C O R R E C T E D V E R S I O N

LAW REFORM COMMITTEE

Inquiry into sexting

Melbourne — 27 July 2012

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Dr G. Lyon, Chair, and

Mr A. Trood, Member, Criminal Bar Association.

The CHAIR — Thanks for coming in. As you would be aware, the Parliament gives our committee references to inquire into and we report back to Parliament with suggested changes to legislation. This is the second inquiry that we have done in this Parliament, the first being in relation to donor-conceived children and their right to know their biological fathers. Thank you for your written submission and for coming in today. You are protected by parliamentary privilege in the room but not outside, obviously. For the purpose of the transcript, could you start with your name, professional address and who you represent and then take us through your submission.

Dr LYON — My name is Gregory Lyon. I am senior counsel practising at the Victorian Bar. I am Chair of the Criminal Bar Association, and I am here representing the CBA today.

Mr TROOD — Tony Trood is my name. I am also a barrister. I practise criminal law. I am also a member of the Criminal Bar Association, and I appear as one of its members with Greg. My professional address is Level 6, 530 Lonsdale Street, Melbourne.

Dr LYON — My address is 205 William Street, Melbourne.

The CHAIR — All right. Would you like to take us through your submission?

Dr LYON — We have provided a written submission dated 13 June 2012, which comprehensively sets out our position. Perhaps if I can take up the invitation to take you through it, what we have done is comment expressly and confined our submission to the appropriateness of the existing laws, especially the criminal offences and the application of the sex offenders register.

The position of the CBA can be stated fairly simply. The nature of the offences are such that we say that there should not be a change to the definition of sexting so as to take it out of being either the use of a carrier or child pornography, because in fact the images that are created are by their definition child pornography. The reason that we say that there ought not be any sort of change to the definition is that it cannot change depending on whose hands it is in. If you have kids who are 15-years-old or so taking explicit photos of themselves or of each other and transmitting them, it is still child pornography. We would be horrified, as would be members of the public, if it was a 50-year-old man who lives with his mother, has a comb-over and wears a blue singlet who had possession of those images. They are still child pornography. What we say the focus should be is how they are dealt with. What we propose is that there are two or three factors that really need to be considered in how these offences are dealt with.

The CHAIR — Just to interrupt you, the term 'sexting' has become part of the vocabulary in recent years. Is that term appropriate for us to try to work into legislation, or is it too broad and colloquial a term to use? We have heard evidence that sexting can involve anything from taking a picture of your own genitals through to filming someone being raped.

Dr LYON — Yes.

The CHAIR — Is 'sexting' an appropriate word for legislation?

Dr LYON — It can be if it is appropriately defined, because it does seem to have that meaning even within the broad scope of what sexting can be. Most people understand that it can be self, it can be intimately consensual or it can be non-consensual, so I think that you can use it in those sorts of contexts. Certainly for the purposes of how the matter is dealt with, it would be appropriate and convenient to have some sort of definition, I think. What we say is that, really, it is how you deal with it. Depending on the age of the people involved, depending on the circumstances — whether it is consensual — the main thing that we propose is that the Magistrates' Court's diversion program can create a sensible way of dealing with a number of young offenders. I will get Tony to speak about diversion.

Mr TROOD — What we have looked at really has a focus on young adults, so we are talking, say, 18 to 21 or thereabouts. As you would probably be aware, the criminal law has long taken the view that even if you are legally an adult, as of course you are at 18, the maturity of 18 to 21-year-olds is going to vary enormously. Just because you are 21 does not mean you are going to be fully mature. There are going to be exceptions to that. Our standpoint is really that children, though subject to the Children's Court, are going to have a number of,

perhaps, specialist factors related to them because there is specialist legislation, of course, that is applicable to them.

In terms of the young adults, in terms of that age group, and those over 21, we take the view that because there are those ranges in maturity, you need a mechanism by which you can deal with these issues short of going to court orders or conviction. As you would be aware, I suspect, from hearing evidence, the sorts of issues and the privacy issues that these cases raise can be dealt with in all sorts of ways. Schools sometimes deal with them very well in the sense of dealing with the privacy issues that have arisen, with educative programs and the like. What tends to happen of course is that those who are too old for school are subject to the police and subject to charges.

