

Stellungnahme zum Referentenentwurf des Bundesministeriums der Justiz für ein Gesetz zur Anpassung der Mindeststrafen des Paragraph 184b Absatz 1 Satz 1 und Absatz 3 des Strafgesetzbuches

Opinion on the Federal Ministry of Justice's draft bill for a law to adjust the minimum penalties in Section 184b (1) sentence 1 and (3) of the German Penal Code

1 Initial situation

The Federal Ministry of Justice wants to reform the offences of distribution, acquisition and possession of child pornography content. The aim of the reform is to lower the minimum sentencing range, which was increased with the amendment to the German Penal Code (StGB) on 1 July 2021 by the Act to Combat Sexualised Violence against Children¹, so that it is reduced from a felony to an offence. This means that in future, proceedings under the Code of Criminal Procedure can (again) be stopped in case an adult accused person did not act with paedo-criminal intentions, which are to be prosecuted under Section 184b, or if juvenile accused persons create, possess and share relevant material with each other by mutual consent and without infringing the rights of third parties.

On 17 November 2023, the Federal Ministry of Justice initiated the participation of associations in the draft bill, sent the invitation to specialist groups and organisations involved in the topic and asked for feedback by 15 December 2023. The Digital Opportunities Foundation is using this opportunity to provide the following comments and suggestions on the draft. We focus in particular on the perspectives of children and young people and draw on our expertise from the project "Child protection and children's rights in the digital world"² as well as the professional exchange in the expert group³ for children's rights in the digital world.

1.1 Media use and sexting by children and young people

Young people are growing up in a digitalised world. According to the KIM Study 2022, almost all children between the ages of six and 13 (99 per cent) live in households that provide access to the digital environment via internet access and the necessary devices. Almost every second child in this age group has their own smartphone (girls 43 per cent, boys 45 per cent). While more than one in three 6 and 7-year-olds are online (38 per cent), almost all children in the 12 to 13 age group are online (99 per cent).⁴

According to the JIM Study 2023, with increasing age it can be assumed that almost all young people (96 per cent) have their own smartphone. In addition, almost three quarters of young people between the ages of 12 and 19 can call a computer/laptop their own. With extensive access to devices, both media usage times and media usage variance increase over the course of age. On average, the young

¹ BGBl. I S. 1810

² Child Protection and Children's Rights in the Digital World. <https://childrens-rights.digital/> Retrieved on 27.11.2023

³ The expert group 'Children's rights in the digital world' brings together 28 organisations, associations and institutions to discuss current aspects and issues of children's rights in the digital environment. On 23 November 2022, the working group 'Protection vs. Privacy' held an expert discussion on the topic of sexting. Further information on the expert group can be found at <https://www.dkhw.de/schwerpunkte/kinderrechte/koordinierungsstelle-kinderrechte/kinderrechte-in-der-digitalen-welt/expertinnenkreis-fuer-kinderrechte-in-der-digitalen-welt/> Retrieved on 30.11.2023

⁴ Feierabend, Sabine et al. (2022): KIM-Studie 2022. Kindheit, Internet, Medien. Basisuntersuchung zum Medienumgang 6- bis 13-Jähriger. Medienpädagogischer Forschungsverbund Südwest. https://www.mpfs.de/fileadmin/files/Studien/KIM/2022/KIM-Studie2022_website_final.pdf Retrieved on 27.11.2023

people surveyed spent 224 minutes online every day. Without exception, the three most relevant apps⁵ for them open up the possibility of communicating with third parties⁶.

The term sexting is made up of the words sex and texting. The term is therefore used to describe both the sending and receiving of messages and images with sexual content that are created and exchanged by mutual consent. This behaviour is in line with the age-appropriate development of young people, which is increasingly taking place in digital environments. Accordingly, sexual identity and self-determination are also being shaped online.⁷

1.2 *Children's Rights in the digital environment*

In General Comment No. 25⁸, the United Nations Committee on the Rights of the Child⁹ explains how their rights to protection, provision and participation can be equally realised in the digital environment. The Committee members point out that the digital environment is of enormous importance for young people and their development, including the formation of their own sexual identity. Against this backdrop in particular, they emphasise the need to protect children and young people from risks associated with, among other things, contact, conduct and content, but also sexual exploitation and sexual violence, and oblige the states parties¹⁰ to take appropriate measures to ensure the safety of children and youth online. The Committee points out that such sexual assaults and offences are not only committed by adults and/or third parties, but that children and young people themselves can also become perpetrators within their circle of friends or towards (former) intimate partners. In the opinion of the committee members, this makes prevention and protection programs and measures that focus on redress even more important. When developing these plans and regulations, children should be involved and their perspectives taken into account in order to adhere to the principle of the best interests of the child as a primary consideration.¹¹

Paragraph 118 of General Comment No. 25 is of particular importance in the context of the facts to be commented on here, in which the United Nations Committee on the Rights of the Child expressly states that "self-generated sexual material by children that they possess and/or share with their consent and solely for their own private use should not be criminalized"¹². Child-friendly channels should be created to allow children to safely seek advice and assistance where it relates to self-generated sexually explicit content. The committee members also emphasise the need for child-friendly information and prevention services in the context of self-produced depictions of sexuality.

