

Recommendations for Dealing with the Creation/Sharing/Distribution/Possession of Sexually Explicit Images¹

NAPD Welfare Committee

Disclaimer: The information contained in this document is provided as reference material only; it is not intended to be legal advice. Specific legal advice should be obtained in individual cases.

¹ Sections on *Lockers: Information and Resources for Schools around the Sharing of Explicit Self-Generated Images* have been reproduced/incorporate/adapted in this document with the kind permission of PDST.

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1. Introduction

The rapid rate at which new technologies are developing and the unpredictable ways in which they are often adopted and used by young people presents many unforeseen opportunities and challenges for schools, parents and the wider community. New technologies are central to modern life as they allow for the rapid retrieval and collation of information from a wide range of sources, and provide a powerful stimulus for creativity.

However, these technologies are also potentially damaging. They can give access to harmful and inappropriate materials and, because of the anonymity offered, individuals may be harmed or exploited. As a result, schools need to be well informed when encountering incidents involving the inappropriate use of technologies by students as the repercussions can seriously undermine the health and well-being of staff and students. In addition, legislation has placed very strict reporting requirements on schools where there are reasonable grounds to suspect that an offence has been committed, including in relation to the creation/sharing/distribution/possession of child pornography/child exploitative material etc.

The purpose of these recommendations is to provide useful and relevant guidance to school leaders that will allow them to deal effectively with incidents involving the inappropriate use of technologies by students.

Schools need to be extremely careful about how they handle any incidents involving the inappropriate use of technologies. **All incidents involving sexually explicit images should be referred to the Gardaí for investigation.** School leaders, Boards of Management, staff, students and parents need to work together to develop a clear strategy around the safe use of technologies and e-safety, with policies being reviewed regularly in light of technological developments. Schools are expected to provide information and knowledge to create a supportive environment for students around the safe and appropriate use of technologies. This is mainly achieved through awareness campaigns and relevant school programmes for e-safety which enable students to become safe and responsible users of new technologies.

Parents/guardians should be informed and made aware of school policies in relation to the use of technologies and how incidents of inappropriate use will be managed by the school, including the procedures to be followed for behaviours outside of school. All staff are expected to have sufficient knowledge and understanding of the school's Anti-Bullying Policy, the Code of Behaviour, Child Protection Policy, Acceptable Use Policy and other relevant policies. It should also be noted that all internet providers, including social media services, have tools that can be used to report/ have illegal content removed when they have been notified of its existence.

It is hoped these recommendations will provide the necessary information to allow school leaders to deal with incidents involving the inappropriate use of technologies in a school context.

***Note on Terminology-** This document uses the phrase "sharing of sexually explicit images/content" to capture behaviour colloquially referred to as "sexting". For the purpose of this document: - "**sexually explicit image**" means any indecent or obscene image.

2. Legal Framework

There are a number of pieces of criminal and civil legislation which are relevant to the area of inappropriate use of technology and the creation/sharing/distribution/possession of sexually explicit images in the school context.

2.1. Child Trafficking and Pornography Act, 1998² and the Criminal Law (Sexual Offences) Act 2017

The sharing of sexually explicit images of children (u-18s) is captured by the Criminal Law (Sexual Offences) Act 2017). The 1998 Act was designed to protect children from exploitation. If sexually explicit images or videos of children are shared or stored on a device, an offence is committed, provided the content shared/stored meets the definition of child pornography.

The definition of child pornography was amended in the CL (SO) Act 2017.

F2 [(a) any visual representation —

(i) that shows, or in the case of a document relates to, a person who is or is depicted as being a child and who is engaged in or is depicted as being engaged in real or simulated sexually explicit activity,

(ii) that shows, or in the case of a document relates to, a person who is or is depicted as being a child and who is or is depicted as witnessing any such activity by any person or persons, or

(iii) that shows, for a sexual purpose, the genital or anal region of a child or of a person depicted as being a child,

(b) any audio representation of a person who is or is represented as being a child and who is engaged in or is represented as being engaged in explicit sexual activity,

(c) any visual or audio representation that advocates, encourages or counsels any sexual activity with children which is an offence under any enactment, or

(d) any visual representation or description of, or information relating to, a child that indicates or implies that the child is available to be used for the purpose of sexual exploitation within the meaning of section 3.

