

CORRECTED VERSION

LAW REFORM COMMITTEE

Inquiry into sexting

Melbourne — 7 August 2012

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Dr A. Bendall, Acting Victorian Privacy Commissioner,
Mr D. Taylor, Director, Privacy Awareness, and
Mr S. May, Senior Policy and Compliance Officer, Office of the Victorian Privacy Commissioner.

The CHAIR — Welcome to the Law Reform Committee. Thank you for putting in your submission. We have been given this reference by Parliament to look at this issue, gather evidence and make a recommendation, which will then go into Parliament. The government will then either accept or reject our recommendations, so it is a very important process that we are going through at the moment, and thank you for your participation.

Everything you say here is covered by parliamentary privilege but it is not outside the room, so be aware of that. There certainly has been a lot of media interest in the issue. We can start with your names and addresses for the purposes of the transcript and then launch into what you want to tell us. Your professional addresses are fine.

Dr BENDALL — I am Dr Anthony Bendall. I am the acting Victorian Privacy Commissioner. My business address is Privacy Victoria, level 11, 10–16 Queen Street, Melbourne 3000.

Mr TAYLOR — Good morning. I am David Taylor. I am the Director of Privacy Awareness at the Office of the Victorian Privacy Commissioner — the same business address.

Mr MAY — Good morning. I am Scott May from the Office of the Victorian Privacy Commissioner and a Senior Policy and Compliance Officer at the same business address also.

The CHAIR — Have you got a plan as to how you are going to present to us?

Dr BENDALL — I will start and revisit some of the main points of our submission and then take questions. That was the plan. Obviously to start with the committee would be aware that smartphones and other devices are far more prevalent with higher and different capabilities, including cameras with video internet connections as compared with earlier times. These smartphones are beneficial and have huge benefits to individuals and the committee, but they do have other ramifications and those ramifications largely outpace the law.

There seems to be some confusion as to the definition of ‘sexting’. Our submission went into that to some extent, but most of the definitions seem to refer to some type of communication of non-professional images or videos of persons in a state of nudity or of some other sexual manner, which is significant because it encompasses a wide variety of behaviour from one-to-one sharing of images in a consensual manner all the way through to coercion, mass sexting and bullying. Part of what our submission says is that there needs to be a more granular approach to the problem than there is at the moment where it is basically all considered to be the one phenomenon. That is where we see some of the problems.

The CHAIR — Would you consider ‘sexting’ is a convenient term that has emerged with this issue? Does it also cover emailing of images?

Dr BENDALL — I guess so, but any kind of sharing of images using electronic means. We looked a little bit at the incidence both internationally and within Australia, and generally our research was confined to the US and cited a number of US surveys. Again, because of the differences in definition, it made it hard to compare, but basically the conclusion that could be drawn was that young people both here and in overseas jurisdictions are engaging in sexting; it is fairly widespread.

Our submission relied quite heavily on our Youth Advisory Group survey — they are going to present following us, so I will not go into great detail about that, because I will let them do that. The former Privacy Commissioner requested that the Youth Advisory Group look at the issue in late 2011, and it was the Youth Advisory Group who put together the survey. The survey was anonymous and online, so for that reason it is not scientific. There is no verification really of who it is that is giving the answers. It included a wide definition of ‘sexting’. For that reason, as I said, while the results are illustrative and indicative, they are not particularly scientific.

It was still kind of interesting that 68.05 per cent of the respondents were under 20 and almost 50 per cent were under 15. It seemed as though it got to the demographic that we were interested in. There were some interesting results in that it seemed as though the prevalence of engaging was that more than 28 per cent of the respondents had taken or sent a sexting image and that it seemed that that was more likely as the respondents got older — 48.04 per cent of those who said they had were between 21 and 25. But still between the 10 and 15 age group more than 18 per cent of those had actually taken images of themselves.

The CHAIR — So do you believe that when it is consensual there is any concern with sexting, or is your answer dependent on the age of the sender and the recipient?

Dr BENDALL — I think that is right. Part of what our submission looked at was the social effect of simply doing it, even where it is consensual and there is no element of coercion or bullying. Particularly for younger participants it obviously sexualises them at a young age, and the very fact of taking the image and sharing it can have a social effect, which was what some of the research we looked at showed.

The CHAIR — So should there be penalties to deter younger people from doing it?