⁵ WhatsApp (79 Prozent), Instagram (31 Prozent), TikTok (25 Prozent)

⁶ Feierabend, Sabine et al. (2023): JIM-Studie 2023. Jugend, Information, Medien. Basisuntersuchung zum Medienumgang 12- bis 19-Jähriger. Medienpädagogischer Forschungsverbund Südwest.

https://www.mpfs.de/fileadmin/files/Studien/JIM/2022/JIM_2023_web_final.pdf Retrieved on 1.12.2023

⁷ Klicksafe (2023): Sexting. <https://www.klicksafe.de/sexting> Retrieved on 27.11.2023

⁸ UN (2021): General Comment No. 25 (2021) on children's rights in relation to the digital environment.

<https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-comment-no-25-2021-childrens-rights-relation> Retrieved on 27.11.2023

⁹ According to Art. 1 UN-CRC a person under the age of 18 years is a child.

¹⁰ States that have ratified a convention of the United Nations are states parties. For the UN-CRC this is the case for all states except of the United States of America.

¹¹ Krause, Torsten (2021): Kinder und ihre Rechte im digitalen Raum schützen. In: Kinder- und Jugendschutz in Wissenschaft und Praxis (KJug). 2/2021. Seite 66-69

¹² General comment No. 25 - Chapter XII: Special protection measures. <https://childrens-rights.digital/hintergrund/index.cfm/aus.11/key.1736/StartAt.1/page.1> Retrieved on 27.11.2023

1.3 Protection of personal integrity

With the amendment of the Youth Protection Act 2021, the federal legislator introduced the new protection objective of personal integrity. According to the definition¹³, this protection objective also includes the sexual self-determination of children and adolescents. In the genesis and context of the protection of minors, the aim was to protect young people in their sexual development from unwanted interference by third parties. In the light of the subject matter under discussion here, however, it must also be assumed that this protection objective is linked to the possibility of consensual sexual exploration (in the digital space). Sanctioning such behaviour would therefore be contrary to the protection objective of personal integrity, which, understood in this way, is also to be read in accordance with paragraph 118 of General Comment No. 25.

2 Amendment of Section 184b StGB German Penal Code

With the reform of Section 184b (1) phrase 1 and (3) of the German Penal Code, the Federal Ministry of Justice wants to re-establish the possibility to stop criminal proceedings with impunity if adult accused persons for non-paedo-criminal reasons have respective material available that is to be prosecuted under Section 184b and its creation, possession and dissemination punished. The Federal Ministry of Justice also intends to do the same for juvenile accused persons who engage in consensual sexting without infringing the rights of third parties.

2.1 General assessment

The Digital Opportunities Foundation generally supports the Federal Ministry of Justice's intention to reform Section 184b (1) sentence 1 and (3) of the German Penal Code. It is comprehensible and necessary to give law enforcement authorities and courts the opportunity to stop proceedings against adult accused persons if it can be clearly proven that the person in question is not acting out of paedo-criminal intentions.

We also welcome the proposed reform with regard to juvenile accused persons who engage in consensual sexting and do not infringe the rights of third parties. However, the mere downgrading of such acts by young people to an offence does not correspond to the intention of paragraph 118 of General Comment No. 25, which expressly calls for the consensual exchange of sexual content between peers not to be criminalised. As a result, consensual sexting should be legalised in principle.

With regard to persons who receive in principle illegal material in accordance with Section 184b in order to pass this on to law enforcement authorities for documentation and preservation of evidence and thus contribute to the investigation and prevention of (further) criminal offences, we suggest an exclusion of the offence instead of stopping the proceedings in order to exempt such actions from punishment. The conditions of the exclusion of the offence should be formulated in such a way that only persons who genuinely and immediately wish to contribute to the investigation of the offence are covered.

Furthermore, the phenomenon of sexting by young people is far more complex in the context of criminal law than could be solved solely by reforming Section 184b (1) phrase 1 and (3) of the German Penal Code (see also 3.). In any case, it should be possible to refrain from making an entry in the educational register if the proceedings are stopped in accordance with Section 45 of the Juvenile Courts Act, as juveniles would otherwise be disadvantaged and discriminated against in comparison to adults.

Provided that sexting is mostly consensual within existing relationships and/or between sexual partners, this can initially be considered unproblematic behaviour. Nevertheless, sexting, as with the

¹³ Krause, Torsten et al.: Zum Begriff der persönlichen Integrität im Jugendschutz. In: Recht der Jugend und des Bildungswesens (RdJB). Jahrgang 70 (2022). Heft 4. Seite 629-635

analogue initiation of relationships and sexuality, can lead to breaches of consensus, for example if there is no consent to the sending of such texts and images or if they are shared with third parties. Such violations of consent must be named, addressed, prevented and, if necessary, prosecuted. This requires education, information and awareness raising. Safer sexting messages and campaigns are helpful in this context.¹⁴

In our view, it is questionable to argue against sexting per se. It can be assumed that assaultive behaviour cannot be addressed, dealt with and clarified, as those affected may tacitly accept it. In addition, the Digital Opportunities Foundation believes that care should be taken to ensure that in the case of violations of the personal sphere or more serious assaults, it is not the person who has been harmed who is deemed responsible, but rather that the person causing the harm is confronted. In this context, we also encourage the continuation and expansion of information and counselling services to promote the competent use of digital media as well as services to avoid or reduce interaction risks for children, young people, parents and other caregivers as well as professionals.