Is the committee familiar, in general, with how the Magistrates' Court's diversion program works? Would you like a quick run-down? In Victoria, to its credit, the Magistrates' Court runs a very innovative and sensible program. It is called diversion. The whole idea behind it is that particularly first-time offenders have the opportunity in certain circumstances to avoid getting a court order against their name. As you would be aware, in terms of sentencing, the lowest is what used to be called a good behaviour bond, where something is adjourned without conviction and there is a whole range of conviction orders. This program takes it back one step prior to that. Basically how it works is this — where someone is charged with a criminal offence and an informant recommends it, the matter can be dealt with in the diversion program. It requires the imprimatur of the magistrate, who says yea or nay, and there is obviously some discretion there. In a typical example what will happen is that an informant will recommend diversion, it will be considered by the magistrate and the magistrate can make a number of conditions that you have to comply with and to relate this to this area.

Just assume for a moment that you have got an 18-year-old who comes within sexting, is charged because there is a complaint for whatever reason and goes to court. If the informant recommends the diversion, it will go in front of a magistrate. A number of obvious things will be made as a condition of the diversion order. One would be, say, some sort of apology to whoever is the victim of the images. That would be an obvious thing to do, but you could also incorporate both educative and other program conditions. A number of the sexual assault centres, and the acronym is CASA — the centres against sexual assault — —

Mr NORTHE — We heard from them earlier today.

Mr TROOD — They run, as I understand it, very good programs for young adults to do with sexual education. If someone is involved in this conduct, they may well be an appropriate person to make it a condition of the diversion order that you have to complete a program. To finish off on how the program works, when you go to court the case gets adjourned, say, for three months. There are conditions that are the subject of the order. If you complete the conditions, you have to provide proof. For example, if you attend a program, you have to provide a certificate of completion. If you have to do an apology, you have to produce a copy of the apology and those sorts of things.

The end point is that if you comply with the requirements, the charge is withdrawn. As I say, it is a step back from even a good behaviour bond, which is no conviction. One of the basic premises of the program is the recognition that court orders, even without a conviction order, can still hamstring a person when it comes to work opportunities, discrimination between employers, for example, travel opportunities and the like, so in my view it is a very good program because of that.

If we apply it to this sort of area, because sexting is child pornography, our experience is that informants are reluctant to recommend this sort of thing, and while we have suggested, as it were, a positive directive by police, it is partly for that reason but the other reason is this: if an informant does not recommend you under the present law you cannot get diversion. So it does not really matter — if a magistrate is hearing a case and even if they were to gently suggest or cajole, unless an informant signs the piece of paper, you do not get to do it. So what we are suggesting is some proactive policies.

Mr NORTHE — Sorry, Tony, can I just ask a question at this point: in those circumstances, if we gave an example of, say, an 18-year old who had taken explicit pictures, with consent, of a 15-year old who he thought was a 16-year old and they had been passed on, then he is charged with making child pornography and then ends up on the sex offenders register, if you took a back step, would you suggest that there needs to be another

type of charge or offence that will apply in that circumstance as well? I know you are talking about the diversion program, but is that particular charge relevant?

Mr TROOD — I think it is a relevant issue. Child pornography is clearly a very serious charge. It is also a very emotive charge, and it may be that one way of dealing with that issue would be to either direct these charges into a lesser charge or to create a lesser charge to deal with it. That would be recognition of both of those factors: that child pornography is a very serious charge — and rightly so — but a very emotive one also.

Dr LYON — It would be hard to explain 10 years down the track, because if the priors sheet says — —

Mr TROOD — Transmitting an offensive image or— —

Dr LYON — Using a carriage service or something, or sexting— —

Mr TROOD — Yes. You could certainly deal with it in that way. That would in our view be a sensible way. I suppose our position would be the more flexibility there is in dealing with this, the better it is, and that relates both to what charge there is going to be and even if the person is not going to be subject to, for example, a diversion option and proceeds to court because, for example, there is a large number of charges or it is a particularly serious example of what we are talking about, it still might be appropriate to deal with it other than as a child pornography charge.