Dr BENDALL — Some of the respondents basically thought that there should still be some kind of penalty even for that type of activity. I guess my preference with that would be to have an educative approach to try and alert people to the potential for it to be misused and the consequences that could follow, so that those younger people think about it before they actually engage in it. A legal penalty might be too heavy-handed, I think. Some kind of response to it, cleared by parents and by schools and that sort of thing is clearly warranted, but I am not sure if a criminal approach to it — —

Certainly in that circumstance, where it is consensual and that is the extent of it, it might be going too far.

Mr NORTHE — If you do not mind, could you extrapolate this out a little bit more? If you are talking about non-consensual activities — I guess non-consensual there are different elements there.

Dr BENDALL — Yes.

Mr NORTHE — I mean there might be someone who is just playing a practical joke, or otherwise, in their own mind, but there is also the issue of intent to deliberately hurt somebody as well, so it is probably a bit of a grey area. I am just wondering if you have looked at that aspect of it in terms of applying the law and in terms of criminal offences.

Dr BENDALL — Yes. Largely the main thrust of our submission, I guess, is to have some kind of granular and discretionary response so that it is not automatic. It may be that you need to make all of it an offence to some extent to at least engage the process and then apply some discretion as to what the response is.

Mr MAY — If I can interrupt, I think part of the difficulty when looking at the issue is because it encompasses such different levels of conduct and you give the example of a consensual one-to-one sexting, which is very different from someone disseminating a sexting image to a wide group of people with the intent to hurt, and I think because of that, because there are such differences in the conduct and the effect, it is very difficult to say, ‘Should consensual sexting be okay?’ It probably needs drilling down in a way into what conduct you are actually looking at. That was part of what Anthony was speaking about earlier — that sexting does encompass a whole lot of different behaviours, and the responses might have to be measured to those.

Dr BENDALL — The submission then went on to what some of the legal ramifications are and dealt with a range of different legal areas, including criminal and child pornography laws, and again both federal and state. Civil and criminal laws all apply, and we went through some of those — the Crimes Act in Victoria and some of the Commonwealth laws. Again while there is a granularity to that, to some extent it still seemed to us a bit heavy-handed. We recognise that it is difficult to get a perfect answer, but defining every instance of sexting as child pornography it seemed to us is not necessarily all that helpful — again recognising that there are certainly some instances where there is mass distribution or where someone is deliberately masquerading as someone of a certain age to gather images and those sorts of things that clearly do fit within that definition. One of the things we acknowledge in the submission is that none of this is very easy to do. It is quite a difficult thing to come up with a system that actually protects young people but at the same time does not have harsh consequences for those who are not actually intending to do harm. It is actually quite a difficult thing.

The CHAIR — Given the multitude of scenarios that the court could face, is it your view that judges should have the discretion as to whether or not to put people on the sex offenders register?

Dr BENDALL — Yes, certainly. That is probably the main thrust of our submission. Basically in our recommended reforms there were four areas of reform. The first is reform of the Sex Offenders Registration Act

to grant discretion to the trial judge to look at what risk the person poses and then decide whether or not they should go on the register.

The CHAIR — So you are not suggesting that all instances of sexting are not child pornography — —

Dr BENDALL — No.

The CHAIR — And that there could be circumstances whereby it is appropriate that they be put on the register.

Dr BENDALL — Yes, absolutely. The difficulty really is that automatic registration when a judge hears the evidence, and it is quite clear that it was an actual one-to-one relationship between the two parties. They were a similar age and those sorts of things; there was not actually an intention to victimise anybody. It is quite different to other scenarios where there is. I think this is our main concern.

The CHAIR — It seems that the big issue that arises commonly is where there are two children who consensually engage in taking pictures of each other and then time goes on and one of them becomes an adult and the image is found either in their possession or distributed. Obviously a 19-year-old having possession of a picture of a naked 15-year-old on the face of it looks like child pornography, but if that image was created when they were both children, does that make a difference or not?

Dr BENDALL — Again it would depend on the circumstances, I guess. What we say in the submission is that there could be a presumption in that circumstance that it is to be considered child pornography but that that be rebuttable in the course of the trial, so that again you would not necessarily have a rule that in that circumstance it could never be child pornography, because again you could see that a person could do that — even when they were 15 they could be doing it more than once and actually be dealing in child pornography, even at that age. There are some circumstances in which that might happen, so I think the way to deal with that is to have in certain circumstances the presumption that that offence applies and then have that be rebuttable in the trial. Having said that, I am not a criminal law expert, so how that would actually work I am not sure.

