹⁶ *Criminal Code Act 1924 (Tas)* Sched. 1 s1A

¹⁷ *Criminal Code Act 1924 (Tas)* Sched. 1 s1A – "material" includes computer image

¹⁸ *Criminal Code Act 1924 (Tas)* Sched. 1 s1A – "material" includes film

¹⁹ *Criminal Code Act 1995 (Cth)* s 473.1 "child pornography material"

²⁰ *Criminal Code Act 1995 (Cth)* s 473.1 "child pornography material"; *Criminal Code Act 1924 (Tas)* Sched. 1 s1A

²¹ *Criminal Code Act 1995 (Cth)* s 473; *Criminal Code Act 1924 (Tas)* Sched. 1 s130 – involving or doing anything to facilitate the involvement of a child in the production of child exploitation material

²² *Criminal Code Act 1924 (Tas)* Sched. 1 s130D – "accessing" is a crime

²³ *Criminal Code Act 1924 (Tas)* Sched. 1 s130A

²⁴ *Criminal Code Act 1924 (Tas)* Sched. 1 s130C

²⁵ *Criminal Code Act 1924 (Tas)* Sched. 1 s130B,

²⁶ *Criminal Code Act 1995 (Cth)* s473.1; s473.21 defence – there is no defence on grounds of consent; *Criminal Code Act 1924 (Tas)* s130E – defence available if image depicts a sexual activity that is not illegal

²⁷ *Criminal Code Act 1924 (Tas)* Sched. 1 s130E – defence of the legality of the act depicted does not apply to distribution of child exploitation material

²⁸ *Criminal Code Act 1924 (Tas)* Sched. 1 s130E – defence available if depiction is not of illegal sexual act

²⁹ *Criminal Code Act 1995 (Cth)* s473.1; s474.19

³⁰ *Criminal Code Act 1995 (Cth)* s 473.1 "child pornography material" – "appears to be, under 18 years of age"; *Criminal Code Act 1924 (Tas)* Sched. 1 s1A

Even if a picture is not child pornography, asking for or sending a nude/sexy photo can be an indecent act and this is a crime³¹. An indecent act is usually a sexual act that the average person finds offensive, and can include sending sexual images to someone under 18³².

A real life example:

18 year old Damien³³ texted a 13 year old girl and asked her for a “hot steamy” picture. The girl texted back to Damien a nude picture of herself. The girl’s father found the picture on her phone and called the police. Damien was charged with possessing child pornography and causing the girl to do an act of indecency. He was found guilty of the indecency charge and was placed on a good behaviour bond.

The girl also broke the law by taking and sending the picture³⁴. In this case, she was not charged (probably because she was so much younger than him, Damien was considered more at fault).

What are the penalties?

The maximum penalties for child pornography can be up to 15 years in gaol under the national law.³⁵ The maximum penalties for child pornography or an act of indecency may be even longer under Tasmanian law where judges can sentence you as much as 21 years in gaol.³⁶ You may also be placed on the sex offender register³⁷ (see below). The penalties are high because the laws were meant to stop adults from sexually abusing children. When the laws were passed, nobody realised that they might also be used against young people who took pictures of themselves or other people of their own age.

In some sexting cases, instead of using child pornography laws, the police might decide to:

- send you to youth justice conferencing;
- give you a warning or caution; or
- let your parents or school decide your punishment.

The policy of the Tasmanian police is to let parents or social workers deal with sexting between children when both children agree to taking and sending the pictures. However, when sexting is intentionally meant to hurt or take advantage of another child, the police are likely press serious charges that could lead to gaol or sex offender registration.³⁸

³¹ *Criminal Code Act 1924 (Tas)* Sched. 1 s137(b) – indecency charges, s125D(3)- exposing a person under 17 to indecent material

³² *Tasmania v. Baker*, [2006]TASSC 74 26 September 2006.

³³ *Facts of Eades v DPP (NSW)* [2010] NSWCA 241

³⁴ *Criminal Code Act 1924 (Tas)* Sched. 1 s130A, s130B; *Criminal Code Act 1995 (Cth)* s 473.1; s474.19 – sending child pornography material using a carriage service

³⁵ *Criminal Code Act 1995 (Cth)* s 474.19

³⁶ *Criminal Code Act 1924 (Tas)* Sched. 1 s389.3

³⁷ *Community Protection (Offender Reporting) Act 2005 (Tas)*, s12-15, Sched. 1-3

³⁸ Letter from D.L. Hine, Tasmanian Commissioner of Police, to the Parliament of Victoria Law Reform Committee Inquiry into Sexting, 22 June 2012.

If the person is under 18 when they commit the child pornography crime, the police must get the Attorney General's permission before they can make child pornography charges under the national law³⁹. The police do not need to get this permission before making charges under the state law.

What is the child sex offender register?

You may be placed on the Community Protection Offender Register if you are found guilty of child pornography.⁴⁰ People on this Register have to give their contact details to the police and inform them of any changes (like moving houses or switching jobs)⁴¹ or travel outside the state for more than 7 days.⁴² They also have to report any unsupervised contact with children, and membership in any club which has children as members.⁴³

If you are under 18, you can be placed on the Register for committing a child pornography crime for up to 7 years and 6 months⁴⁴.

What should you do?

If you receive nude/sexy pictures or videos on the internet or on your mobile without having asked for them, you can avoid getting into trouble by⁴⁵:

- Deleting the pictures/videos immediately and
- Letting the sender know that you don't want to receive any more of these pictures/videos⁴⁶.

You should NEVER forward these images onto other people because this is a crime⁴⁷.

When sexting involves harassment...

Sexting can also be a form of harassment⁴⁸. For example, someone might keep bothering you with requests for a naked picture. Or they might send you a naked picture that you don't want. Or they might threaten to send a naked picture of you to other people without your permission.