In short, any photo, video or audio recording that shows a child engaged in sexual activity, or that shows the genital or anal region of a child is considered as child pornography. Part (d) of the 1998 Act could be interpreted to mean that almost any provocative content produced or sent by a child could be considered as child pornography. Ultimately, only a court can decide whether particular content is illegal under this section.

All cases involving the creation, distribution or possession of sexually explicit images of children are criminal in nature and should be reported to An Garda Síochána. The duty to notify the Gardaí in these cases is required by the Withholding of Information on Offences Against Children and Vulnerable Persons Act 2012 (the “**2012 Act**”).

² As amended by the Criminal Law (Sexual Offences) Act, 2017.

2.1.1. Self-generated sexually explicit content

It is important to note that while consent may be a defence to the offence of engaging in a sexual act with a person between the ages of 15 and 17³, it could be an offence for them to record this activity. In cases of self-generated sexually explicit content or “nude selfies”, the person him/herself can be the creator, distributor and possessor of illegal content. The law in this area was designed to protect children from exploitation and not to criminalise their reckless acts. That said, approaches will differ from Garda Station to Garda Station. There is no protocol in place directing Gardaí on how to deal with “nude selfies” of adolescents. Depending on the circumstances surrounding each case, this will decide how the case will be dealt with by An Garda Síochána and whether any criminal breach of an offence has occurred.

As the 1998 Act was not originally intended to deal with “nude selfies” of teens, but rather for people guilty of trading in child abuse images, the punishments for people found guilty under the Act are harsh. Punishments include imprisonment, a fine and also the person being made subject to the Sex Offenders Act 2001. However, for the offences of creation, distribution and possession of child pornography, no such discretion exists. Therefore, if a person is convicted of such an offence, that person will automatically be placed on the register for at least 2 and a half years.

2.2. Criminal Law (Sexual Offences) Act, 2017

With certain offences there is a provision for persons to not be made subject to the Act (for example, where the two persons involved are similar in age). However, for the offences of creation, distribution and possession of child pornography, no such exemption exists. Therefore, if a person is convicted of such an offence, that person will automatically be made subject to the Act for at least two and half years.

It must be noted that all files for sexual offences are sent to the DPP for decision when a child is deemed not suitable for inclusion in the Juvenile Diversion Programme. When a person under 18 years of age is responsible for a crime the matter can be dealt with in one of two ways; 1. the young person can be cautioned or 2. brought before the courts. Before any young person is brought before the courts, she/he must first be considered for a caution. The caution is a warning from a Garda Juvenile Liaison Officer (JLO) and includes a discussion about the crime. The decision to caution or prosecute is made by a Garda Superintendent at the Garda Youth Diversion Office. This alternative programme for dealing with young people who commit an offence or crime is known as the Diversion Programme. This programme operates under legislation as set out in the Children Act, 2001.

2.3. Withholding of Information on Offences against Children and Vulnerable Persons Act, 2012

As stated above, all cases involving the creation, distribution or possession of sexually explicit images of children are criminal in nature and should be reported to An Garda Síochána. The duty to notify the Gardaí in these cases is required by the 2012 Act.

³ Section 3(1) of the Criminal Law (Sexual Offences) Act 2006 as amended by the Criminal Law (Sexual Offences) Act 2007 makes it an offence to engage in a sexual act with a child under the age of 17. However, Section 3 (8) provides that a person charged with an offence of engaging in a sexual act with a person between the ages of 15 and 17 years can use consent as a defence, provided the person charged is younger or is less than two years older. The person charged must also not be in authority over the child or be intimidatory or exploitative. The Act also provides at Section 5 that a female child under the age of 17 years shall not be guilty of an offence under the Act by reason only of her engaging in an act of sexual intercourse.
<http://www.irishstatutebook.ie/eli/2006/act/15/section/3/enacted/en/html#sec3> and CL(SO)(a) Act 2007
<http://www.irishstatutebook.ie/eli/2007/act/6/enacted/en/html>