Mr MAY — The other question, obviously, it does raise — even leaving that aside — is: should that person be registered on the sex offenders register? Would they pose a risk? Currently, as the law stands, they would be, because it is automatic. It fits the class of offence and they would become automatically registered, even though you would say the risk in the circumstances you have described is actually quite low. So you come back to asking: what is the point of the sex offenders register? It is really to try to target those people who pose a risk, and the question in cases like these — and there are others — is whether the register is meeting its purpose and doing what it is meant to be doing.

Dr BENDALL — Basically the first priority we had was about the sex offenders register. The second was about reconsidering sexting and child pornography laws, but I think we have dealt with that to a large extent. There are a few options from other places that we cite in the submission. The US state of Vermont had a new but lower offence for sexting which exempted minors from prosecution under child pornography laws while they were minors. I guess in the situation we just talked about where they are no longer minors you would have a presumption that that would apply but that then you could rebut that. In Nebraska they had a defence if the image was knowingly and voluntarily created. So there has been a range of different approaches.

Mr MAY — Yes, I think the Nebraska approach is basically a new defence to say that if you had that consensual relationship knowingly and voluntarily and did not disseminate it any further and have not made the image available, then that is a defence to the offence, which might somewhat assist in the situation you describe.

The CHAIR — Have you looked extensively at what other jurisdictions such as the United States have done?

Mr MAY — Probably not extensively, given the constraints we have, but certainly in relation to some of the research we have done and academic papers we looked at, a lot of research had come from the United States.

The CHAIR — Are they further ahead than us in their response to this issue?

Mr MAY — I would say yes, certainly, in that some states have taken legislative action to actually address that situation. Secondly, I would say there seemed to be when I was looking at the issue a lot more research

done generally about the phenomenon and about what was happening. So the answer to your question would probably be yes.

The CHAIR — The responses in the States are on a state-by-state basis — they are not uniform?

Mr MAY — No. I do not think there was any federal law in the US.

Dr BENDALL — There is no federal law, no.

Mr MAY — Again, they tend to be state offences as well in the US I think, but we are probably exceeding the level of my knowledge of US law.

Dr BENDALL — Basically our main argument, which I think we have already put, is that there needs to be some leniency for young people who are sending images between each other but really no leniency for those who are maliciously distributing. There needs to be that kind of granular approach.

The CHAIR — The malicious distributing — do you see that as a sexual offence or a bullying sort of offence?

Dr BENDALL — Again, it would depend on the circumstance really and to whom you were distributing it. It could be bullying. Some of the research in our submission shows that there is a link between cyberbullying and it being used for that, particularly in the circumstance where it is a consensual sexual relationship between two teenagers, basically, which goes wrong, and then it is used in that kind of circumstance. But it could also be someone masquerading as somebody who is that age or whatever, or even being that age, collecting a large number of images and then distributing it for sexual purposes, so it is those two elements.

The CHAIR — Is your evidence then that judges should have the discretion to make an assessment as to whether the secondary dissemination is of a bullying nature or of a sexual nature and decide whether it is appropriate or not to be on a sex offenders register, or do you consider that if an offence has been committed and it is a sexual image, it is automatic that they should be on a sex offenders register?

Mr MAY — I would say the former.

Dr BENDALL — Yes, the discretionary approach I think is what — —

Mr MAY — Again, it is coming back to the purpose of the sex offenders register being to target sex offenders, to keep an eye on them — I know that is probably not the right term. If you keep registering people who are not actually going to pose a further risk, then you probably lose sight of those on the register that are. I suppose that is some of the thrust as to why we said judicial discretion might be the way forward in that it ensures that the judge, having heard all of that evidence and heard the risk this person will pose is probably in the single best position to make that decision, unlike a piece of law, which simply sets out administrative decisions that would happen. Certainly a very small percentage of the respondents in the survey thought that automatic inclusion on the sex offenders register was appropriate, so I think it was below 10 per cent of people thought that was the way to go.

Mr NORTHE — If you gave regard to the fact that, under what we have described and have been speaking about, there are probably people currently on the sex offenders register who maybe should not be there, how do you deal with that going forward in removing them from there? Have you thought about or given regard to a process and who and how that might occur?

Mr BENDALL — I do not think in any great detail.

Mr MAY — No. We identified it is an issue certainly. Do you need to go back and look at those cases, and what is the mechanism to do that? They are difficult questions.

Dr BENDALL — One of the mechanisms could be a right to judicial review to apply and have, again, judicial discretion applied as to whether or not you should stay on the register. Of course depending on the numbers involved that would be work for the courts, but that is probably the only way you could do it properly, because in applying some kind of administrative rule which treated everybody the same, you may get some

predatory people removed from the register who should not be, and vice versa: some people not removed who should be removed.

