

# CORRECTED VERSION

## LAW REFORM COMMITTEE

### **Inquiry into sexting**

Melbourne — 7 August 2012

#### Members

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Ms J. Garrett

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Mr R. Northe

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#### Witness

Ms S. McLean, Cyber Safety Solutions.

**The CHAIR** — Susan, welcome to the Law Reform Committee. My name is Clem Newton-Brown. I am the chair. Russell Northe is also sitting with me today. The Law Reform Committee is one of a number of committees set up by Parliament to hold inquiries, report back to Parliament and make recommendations as to changes to legislation. This is the second inquiry that we have done in this Parliament. We have called for submissions and oral evidence as well, and by the end of the year we will be preparing a recommendation to Parliament which may or may not be accepted. Your contribution is greatly appreciated. This is an area that has gotten a lot of public attention in recent months, and there seem to be some issues that need to be resolved, so hopefully we will be able to assist Parliament to do that.

Everything you say in the committee is covered by parliamentary privilege, but what you say outside the room is not, so just be aware that if you are asked any questions by journalists, you do not have the protection that you have in the room. If we could start with your name and address for the purpose of the transcript — a professional address is okay — and then if you could talk us through your report.

**Ms McLEAN** — My name is Susan McLean. My qualification is as a cybersafety expert. I was a member of Victoria Police for 27 years. I took my first report of technology misuse in 1994. I was the first Victorian police officer reporting to a position involving cybersafety and young people, and that was after I came back from an international study tour in 2006 during which I went to Dallas, Texas, and also Rochester. I trained with the FBI and gained qualifications available to the police over there.

**The CHAIR** — Is this specifically in relation to sexting or general cybersafety?

**Ms McLEAN** — This was general technology misuse, of which sexting, cyberbullying, online grooming and sexual solicitation of children were a part. That all forms part of cybersafety.

**The CHAIR** — In 2006 was sexting an issue in the States?

**Ms McLEAN** — It was beginning to be. Sexting has been around in Victoria from the moment mobile phones had cameras on them, but it was not kids doing it. The only people who used to send naked photos of themselves were adults. Any Saturday night at the police station taxi drivers would bring in the phones of the drunks who had left them behind, and there would always be photos of adults on them. The only time we ever saw photos of children was if we were dealing with a traditional paedophile sort of job or if they were taken as a result of coercion, fear or threat. Early on we saw only adults, never kids. Then you got the grooming scenarios, and then you got the girl who was convinced to send a photo to her boyfriend or the person who got drunk and made a poor decision. Even in those situations the person in the image was still a victim.

**The CHAIR** — So I suppose it is only in the last 10 years or so that kids have had phones as a matter of course, as their prices have come down.

**Ms McLEAN** — Yes. Years ago it was very cost prohibitive to have a phone with a camera on it. Phones did not connect to the internet, and kids did not have them initially. As time has progressed we have seen a steady increase in not only the number of children who are being coerced into sending images but also those who make a conscious decision that that is what they want to do. Two weeks ago, for the first time ever, I had a call from a principal reporting that he had a naked picture of a grade 6 student on his desk. Three years ago there was the case of a nine-year-old girl in Horsham, and there was a whole lot of media about that. The magistrate came out and made some comments. Up until recently that was the youngest that I had ever dealt with involving sexting. That was age nine, but that was really one out of the box. We never got close to that. This is the first time I, personally, have ever seen it reported in a primary school.

You see it at the start of year 7 — and they are really only old grade 6s — but never at a primary school. That is not to say it has not happened, but certainly we are seeing it get younger and younger. It used to be 17 and 18-year-olds; then it became 16, 17; 15, 14; 13, 14. It is not uncommon. There is not a secondary school in the world that has not had to deal with this.

**The CHAIR** — Are other jurisdictions in the world dealing with this issue in a legislative sense? Are they ahead of Victoria?

**Ms McLEAN** — No, because they have the same sort of situation as we have. By definition it is child pornography, and they have exactly the same situation where children are being charged with child

pornography offences and are also being placed on a sex offenders register. I am actually going back to America on the coming Saturday for another two-week study tour, so I will look again at what they are doing, how they are doing it and what is the latest over there at the moment.