Mr CARBINES — In relation to, say, a diversion program, and perhaps you could relate this to current diversion programs, if someone who has completed a diversion program finds themselves before the courts again on a similar matter at a later time, does the diversionary program they have been through become relevant— —

Mr TROOD — It does in perhaps a limited way.

Mr CARBINES — I suppose I am trying to think about if we were to apply a diversionary program in these circumstances, and I went and did the diversionary program, how might that affect my thinking around if I had a compulsion to get myself into strife again, as a deterrent, I suppose?

Mr TROOD — You would be perhaps best to speak to the police, but my understanding of how this works insofar as the police are concerned is as follows: for people who receive diversion, the result is of course recorded as any result is recorded. But what happens is that if I am an employer and Greg has applied for a job, and it is a requirement that I get him to sign an undertaking that gives me permission to access police records, the diversion result would not be supplied to me as an employer.

That makes sense because logically there is no conviction and there is no order because the end of the process is that the charge is withdrawn. So there is no finding of guilt, and there is no court order. Good behaviour bonds, for example, as I understand it, will probably be thrown up, and certainly convictions will be thrown up to a potential employer. However, if I have received the benefit of the diversion, and then I reoffend, the police still have the record of that, so it would mean, firstly, that you cannot think of hardly any circumstances — I would not be entitled to a second one. So it has that impact, and that would mean that there would be a charge before the court.

As I understand it the fact that you have been on diversion is not a prior conviction and so would probably not be part of the sentencing in most cases on the charge. So it has a sort of limited impact. But because they keep the records, and for good reason, if you have been given diversion and you have not taken the opportunity, you are not likely to receive the same opportunity again. So it works, I think, pretty much in that way.

The CHAIR — With the creation of a new offence, how do you define that in terms of — are the ages of the victim and the perpetrator relevant? If you have an 18-year old and a 15-year old, is that worse than a 14-year old and a 19-year old? How do you actually say that this is not child pornography, this is harassing through a telecommunication device, or whatever you call the new charge?

Mr TROOD — I am not sure of the answer to that. That will be a difficult issue.

The CHAIR — Is that something that you would recommend Parliament would have to define if we were to recommend creating a new offence?

Mr TROOD — You would.

Dr LYON — I am not trying to dodge the issue there. Obviously Parliament is supreme, so that is your job, but the easier answer is — and this may or may not provide a way out — that if you leave the offences as they are now but create different ways as to how you deal with them once someone has been found in possession of child pornography or they have used the carrier, you might be looking at creating different options. Just as Tony has spoken about diversion, there could be different sentencing options for sexting offences for people under a certain age. In that way you are leaving the actual sentencing discretion with the magistrate as to how they deal with it so that if the matter is serious enough that it is decided that it ought not go by way of diversion but has to go before the courts, if there is greater flexibility or statutory prescription as to how these people should be dealt with in these cases, that is one way you can do it. You leave the primary legislation as it is, state or federal, using carrier to possess child pornography. If you can create an offence of sexting, good, because the word 'sexting', like we said before, has got a pick-up. People know what it means, and it creates a different impression 10 years down the track than just child porn.

Mr CARBINES — Just picking up on that issue that I am seeking to clarify, are we looking at diversionary programs as another aspect of how we deal with or define sexting issues? Is it coming back to applying that to people based on an age circumstance or purely a judgement on the seriousness of whatever sexting practice might have taken place? I suppose in part we are grappling with younger people and how they are dealt with in the circumstances they find themselves in, and then of course it might be a small thing as to the maturity of people who suddenly find themselves as an adult but still may be at school in the sort of context of who we are dealing with. So is it always coming back to how we end up defining different types of sexting practices as to whether you are applying diversionary programs, if they are available, as opposed to perhaps being based around age circumstances? What drives what?