The CHAIR — Do you have any idea of the numbers that might be on the register as a result of sexting?

Mr MAY — I do not at hand. There was a review into the sex offenders register that we did submit, and I cannot recall the exact figure.

Dr BENDALL — From memory, they were quite large numbers, and increasing. I think one of the things we put in that submission was it is likely to become fairly unmanageable for the police to administer it if the automatic registration continues. One of the things we raised concerns about in that submission was that that might then lead to the people who present the most risk of not being properly monitored, in a sense defeating the whole purpose of having the register.

Mr MAY — And you have got people who are low risk having to continually report to police and tie up police resources as well — —

The CHAIR — Putting aside the sex offenders register and children, is a crime committed with sexting between adults or when there is secondary dissemination of an image of an adult?

Mr MAY — I am not sure if it would be a crime. I suppose when you are talking about adults you are almost starting to move into the realm of privacy.

Dr BENDALL — That is right, which is the third priority.

Mr MAY — I would regard it as our third priority.

Mr NORTHE — We are getting to a point of difference there between consensual and non-consensual at this point.

Mr MAY — In terms of?

Mr NORTHE — In terms of transmitting images, is consensual different to non-consensual if you are an adult?

Mr TAYLOR — It is a misuse of personal information. If a person's personal information which is a sexted image of themselves has been misused, it is a misuse of information.

Dr BENDALL — Even if it was consensually collected.

Mr TAYLOR — If it has been used with the consent, that is a different issue to the misuse, which is the tort of privacy issue that we raised.

The CHAIR — How would that be dealt with if, for example, there is a consensual image sent under the situation as it stands today, the relationship breaks up and that image is sent on maliciously? How is the victim able to get redress under the current law?

Dr BENDALL — In some circumstances the breach of confidence might apply, depending on the relationship between the two parties. If they were in some kind of personal relationship between the two of them, there might be a duty of confidence owed from one to the other. There was a Court of Appeal decision or Supreme Court decision in Victoria, *Giller v. Procopets* where, very briefly, there were two people in a relationship who were filmed having sex. The relationship broke up. The male partner in the sexual relationship then maliciously tried to show the images to his former partner's employer, family — there was fairly wide distribution — and she successfully sued for breach of confidence. It actually was a Court of Appeal decision, at first instance in the Supreme Court — —

The CHAIR — That is Victorian?

Dr BENDALL — It was in the Victorian Court of Appeal. It was quite a significant case for privacy law, because at first instance the plaintiff failed because she could not show that any actual physical or psychological harm had been caused to her. She had not been made ill by the action, but she had been distressed. When it

came to the Court of Appeal, although her counsel argued for the recognition of a tort of privacy, in the alternative they argued for breach of confidence mere distress should be enough to recover. The Court of Appeal did not go down the tort of privacy path, but they found that the fact she had been distressed was sufficient for her to recover damages in confidence.

Mr NORTHE — I have seen your submission. So you are seeking a statutory cause of action for breach of privacy?

Dr BENDALL — Yes. The problem with the breach of confidence path is that it will not always be the case. For instance, if two people send each other images and they are in a relationship, one might owe a duty of confidence to the other. If they misuse the image, that might be a breach of that duty, but a person they send it to who then misuses the information, or if someone comes upon the image and misuses it, it is difficult to see how there would be any duty of confidence owed. The way privacy law works at the moment is that it largely only applies to either public sector organisations or private sector companies. Largely individuals are not covered by privacy law. It would be difficult where there is no duty of confidence owed to see how somebody who could be quite significantly harmed by it could recover at all. That is a gap in the law.

Mr NORTHE — The Australian Law Reform Commission has recommended along these lines as well as a couple of other jurisdictions.

Dr BENDALL — That is right.

Mr NORTHE — Do you understand where that sits at the moment with the federal government?

Dr BENDALL — There is the Commonwealth issues paper, which we also made a submission to in 2010, I think. So far it has not responded to the submissions that were made as to which way it is likely to go. The way the privacy reforms coming out of the Australian Law Reform Commission process have been dealt with by the Commonwealth is that there is a first tranche of reforms which are before the federal Parliament at the moment which include a new set of privacy principles for the federal Privacy Act 1988, greater powers for the federal commissioner and a number of other things.