2.4. Non-Fatal Offences Against the Person Act, 1997

The Non-Fatal Offences Against the Person Act, 1997 provides for an offence of harassment, whereby any person who, without lawful authority or reasonable excuse, by any means including by use of the telephone, harasses another by persistently following, watching, pestering, besetting or communicating with him or her, shall be guilty of an offence. A person “harasses” another if s/he by his/her acts intentionally or recklessly, seriously interferes with the other’s peace and privacy or causes alarm, distress or harm to the other and his/her acts are such that a reasonable person would realise that the acts would seriously interfere with the other’s peace and privacy or cause alarm, distress or harm to the other. This offence can capture some instances of cyber bullying and non-consensual sharing of sexually explicit images provided that this is carried out persistently (i.e. more than once). However, the requirement for the communication to be with the victim potentially excludes cases where communications are posted publicly or messages/images are sent to third parties.

It should be noted that a bill is in final stages that will make huge changes to this section and to the whole Cyberbullying and Bullying problems in society. The bill is known as ‘Harassment, Harmful Communication and related offences Bill 2017’. This section may need a change in the near future.

2.5. The Post Office (Amendment) Act, 1951⁴

The Post Office (Amendment) Act, 1951 includes an offence of sending a message by telephone that is “grossly offensive or is indecent, obscene or menacing”. This offence potentially applies to harmful messages and images which are sent using SMS; however, it does not extend to internet communications.

2.6. The Children First Act, 2015

Given the wide definition of harm in the 2015 Act and as sexual abuse includes offences under the 1998 Act and the 2017 Act, it would appear that the 2015 Act imposes reporting duties on mandated persons in schools in instances of non-consensual sharing of sexually explicit images. Teachers, as mandated persons, have a legal obligation to report to Túsła (Child and Family Agency) where they know, believe or have reasonable grounds to suspect that a child is being harmed, has been harmed or is at risk of being harmed. Teachers must also report disclosures made by a child.

Once the relevant sections of the 2015 Act have been commenced, teachers, as mandated persons, will have a legal obligation to report to Túsła (Child and Family Agency) where they know, believe or have reasonable grounds to suspect that a child is being harmed, has been harmed or is at risk of being harmed⁵. Teachers must also report disclosures made by a child. The 2015 Act has been passed but has yet to be commenced by the Minister at the time of writing.

⁴ As amended by the Communications Regulation (Amendment) Act, 2007.

⁵ A mandated person under the 2015 Act is not be required to make a report to Túsła in circumstances where s/he knows or believes that a child who is aged 15 years or more but less than 17 years is engaged in sexual activity with a person who is not more than 2 years older than the child concerned. The mandated person must know or believe that there is no material difference in capacity or maturity between the parties and that the relationship between the parties is not intimidatory or exploitative of either party, that a disclosure has not been made by the child under subsection 2 and the child concerned must make it known to the mandated person that it is his or her view that the activity, or information relating to it, should not be disclosed to the Túsła. There are also further exemptions under the 2015 Act. **This exemption does not apply to the requirement to report under the Withholding of information on offences against Children and Vulnerable Persons Act 2012.**

2.7. The Data Protection Acts, 1988, 2003 and 2018

All records must be collected, stored and maintained in accordance with data protection legislation. Due to the highly sensitive and personal nature of incidents involving the sharing of sexually explicit images, any reports or records created regarding such incidents should be considered as highly confidential and placed in a secure location by the DLP. It is extremely important that schools do not copy, save or store any sexually explicit images as to do so could potentially result in the school being implicated in the possession or distribution of child pornography.

2.8. Duty of Care

A school must note the potential exposure to civil law litigation which may arise on foot of the sharing of sexually explicit images. It is well established that a school owes a duty of care to its students.

Given the nature of sharing of sexually explicit images, it is at least arguable, that a school will be expected to take active steps in ensuring that its students are informed of the dangers and consequences of such activity.