Sexting that involves harassment can be considered a menacing, harassing or offensive use of the internet or a mobile phone⁴⁹.

What is menacing, harassing or offensive use of the internet or a mobile?

It is a crime to use your mobile phone or the internet in an offensive way or to harass somebody⁵⁰. Something could be offensive or harassing if it makes a person feel disgusted, humiliated⁵¹ or

³⁹ *Criminal Code Act 1995* (Cth) s 474.24C(2)

⁴⁰ *Community Protection (Offender Reporting) Act 2005* (Tas), s12-15, Sched. 1-3

⁴¹ *Community Protection (Offender Reporting) Act 2005* (Tas), s16-18

⁴² *Community Protection (Offender Reporting) Act 2005* (Tas), s19

⁴³ *Community Protection (Offender Reporting) Act 2005* (Tas), s17

⁴⁴ *Community Protection (Offender Reporting) Act 2005* (Tas), s25

⁴⁵ *Criminal Code Act 1924* (Tas) Sched. 1 s130E.3; *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (Tas), s. 74B.3

⁴⁶ *Criminal Code Act 1924* (Tas) Sched. 1 s130E.3; *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (Tas), s. 74B.3

⁴⁷ *Criminal Code Act 1924* (Tas) Sched. 1 s130B – distribution is illegal

⁴⁸ *Criminal Code Act 1995* (Cth) s 474.17

⁴⁹ *Criminal Code Act 1995* (Cth) s 474.17

threatened⁵². When sexting is used to threaten or bother someone, it is against the law. The maximum penalty is 3 years in gaol⁵³.

Real life examples:

20 year old Ronnie⁵⁴ posted 6 nude photos of his 18 year old ex-girlfriend on Facebook as a revenge for breaking up with him. Ronnie's ex-girlfriend reported this to the police and he removed the photos for a short time. When Ronnie re-posted those photos later that day, the Police arrested and charged Ronnie with posting indecent pictures. Ronnie was given a 6 months home detention and was left with a criminal record.

Jason⁵⁵ repeatedly sent unwanted sexy pictures to a new friend by SMS on his mobile. His friend was intimidated by the pictures he sent. Jason was charged with menacing, harassing or offensive use of a mobile for each SMS he sent. He was sent to jail for 12 months.

What if you didn't know or agree to your picture or video being taken in the first place?

[INSERT]

Other laws that can apply to sexting...

When sexting involves a person who is under 16 and a person who is over 18, the person who is over 18 could be committing some other very serious crimes.⁵⁶

When sexting is unwanted, it could also be a form of stalking⁵⁷, invasion of privacy⁵⁸ or defamation⁵⁹.

You can find out more on our Lawstuff factsheets:

Sexual harassment: http://www.lawstuff.org.au/nsw_law/topics/sexual-assault-and-sexual-harassment/sexual-harassment

Privacy: http://www.lawstuff.org.au/nsw_law/topics/privacy

Defamation: http://www.lawstuff.org.au/nsw_law/topics/defamation

⁵⁰ *Criminal Code Act 1995* (Cth) s 474.17

⁵¹ *Sexual Discrimination Act 1984* (Cth) s28A(1); *Johanson v Michael Blackledge Meats* [2001] FMCA 6 para 22

⁵² *Crowther v Sala* [2007] QCA 133 [25]

⁵³ *Criminal Code Act 1995* (Cth) s 474.17

⁵⁴ *Police v Ravshan USMANOV* [2011] NSWLC 40

⁵⁵ *R v Vaughan* [2011] QCA 224

⁵⁶ *Criminal Code Act 1995* (Cth) s474.25A; 474.26; 474.27; *Criminal Code Act 1924 (Tas)* Sched. 1 s192,

⁵⁷ *Criminal Code Act 1924 (Tas)* Sched. 1 s192f-h

⁵⁸ United Nations Convention on the Rights of the Child, Article 16 – protection of basic human right

⁵⁹ *Criminal Code Act 1924 (Tas)* Sched. 1 s196

What can I do to stop people from sending images of me around the Internet or through mobiles?

There are a number of things you can do to stop these pictures being sent out:

- If the picture is on a social networking site such as Facebook, you may be able to report the picture and have it taken off the site. You can report something on Facebook here: <http://www.facebook.com/help/?faq=167722253287296>.
- You can also make a report to your mobile phone company if you are receiving unwanted pictures or requests for pictures. Call your mobile phone company or go to their website.
- Apply for a protection order to stop a person from contacting you or sending out images to harass you.
- Send us a *Lawmail*. We can tell you what your options are, help you make a complaint or write a letter to the person threatening to share your picture.
- Tell someone you trust – a parent, friends, school counsellor or teacher.
 - You may also wish to speak to someone from the **Kids Helpline on 1800 55 1800**.
 - **Be aware** that your teacher may feel the need to report to the police.
- Contact the police if images are being spread without your consent or if you feel unsafe.
 - **Be aware** you may be charged if you took and sent the picture. But police have discretion not to charge victims of unwanted sexting.

What should I do if I have a picture or text I am unsure about?

It's important to protect yourself by deleting any pictures you are uncomfortable with straight away.⁶⁰ **NEVER forward these images on to anyone else.**⁶¹

If you're worried you may have committed a crime, you can send a *Lawmail* at www.lawstuff.org.au or call the *Youth Hotline* on 1800 10 18 10.

You should also have a look at our Lawstuff factsheet on self incrimination: _____.

⁶⁰ *Criminal Code Act 1924 (Tas)* Sched. 1 s130C – possession is illegal, s130E.3 – if pictures were unsolicited immediate disposal is a defense.

⁶¹ *Criminal Code Act 1924 (Tas)* Sched. 1 s130B – distribution is illegal