The second tranche were going to deal with things like the statutory cause of action, streamlining and removing some of the exemptions in the federal act and those sorts of things. They were left to the second lot of reforms in a sense, so it is not clear when the second lot are likely to occur.

It is open to have a state-based statutory cause of action. The Victorian Law Reform Commission in its report on surveillance in public places recommended that that be the case. In that context surveillance is done by one neighbour against another and those sorts of things at the moment. Again, that is difficult, even when there is significant harm, for those people to recover. The New South Wales Law Reform Commission which is looking at New South Wales privacy legislation also recommended that that happen.

The CHAIR — With the non-consensual distribution of adult images, there is currently no criminal sanction involved there; the only redress is to take civil action?

Mr MAY — I am not entirely sure. There could be something in terms of whether it is a form of harassment or stalking under the Crimes Act, section 21A, but again it is not as specific as the issue of youth images.

The CHAIR — Do you believe there should be a specific criminal penalty for distribution of adult images? Non-consensual distribution, that is?

Mr TAYLOR — I think the tort of privacy would cover that.

Mr MAY — Yes. It is somewhat different.

Dr BENDALL — A criminal sanction will not get redress for the victim. That would be the problem we would have with that. Whether or not it should be there as a deterrent is another question. In the scenario we are talking about where somebody collects mass images of a large number of individuals and then markets in those and that sort of thing, the risk is slightly different with adults in that there is not the element of preying on children, but it is still fairly predatory behaviour.

Mr MAY — It is adults who are probably in a better position to properly consent and understand the risks of what they are doing. In terms of taking an image and sending an image they are probably more cognisant of the fact that, yes, if something goes wrong, it could be sent. Our submission and a lot of the research that was done in the US focused on talks about the fact that a lot of young people do not understand what could occur. They have a low understanding of the risks — their brains are still developing — and the consequences of taking and sending images. You would hope, at least, that that is less of an issue with adults.

Dr BENDALL — Part of adolescent behaviour is taking risks, and part of the normal development of adolescents is to engage in risky behaviour as a way of developing, which is less prevalent in adults — at least in some adults.

Mr NORTHE — We will probably broach this more with the youth advisory committee when they come in, but from an educational point of view it is obvious, even at this early stage of the inquiry, that those who are undertaking such activities are oblivious to the potential consequences of them. In terms of an educational perspective is there anything in particular that we need to consider as a committee regarding how we can better spread the message about consequences?

Mr TAYLOR — At the moment it is very scattergun; it is very hit and miss. You have got a lot of good work being done around cyberbullying and cybersafety and that sort of stuff, but in terms of the issue of sexting itself, I think it is best for people to look into this at the VCAA, the Victorian Curriculum Assessment Authority, which could look at the P–12 curriculum from a holistic perspective and look at what the issues are and where we need to bring in the educative elements from an early age and build on them as we go through the curriculum. I think a holistic approach would be a very useful thing to take. It is missing at the moment.

Mr MAY — The interesting question is whether it falls towards sex education and should it come in there, or is it part of engagement with technology and IT.

Mr TAYLOR — It comes in everywhere. It is a health and PE issue, it is an ICT issue and it is a respect issue. There are lots of different components. The best educative processes and the way that curriculums are framed these days are very much holistic, and you paint a picture and build upon that picture as you go through the different year levels. In terms of looking at what the issue is and how we are going to address it, what elements are involved in primary, early secondary, middle secondary and later secondary, the VCAA has the smarts to look at it and build in different health and PE, ICT and civil society, or whatever it is called.

Dr BENDALL — That was basically our fourth priority in our submission, the educative one.

Mr TAYLOR — But I think you cannot just have an advertising campaign or a ‘say no to sexting’ campaign. It is not going to work. That would be just a one-off. You cannot tick the box and think it is going to be done. An integrated, long-term school curriculum is the only way to go, really.

Mr MAY — The other thing to add on the education point is that some of the survey results did show a low awareness of legal issues — again I do not want to take the thunder of the Youth Advisory Group, but 41 per cent of respondents did not know whether it would be illegal or not. When you are talking about potential prosecution under child pornography laws it is a bit of a worry that young people are not aware of the possible legal consequences of what they could be doing.

The CHAIR — Have you finished?

Mr TAYLOR — That is about it, really.

Dr BENDALL — They were the four areas we wanted to cover.

Mr NORTHE — I will make a comment rather than ask a question. Thank you very much for your submission. It is well thought out, and there are some good ideas and suggestions.

The CHAIR — Thank you very much for both your submission and coming today. It has been very helpful.

Witnesses withdrew.