Dr LYON — Again, that is a difficult question to answer. Let us take an example that may be relatively realistic. Someone has an older brother. The older brother knows that the younger brother or sister has material on their phone and gets it passed on to their phone so that at 24 or 25 they have inappropriate images of their younger sibling's friends on their phone. It is perhaps not that serious because they have not taken the photographs themselves, but it is still pretty creepy. In those sorts of circumstances you can say, 'Well, it is not particularly serious, but it is still highly inappropriate'. For those sorts of reasons I think that an age basis is better, because even though you can always, as a criminal lawyer, dream up these sorts of scenarios that might call for mitigation, you should leave that to the courts; they can work that out. With the diversion thing, we have the definition of young offenders; it is 21 and under. So it seems to me that it is better for it to be age based than offence based.

Mr TROOD — Having said that, the actual magistrates diversion program is not aged based. It is across the board. There is no age barrier in terms of it, but a part of it is very young offenders because they fall squarely in that. But there are always going to be exceptions.

Mr CARBINES — Just out of interest, in regard to diversion programs that operate in other contexts, for example, do magistrates, just through best practice, get a sense around what the courts are determining is appropriate for diversionary programs?

Mr TROOD — That is right, but it is an individual magistrate's discretion in any situation. If you take sexting as an example, oddly, as I said, to get in the door, you have to have the consent of an informant. If you do not have the consent of the informant, it does not matter — you cannot get in. That is perhaps a side issue, and we would say it is a flaw of the system. We say a magistrate should have an overriding discretion for a lot of reasons that perhaps do not come within your terms for the moment, although they might.

Having said that, a magistrate who, for example, was considering a diversionary application by a police officer in a sexting example where there was commercial gain by the person, you would think it was probably unlikely a diversion would be granted, but that is an aggravated form of it. If somebody were selling stuff to their mates, they would take it beyond perhaps what the norm is. You could easily foresee that you would have difficulty in convincing a magistrate to give diversion if you have got that aggravating feature there. Magistrates commonly make those sorts of decisions, whether it be a theft offence they are looking at for diversion, a burglary or whatever it is. Given that there is the general discretion, of course, you have the ability to cover a whole range of offences.

Mr CARBINES — As an example, that can come back to whether the image of the person who has found themself in this situation because they are making money out of it — it might be a blackmail, it might be threats — as opposed to what might seem to them a harmless exchange of images but brings them into conflict with the law.

Mr TROOD — I might say that in those sorts of examples, though, you could realistically see an informant saying that they were not going to recommend someone for diversion because it has a blackmail aspect to it or a commercial aspect to it. That would be a justifiable and sensible decision. That would mean the person would then be subject to a charge, and they would be dealt with in the normal way through the criminal procedure.

The CHAIR — In the case of sexting between adults, is there any offence when that occurs? Is there any offence via secondary dissemination of an image?

Mr TROOD — I am not sure of the answer to that.

Dr LYON — It is interesting, because I was thinking about that as we were talking. Certainly in a consensual situation where it is passed on past the point where consensual photos are taken, I do not think there is an offence. If it is non-consensual — —

Dr TROOD — I think there is a commonwealth offence of transmitting offensive material, and it may well come within that. I might say that it is unfortunately relatively common for adults to do this too.

The CHAIR — So would your recommendation be that we consider offences for adult sexting? First of all, the issue of it being consensual between the parties — presumably not, but making non-consensual secondary dissemination an offence?

Dr LYON — Personally I reckon you have enough work to do on this alone. I do not believe that is the main issue at the moment. It would seem to me a very good result to get some legislation on the kids issue first up.

Mr TROOD — And I might say that would be a pretty good, you would think, legislative guide. You would get that up and running, see how it works, work out any quirks and all the rest of it, and then if there is an issue about adults, you have a template to work from.

The CHAIR — If you were to create a bit of a hierarchy, would you say that the person who creates the image has committed a lesser offence than a secondary distributor of that image?