A school that ignores the obvious development of sharing of sexually explicit images including non-consensual sharing of sexually explicit images in classrooms and in the school risks being found negligent by a court.

Schools should take a proactive approach and ensure that the issue is directly addressed. This will ensure that schools are in a strong position to show that they did meet the standard of care expected of them and they did all that was reasonable (by educating the students and having strong, well-researched policies and procedures in place).

3. Considerations for Dealing with the Incident

The following recommendations **are not to be considered as legal advice.**

3.1 General

- a. In the case of the sharing of sexually explicit images of children, the role of school personnel in dealing with the incident is supportive not investigative.
- b. School personnel should be cognisant that the student may not know that the sexually explicit image has been shared or how much it has been shared. Similarly, s/he may not have intended for the sexually explicit image to be shared or shared beyond certain persons. In such circumstances, the incident could be quite traumatic for the student.
- c. **School personnel must not send, save, print out or move from one device to another any explicit content involving minors.** It is illegal to create, share or possess explicit content that features or involves minors and there is no exemption for school personnel who risk being implicated in the possession or distribution of child pornography.
- d. **School personnel must avoid compromising the evidence.** The Gardaí have the expertise and facilities to preserve the evidence and should be contacted at the earliest opportunity. Phones and other electronic devices should only be confiscated where the school's policies allow for same. If the policies do not allow for this, the student's parents and/or the Gardaí should be

asked to attend the school as a matter of urgency, this contact should also take place when the school has a policy in place.

- e. Many cases of the sharing of sexually explicit images of children will involve child protection concerns and the Child Protection Policy should be followed as appropriate. Other policies may also be relevant, including for example, the Anti-bullying policy, the Code of Behaviour **Acceptable Use Policy, etc.**
- f. All of these cases are to be **reported to the Gardaí and the child's parents** and it may also be necessary to report the matter to Túsla, for example, if grooming, coercion and/or harassment are alleged. Informal advice should always be sought from Túsla regarding whether or not to report the matter.
- g. Legal advice should be sought and the school's insurer notified.

3.2 Disclosure to a Staff Member from the subject of the sexually explicit image

- a. **Listen supportively** to the student. The student needs to be informed that in order to resolve the case other adults i.e. parents, the DLP will need to be informed.
- b. **Record** the disclosure in the student's own words. Support the student rather than investigating the incident. Facts about the incident need to be established but **do not question the student** unless the facts are unclear. Use open questions rather than leading questions.
- c. Inform the DLP who will deal with the matter in accordance with the Child Protection Policy.

3.3 If a Staff Member becomes aware of the issue otherwise than from the subject of the sexually explicit image

- a. If a staff member becomes aware of the possible creation, distribution or possession of sexually explicit images of a child/children, otherwise than from a disclosure from the subject of the sexually explicit image, the staff member should immediately inform the DLP who will deal with the matter in accordance with the Child Protection Policy.

3.4 The DLP

- a. The DLP should treat the matter as a child protection concern and the child protection policy should be followed, as appropriate. Informal advice should always be sought from Túsla in these cases in accordance with the Child Protection Procedures and this advice should be followed at all times.

There is a requirement to complete a safeguarding statement, maybe also clarify the role of a mandated person and DLP from 2017 guidance (chapter 4)

- b. In all instances of the creation, distribution or possession of sexually explicit images of children, whether the matter is being treated as a child protection concern or not, the DLP should:
 - Inform the parents of the students involved.

- Report the matter to the Gardaí.
- Seek informal advice from Túsla and report to Túsla, as appropriate.
- Seek advice from Túsla regarding providing support to the students.
- Record how the incident was handled by the school, detailing any reports/referrals made.
- Due to the sensitive and personal nature of these types of incidents, any reports or records created regarding such incidents should be considered as highly confidential and placed in a secure location and as outlined above **school personnel must not send, save, print out or move from one device to another any explicit content involving minors.**
- If the sexually explicit image has been posted on the internet, contact Hotline.ie. Hotline.ie provides an anonymous facility for Internet Users to report suspected illegal content, particularly Child Sexual Abuse Material. All internet service providers, including social media services, have tools that can be used to report and have illegal content removed. All content that falls under the definition of child pornography is illegal and will be removed. Most social media services also prohibit the non-consensual sharing of sexually explicit images and will remove it when they have been notified of its existence. Hotline.ie works in collaboration with An Garda Síochána and is overseen by the Department of Justice and Equality.