**The CHAIR** — From your preliminary research, is America where the advances are primarily happening?

**Ms McLEAN** — I have done a university course in England as well. I think America and the UK are way ahead of us. Certainly, if you look at online problems in general, the problems happen there first, but by virtue of the fact of their massive population there are more of them, so they are sort of forced to act quicker. We do not have less problems here per capita at all. In fact I think Australia has one of the largest uptakes of smartphone and internet use of any developed country in the world. The only reason I think we were slower to react is because of the numbers; we cannot have the volume of crime that America does, because we are a smaller population. I think initially schools — not that they are so well equipped now — were very ill equipped to deal with this. It was not something that they were comfortable dealing with. They were floundering, and there was a lot of stuff that was not reported.

**The CHAIR** — For your study tour is that for something you have identified, who you should be talking to and have you organised it yourself?

**Ms McLEAN** — Yes. From the trip I did in 2006 obviously I made contacts on crimes against children. First I will go back a bit. In America the way they deal with online stuff — and offline, to some degree — involving kids is they have these groups called the Internet Crimes Against Children Task Force teams. They started off and had just completed the pilot program when I was there in 2006. The Office of Juvenile Justice and Delinquency Prevention funded several states. It is a multidisciplinary approach to the problems, so you basically have state police, you might have a state trooper and you have an FBI agent. You have a whole range of people come together in these task force teams, and their sole job is to deal with internet crimes involving young people, which, if we go back years and years, were primarily the grooming sort of stuff, but have morphed into more than that.

That trial happened, and that was deemed to be successful, so then they rolled out funding so that every state can have at least one ICAC team. Some states obviously have more. Those sorts of groups run the best conferences in the world; there is nothing that surpasses what they do. Whilst they call it a conference, it is not. It is an X amount of hours training program, and you have to pass and get a certificate. So it is a little bit different to what we would use the word ‘conference’ for here. Without doubt the one in Dallas — I think it started off with 600 participants, and it has something like 5000 participants now — is deemed to be the pre-eminent internet crimes conference of the world. The Virtual Global Taskforce one is quite good, but that is only every two years. It tends to be about predominantly law enforcement and policing sorts of issues, whereas the Dallas one has stuff like child homicide. There is a whole lot of stuff, but it has the internet component and covers both reaction and productivity, so it obviously looks at what the police need to do and things like that. But it also looks at education programs and looks at what communities need to do to address it — to prevent it.

**The CHAIR** — I will let you get back to your submission. Sorry; I have distracted you.

**Ms McLEAN** — No. So that is where I am off to next week. Really over the period of time that cameras have been on phones and they have become very cheap and very affordable, that is when we have seen the problems growing. Of course there is still criminality involved with some of these behaviours. There is certainly a range of the behaviours that are really not criminal at all, but by virtue of the way that legislation is worded, that is where it fits in. Of course you cannot sort of sit on something that is child pornography. You have to act, you have to involve the police and of course there is no discretion. That is where it is becoming problematic.

**The CHAIR** — So when you say you have to act, that is your view even if it is between two children sharing child pornography?

**Ms McLEAN** — Well, at the moment you do, because by definition that image is of child pornography. The problem is you cannot advise the school to make a value judgement on that because you do not know what has really happened. There are certain things schools can deal with. As a police officer I worked in schools for 17 years. There is a vast majority of things that are technical crimes which you do not ring the local divvy van for. But we have changed over time. I joined the police force in 1982, and I never set foot in a school; you would not go there unless the science lab had basically blown up. Then we moved to schools reporting assaults

that had happened — Johnny belted Tom and things like that. Then drugs became the big thing. In the old days the principal would just confiscate the drugs or the pocketknife and then chuck it in the bin at the end of the term. That changed, so the police became involved in that. Child pornography is something that is problematic.