Mr TROOD — Is that with the consent of the person or without the consent — the person who takes the — —

The CHAIR — Without the consent of the person. Presumably there is greater harm caused by the secondary dissemination because there is more potential for it to go viral.

Mr TROOD — Yes.

Dr LYON — Certainly. I gave Tony an example, when we were waiting, of one that happened at the school my girls go to where a young girl took self-images and passed them to a potential boyfriend. He thought it was a great lark and sent them to his mates. His mate sent it back to one of the girls at the school. She disseminated it through three schools at two levels — kids, parents and teachers. We are not talking about a country high school here. That is a case where the dissemination was where the harm was done.

Mr TROOD — That is probably right.

Dr LYON — So from my anecdotal experience, yes, you are right; it is the decision to send it on beyond those by whom it was taken or to whom it was intended. Even with kids you start having a slightly malicious element to it then. I know when the boys got it they thought it was a great joke, but the girl who ultimately got it, to send it on — there was a real element of, 'I'm going to fix the photo taker here'.

The CHAIR — Are there other examples of you or your members having clients who have been charged with sexting offences?

Dr LYON — The experience has been more with the register, which is the next issue we want to touch on briefly, where because it is automatic inclusion rather than individual assessment it has been seen to be a hardship more than any other examples like that.

Mr TROOD — You probably have those articles by Nicole Brady, who has written a couple of articles in the area whilst you have been running your inquiry.

The CHAIR — Yes. She is sitting behind you.

Mr TROOD — I am sorry!

The CHAIR — Fantastic articles, yes.

Mr TROOD — I was about to praise — —

Dr LYON — A great journalist too!

Mr TROOD — The example she gives of the young man in those articles, I think, is not an uncommon thing that is happening. You can understand that it is happening in an emotional situation. He is, reading between the lines, perhaps immature and regrets it. It has very serious consequences which are attached to it. To give her a pat on the back, it is a very good and illustrative example of what we are talking about.

The CHAIR — So would your recommendation be that there be a discretion retained in relation to inclusion on the sex offenders register?

Mr TROOD — Very much so.

Dr LYON — Yes, very much.

Mr CARBINES — Is that the way that potentially there might be redress for past cases that have been dealt with?

Mr NORTHE — Retrospectivity.

Mr CARBINES — Yes. I was thinking about the register, and retrospectivity, I suppose, is even a further aspect of it, but I was going to ask about whether that is going too far and whether people finding themselves on the register under current laws needs to potentially be revisited. Do you have some thoughts; are you going all the way, are you potentially opening the door part of the way? How do we grapple with those issues?

Mr TROOD — I think the Law Reform Commission deals with this very well. The assumption that the Act is made on is that it is a homogenous lot of offenders; the assumption made is that they all have risks. Those assumptions — we would support the Law Reform Commission's view — are not warranted. If you start from that point, then you need some sort of risk assessment process. If the law changes — for example, as a result of your endeavours — then you are stuck with the situation of, 'What about those who, if they committed an offence today, would perhaps not find themselves on the register but who are now on it?'. The Law Reform Commission makes a very sensible suggestion that says, 'All right. For those people who are in that situation, since they are already on it, assess them'. You can assess them as to whether they pose a risk. If as a result of your assessment they do pose a risk, they stay on it. They suggest you can tailor the years, the conditions and the like. If they do not pose a risk, then they can be exited from the existing register. That is a reasonably simple mechanism to deal with exactly what you have posited.

Mr NORTHE — Can I ask about that. Further to Anthony's point on that, will there be any repercussions or legal liability or otherwise if the government takes that approach? For one, persons who might find themselves in that position at the moment would, I guess, perceive that they have been done an injustice. Would there be any recourse you would consider from a legal perspective?