4. Implications for School Policies

Usually, school policies and codes of behaviour only apply when students are in school or involved in school activities. However, a school's code of behaviour can apply outside of school time when the impact of a particular behaviour is felt in school and when the wellbeing of members of the school community is compromised.

You should **consider amending your Code of Behaviour and Anti-Bullying Policy** to make specific reference to the creation/sharing/distribution/possession of sexually explicit images and in particular the creation/sharing/distribution/possession of sexually explicit images of pupils without their permission.

You should clearly state that it is an **unacceptable and absolutely prohibited behaviour, that it is a breach of the relevant policy, with serious consequences and sanctions** for those involved.

4.1. Code of Behaviour

If you are amending your Code of Behaviour, you should also outline the sanctions that will be enforced. A Board of Management may decide, as part of the school's policy on sanctions, and following the consultation process with the principal, parents, teachers, and students, that non-consensual creation/sharing/distribution/possession of sexually explicit images of pupils in the school automatically incurs suspension as a sanction. However, a general decision to impose suspension for this type of behaviour does not remove the duty to follow due process and fair procedures in each case.

As noted in the National Education Welfare Board's (NEWB) publication Developing a Code of Behaviour: Guidelines for Schools: "where a student is alleged to have engaged in serious misbehaviour outside school, when not under the care or responsibility of the school, a judgement would have to be made that there is a clear connection with the school and a demonstrable impact on its work, before the Code of Behaviour applies. The school authorities may need to get legal advice where the situation is complex".

4.2. Anti-Bullying Policy

As noted in the Anti-Bullying Procedures for Primary and Post Primary Schools, “isolated or once-off incidents of intentional negative behaviour including a once-off offensive or hurtful text message or other private messaging do not fall within [the Procedures’] definition of bullying and should be dealt with, as appropriate, in accordance with the school’s Code of Behaviour.” The sharing/distribution/possession of sexually explicit images often occurs via private messaging services and so a single incident of non-consensual sharing/distribution/possession could fall outside the remit of the Anti-Bullying Policy. For this reason, it is especially important that the creation/sharing/distribution/possession of sexually explicit content is addressed in a school’s Code of Behaviour and also added to the school’s Anti-Bullying Policy. A single incident of non-consensual creation/sharing/distribution/possession can have a serious effect on a student and may constitute an offence.

The Anti-Bullying Procedures for Primary and Post-Primary Schools note that “placing a once-off offensive or hurtful public message, image or statement on a social network site or other public forum where that message, image or statement can be viewed and/or repeated by other people will be regarded as bullying behaviour”. When sexually explicit content is distributed publicly, maliciously and without consent, the behaviour can be addressed under the Anti-Bullying Policy. It may also constitute an offence.

For example, your policy could be amended to include the following line: The non-consensual sharing/distribution/possession of sexually explicit content always warrants a report, regardless of whether the issue is resolved within 20 days and whether the teacher thinks the incident warrants a report. It may also constitute an offence.

As part of the Anti-Bullying Procedures, schools have a responsibility to deal with bullying that occurs within school and outside school if it has a negative impact on the student within the school.

4.3. Reporting under the Code of Behaviour and Anti-Bullying Policy

Both the Code of Behaviour and Anti-Bullying Policy should highlight the fact that all incidents involving the creation/sharing/distribution/possession of sexually explicit images of children will be reported to the Gardaí and will be dealt with in accordance with the Child Protection Policy, as appropriate, which includes reporting to Túsla, as appropriate.

4.4. Child Protection Policy

Incidents should be handled under the Child Protection Policy, as appropriate.