**The CHAIR** — Is it mandatory for schools to report to police?

**Ms McLEAN** — Well, you will not find it as one of the criteria. If you look at mandatory reporting, it is not there. But if you look at: is the child engaging in under-age sexual activity, if a crime has been committed against them or they are at risk, well, then that fits mandatory reporting. So you can argue either way. If someone was going to challenge a school as to why they told the police, they could very easily use mandatory reporting.

**The CHAIR** — But your view is that if schools come across instances of consensual sexting, every instance should be reported to police; they should not be making any judgements themselves as to whether this is serious or not?

**Ms McLEAN** — Not at the moment, because they do not have that capacity. The problem is if they make those value judgements and a week later something happens or it hits the fan, then what is going to happen to the school? The law is not going to back them up.

**The CHAIR** — But do you think the law should be changed to give schools that discretion as to whether to involve the police?

**Ms McLEAN** — No, I do not know that schools need the discretion; I do not know that they are informed enough. There are still schools absolutely floundering with this sort of stuff, so I do not think discretion should be given to schools. In relation to should sexting between two consensual 16-year-olds result in a child pornography charge, the answer is: of course not. But the thing for you to work out is how you are going to deal with this in a way that does not allow a paedophile to find a loophole, that does not basically say all sexting amongst kids is fine and that protects vulnerable young people. I like to use the bike helmet thing: we prosecute people for not wearing a bike helmet, but really who are they hurting if they fall off? Themselves. But adults have a role to protect children who are not cognitively developed to make a good decision.

The other big one is that this is all well and good, but you have to have consistency around Australia, and I see that as a big problem. The other thing is you have Commonwealth legislation that covers sexting and child pornography. So unless you also include the fact that Victoria Police are somehow not allowed to use that Commonwealth law when they are dealing with a couple of teenagers sexting, then you are going to have one policeman who goes, 'Okay, this', then another one who says, 'Okay, that', and then you get kids who live in Albury-Wodonga. How does that work? So you have to have consistency right around Australia.

That does not mean that Victoria does not lead the way; I am not saying that. It is absolutely pointless having different states doing different things, and it is also pointless, in my opinion, having a law that contradicts or is contrary to a Commonwealth law, because that just becomes messy.

**The CHAIR** — What is your view on the mandatory inclusion on the sex offenders register for those over 18 and have an image of a minor on their phone?

**Ms McLEAN** — Look, there is always going to be someone for whom that is correct and someone for whom that is not. I think there can be discretion in that, but it has to be at the judicial level and not at the police level, because they are not all well enough equipped, I believe, at this point in time to make that decision — but certainly at the judicial level, absolutely.

**The CHAIR** — In essence, then, what you are saying is that in every instance of sexting it should be reported to the police and the police should charge them with child pornography offences but that the judiciary then has discretion as to whether to put them on the register or not?

**Ms McLEAN** — No, because I think in my submission I talked about the fact that you could have an amendment to the law that there was 'possessed child pornography' and then in brackets 'sexting' so it became a defined offence. You have got to move it away from 'Billie, the paedophile', with the images of child abuse. You cannot lump it into the same category. It could be like some offences where there is a defence to it. You

have committed the crime, but you are not actually going to be charged because you are both of the same age and it was consensual.

The other thing is: do you stop there, or do you say it was consensual and it never left either of your phones? What happens if it was consensual and then one party forwards it on? That changes the landscape very much. There is always going to be a time when a 15 or 16-year-old should be charged with these offences 100 per cent because they are criminal, and I have charged a 15-year-old boy with child pornography offences. That is the extreme case. You do not want to automatically say that if they are under age it is not criminal, because there may be a case where criminal charges are warranted.

As for inclusion on the sex offences register, I spent time at the MAP unit, which is the children's jail where sex offenders who are under age get sent to jail. There are certainly kids in there who are very damaged and have the criminality of an adult, but they are the exception rather than the rule.

I think the government is to be commended for looking at it because it has been a messy thing for so long. What schools are afraid of is that if they tell the police, then Mary and Johnny end up on the sex offenders register for something where they need not. Then they try to keep it in-house, they are ill equipped to deal with it and it blows up in their faces. There have to be guidelines much the same as we have got a process for reporting drugs.