3 Suggestions for the reform discussion

In addition to the legal options of sexting, we would like to point out criminal offences and contradictions that need to be considered and discussed in the context of regulating sexting in accordance with paragraph 118 of General Comment No. 25 of the Committee on the Rights of the Child. According to the German Penal Code, sexting can be prosecuted as sexual abuse (Section 176a), as possession or distribution of child or youth pornography (Sections 184b, 184c) or – if consent and voluntariness do not exist – also in other criminal law dimensions (e.g. Sections 185 (insult), 201a (violation of the most personal sphere of life), 240 (coercion) or according to Section 33 KunstUrhG (right to one's own image).

3.1 Sexual abuse of children (Sections 176 and 176a StGB)

In principle, it should be noted that from a criminal law perspective, sexting always constitutes sexual abuse if a person under the age of 14 (child) is involved. However, while a consensual sexual act with a child and a person with only minor differences in terms of age, development and maturity can be exempted from prosecution under Section 176(2) if no exploitation of the child takes place, there exists an indirect possibility of stopping proceedings in the case of a digital sexual act in the same constellation of persons under Section 153 of the Code of Criminal Procedure or Section 45 of the Juvenile Courts Act. In the second case, however, this is accompanied by an entry in the educational register. Accordingly, while Section 176a generally provides for punishment of the older person in the constellation under consideration here in the case of sexting, the same person is explicitly exempt from sanctions in the case of an analogue act in accordance with Section 176.

Against this backdrop, the Digital Opportunities Foundation recommends providing for the same possibility to waive punishment in the context of digital sexual acts (Section 176a) as already exists in Section 176(2) for analogue sexual acts. This would eliminate the discrepancy between criminal law when dealing with consensual sexual acts of young people in analogue and digital environments and thus significantly contribute to legal certainty in the sexual development and self-determination of young people. At the very least, however, it should be possible to refrain from making an entry in the educational register if proceedings are stopped in accordance with Section 45 of the Juvenile Courts Act.

¹⁴ A current campaign is <https://www.safer-sexting.de/>, run by several State Media Authorities in Germany. Retrieved on 1.12.2023

3.2 *Distribution, acquisition and possession of (juvenile) pornographic content (Sections 184 and 184c StGB)*

For persons who are older than 14 but younger than 18 (juveniles), the ongoing process of sexual development is already taken into account in criminal law. This means that only those acts with a particularly high risk potential are criminalised. Therefore, sexting between young people is already exempt from punishment if both parties act voluntarily and the content is only used for private purposes, i.e. is not made accessible to third parties.

A young person is also exempt from punishment if the corresponding content is voluntarily made available to a person of legal age (Section 184c (4)), whereas an adult who is sexting with a person who has not reached the age of majority may be liable to prosecution for the distribution of pornographic content in accordance with Section 184 (1) (1). This is not expedient or practicable for the shaping of relationships and sexual contacts of people around the age of majority.

Against this background, the Digital Opportunities Foundation recommends that a further exception be made in paragraph 184 for the legal distribution of pornographic content. This should be permitted if the young person receiving the content consents to it and the voluntarily provided pornographic content only relates to the adult person with whom the young person has a consensual relationship or sexual contact and who differs only slightly in age, maturity and development from the minor.

3.3 *The concept of abuse and pornography*

The concept of abuse is criticised in specialist circles. On the one hand, the term goes hand in hand with an objectification of the child, who is consequently no longer perceived as a subject. On the other hand, it also implies that there could be a permissible use of a child. Instead of the term abuse, the term (sexual) violence is therefore often used. This term makes it clear that it is an unauthorised assault that disregards the rights of the child and will have negative consequences for the child. The term pornography should also be rejected in connection with sexual violence against children.¹⁵

Against this background, the Digital Opportunities Foundation recommends examining and adapting the designation of criminal offences in this context.

4 **About the Digital Opportunities Foundation**

The Digital Opportunities Foundation is a non-profit, operational foundation based in Berlin. Since 2002, it has been researching the social consequences of digitisation and is committed to equal access to the Internet for all people. With numerous projects at national and European level, the foundation pursues the goal of digital inclusion, participation and equal opportunities and thus counteracts a digital divide in society.

¹⁵ ECPAT (2016): Terminology Guidelines for the Protection of Children from Sexual exploitation and sexual Abuse. <https://ecpat.org/wp-content/uploads/2021/05/Terminology-guidelines-396922-EN-1.pdf> Retrieved on 6.12.2023