4.5. ICT Acceptable Use Policy

Similar to the Code of Behaviour and the Anti-Bullying Policy, schools should consider amending their ICT Acceptable Use Policy to make specific mention of the creation/sharing/distribution/possession of sexually explicit images and in particular the creation/sharing/distribution/possession of sexually explicit images of pupils without their permission. The ICT Acceptable Use Policy should clearly state that it is unacceptable and absolutely prohibited behaviour, with serious consequences and sanctions for those involved. The sanctions that will be enforced should be clearly outlined in the Policy or the Policy should refer to the Code of Behaviour if it provides for sanctions in such cases.

4.6. Policy Asserting the School's Right to Search a Student

Schools should ensure that there is a clear policy in place in respect of the school's right to search a student, or his/her property in cases where there is evidence that a criminal offence may have occurred. Schools should have such a policy in place for illegal and harmful substances (drugs, alcohol) and for dangerous articles (knives, weapons etc.). Such policies should state that the consent of the student as well as the student's parent/guardian is required before a search can be carried out. The parent/guardian should also be present before any search is carried out.

This policy should be expressly extended to cover instances where the school reserves the right to search a student where it is necessary to prevent the distribution of child pornography or the commission of other criminal offences.

Note: The search should only relate to the mobile device itself and not the data contained thereon. The data searches should only be conducted by the Gardaí and a physical search of a student for a phone should only take place by a member of school staff where it is not practical to wait for the assistance of the Gardaí and the search must also be witnessed by another member of school staff. Members of the Gardaí have specific statutory powers to stop and search, whereas members of the public do not have such powers and risk civil and/or criminal litigation if a search is carried out in a manner which violates the student's rights. It is essential that both students and staff are made fully aware of the policy.

4.7. Staff Awareness and Support

The Board of Management must ensure that members of school staff have sufficient familiarity with all of the school's policies to enable them to apply the policies effectively and consistently, when required. Supports for staff should be appropriate to the individual's role. The Board of Management must also make appropriate arrangements to ensure that temporary and substitute staff have sufficient awareness of the school's policies.

5. Suggestions for both preventing and dealing with forms of Bullying, Cyber bullying and the Misuse of Social Media.

This list is not exhaustive.

Preventative:

- Whole-school approach - all stakeholders involved in development of the Anti-Bullying Policy to encourage a shared vision
- Internet Safety day/week events linked with SPHE personal safety etc. (not one-off events)
- Education on the appropriate use and power of all forms of ICT
- Use of materials such as "Be in Ctrl" with the "Lockers" programme as part of SPHE programme
- Extra-curricular activities to encourage team-spirit and cooperation
- CPD for all staff members
- Parents' Council events/talks on the subject/talks by garda juvenile liaison officers
- Student Council, prefects to have a particular role in looking out for bullying and reporting it to the relevant authorities
- Surveys to get an overall picture of what is going on
- Staff (all) modelling pro-social behaviour
- Working to move bystanders to defenders of the victims
- Cooperative learning methods

- Development of resilience and raising of self-esteem
- Adequate and effective supervision of the students in class, in corridors, locker rooms, yard etc.
- Use of the curriculum to raise awareness e.g. abuse of power in Politics and Society, Economics, Geography, History. Poster making in Art etc.
- CCTV
- RSE-respect for self and others, appropriate relationships, abusive relationships, the power to say “no”
- Ensure the school internet access has appropriate content filtering in place/use of passwords
- Talks by Community Policing units to schools on “*Be in Ctrl*” and other topics.

Dealing with forms of Bullying, Cyber bullying and the Misuse of Social Media

- Positive behaviour management structures such as non-violent conflict resolution, solution-focused approaches
- Direct interventions involving the Gardaí if necessary, bringing in parents/guardians
- Zero tolerance of the misuse of mobile phones, school computers etc.
- Counselling for both victims and perpetrators (to change this behaviour and find out why is it happening as happy children/adults do not bully)
- Restorative justice approaches to restore the broken relationships, if appropriate
- Assertiveness training to help those victimised