Mr TROOD — You would not think so, because they have been dealt with properly under the laws that pertained at the time. In fact they are getting a benefit from a change in the law. Whilst they might think it is unfair — we do not purport to act for the government solicitor, but having said that, the laws will not apply if it has been applied correctly. If they are given the benefit of a change in the law, you would think that — —

Dr LYON — There is a parallel that goes back a few years. It used to be that after the death penalty was abolished people got life imprisonment with no parole for murder but otherwise got out after about 11 years. Then Parliament introduced a non-parole period, so people who had been previously sentenced to life with no parole could apply to the court for a non-parole period. For the most part they were all grateful for the opportunity rather than saying, 'You should not have done that to me in the first place'. Some, of course, were granted almost immediate release through non-parole periods. It just happens. As far as I can tell, if they were properly sentenced under the law or properly placed on the register, there can be no blowback on the government.

The CHAIR — So just to be clear, Tony, on the point, you are not suggesting that there be retrospectivity but that there be a mechanism whereby people are able to be reviewed and taken off the register. I suppose to some extent that is retrospectivity if the current law is that they are required to be on there for eight years. If we enact some sort of mechanism whereby they can get off before eight years, that is retrospective to some extent, is it not?

Dr LYON — No, because it is a current application. That is a current assessment. It would be retrospective if you said, 'You are on for eight years', and then you said, 'From now on, anyone convicted of a class 1 child pornography offence is no longer to be registered for eight years, and it applies to everyone convicted up to eight years ago'. Because you are making it an individual, current assessment, you are avoiding — I understand what you are getting at, which is the nasty, often constitutional issue of retrospectivity and things like that. You are not going to have that problem.

Mr TROOD — And if you are bringing in a risk-based assessment for current offenders, then that means there is an even playing field for both current and past offenders. It is not retrospective in that sense.

Mr CARBINES — In thinking about people who have may have found themselves on the sex offenders register who, if you were to change the law in that regard, may potentially have an opportunity for reassessment and come off it, they would still have a conviction. Those aspects still apply to them, do they not?

Mr TROOD — Yes, you are quite right.

Mr CARBINES — All you are doing is relieving them of some sanctions and obligations under the law.

Mr TROOD — Exactly, because the court orders which put them on in the first place still remain.

Mr CARBINES — Yes. It will still have an effect on them.

Mr TROOD — Yes. The register is — if I can put it this way — a somewhat blunt instrument. If you think it through for a moment, it is going to cause enormous issues. I will give you a quick example. If, as happens not infrequently, you have an offender before the court who is 80 years old and as a result of commission of the offences is on for life. They might be fit and healthy when they are sentenced, but let us assume that in five years time they get dementia and cannot look after themselves. As you know, if you are on the register for life at the present time, there is no ability for you to make an application before you have done 15 years to get yourself off. How is the system going to deal with an 85-year-old person who suffers from dementia and who is supposed to comply with the reporting requirements under the present regime?

The CHAIR — Is there anything else that you have not yet covered in your submission?

Dr LYON — No, that is it for the submission, thank you.

The CHAIR — All right. Are there any further questions?

Mr NORTHE — No. Well done. It was excellent. Thank you.

Mr CARBINES — Yes, that was really helpful.

Dr LYON — Can I say two things? The first is that I want to thank the committee for giving the Criminal Bar Association the opportunity to make submissions and to appear before the committee. We appreciate it. We are a voluntary organisation, but we do work very hard on criminal justice issues. To have the opportunity to be recognised before the committee is an honour for us. The second thing, and I am not just saying it because

Nicole is here, is I want to acknowledge and thank Lachlan Carter, barrister, for his work in contributing to the preparation of these submissions. Can I say that the majority of the work was done by Tony, so I am really grateful for the work he has done on this.

The CHAIR — Thank you, and it is greatly appreciated that you have taken the time to put the submissions together. It is great to hear from people at the coalface. Practically it could work if we made some changes. Would you be happy for us to stay in touch as things progress and, if we need to get some more advice from a legal perspective, to seek further information?

Mr TROOD — We would be very grateful.

Dr LYON — Yes, we would really like to be involved in the process going forward, if there is a role for us to play.

The CHAIR — Thank you very much.

Committee adjourned.