There needs to be communication between police and schools as to what will happen, not only to help the school but to provide consistency from the police, because the excuse is that when schools have rung police to report this it has ranged from, 'The law was not written for that; what do you want me to do?' or 'They are boyfriend and girlfriend; it is not a crime' to 'It is a school matter; you deal with it', and that is not helpful at all.

No matter what the outcome is, education needs to be given to police on all online crimes, because it is sadly lacking. They do high-level stuff very well and they do online child pornography very well, but that is about it. The rank-and-file police really do not have a lot of ideas, and that is Australia wide, not just in Victoria.

What you need to do is come up with something — if you look at what a law is meant to do — to protect the public, provide a suitable punishment which is equitable to the crime and provide a deterrent, and at the moment these laws, as they are applied, are not doing any of that because it is basically, 'This is a course of conduct, this fits into this legislation, so therefore it must be'. But I think there is a lot of pressure on young people to perform and to conform. You see all the starlets over in America who have all got sex tapes; it has not hurt their reputation at all. I have had girls say to me, 'It is just what we do', 'It is how to get a boy to like us' or 'It is how to keep a boyfriend' and all that.

It is not just the law; you have to look at why kids today do this. Even if you go back 20 or 30 years ago, kids did not take naked and sexually explicit pictures of themselves, develop them and send them to a friend. They had the means — it might not have been as easy — but they did not do it. You have to look at the causal factors as well.

**The CHAIR** — Would it be fair enough to say, given that there appears to be a lot of sexting going on among a large number of kids, that each day you have another bunch of people turning 18 who are holding these images on their phones — that we are sitting on a time bomb of people out there who are, under the law, child pornographers, and every day thousands are added to the ranks? How should we deal with that?

**Ms McLEAN** — I think it has to get back to an amendment to the current law or a new section which defines 'sexting' as opposed to 'child pornography'. I think that would be a starting point, so that rather than calling every naked image of a child 'child pornography', you had an offence of sexting. Is it always criminal? Obviously not.

**The CHAIR** — How do you define 'sexting' as opposed to a 'child pornography'? A child pornographer could take a picture on his phone. Is it the relative ages between the kids, or is it consent?

**Ms McLEAN** — I think you have to look at the ages. If you look at the consent laws for just having a sexual relationship, they have 'not more than two years age difference' so you do not get that power imbalance. There are also special laws about if you are their coach or their teacher, so you have got all those.

**The CHAIR** — Do you think the same laws should apply to sexting?

**Ms McLEAN** — I think that would be a good starting point. The other thing I would not do is, say, make a kid 16 rather than 18, because that is contrary to Commonwealth law. It needs to stay 18, but I think you can have the not more than two years age difference, and consensual is the big thing — ‘I took one of me, and you took one of you’. That is fine until someone else shares it. If you say that that is not a crime and that is fine, then what do you do when one party sends it on?

**The CHAIR** — That is a different definition.

**Ms McLEAN** — So you would have to have ‘disseminate’ or ‘transmit’ or whatever wording, but I think you have got to get some law there that differentiates between sexting and child pornography — that is very clear. In the States at the moment every week there are headlines everywhere about kids being charged under felony offences rather than misdemeanours, and they are trying to work through it as well because they understand or appreciate that that is not the intent of the law.

**The CHAIR** — With the sexual offences at the moment, as I understand it a 16-year-old and an 18-year-old can legally have sex, but someone under 16 is not capable of consenting. Would you apply similar thinking to sexting in that someone under 16 cannot be seen to be consenting to sexting?

**Ms McLEAN** — Yes. I think that would be a really good way of starting it in relation to it providing consistency so people do not have to get their head around one bit of the law and another bit of the law; that is the same. Whilst some people will argue that kids are sexual beings and this is just what they do and it is part of normality, adults have a requirement to keep kids safe. It is not a good career move by anyone, regardless of age, to have naked pictures of themselves floating around cyberspace. Certainly at least under the age of 16 if you make no consent, it makes it very consistent with the age-of-consent laws, and I think that is very sensible, because then you are protecting vulnerable people. You are going to have to look at what is consent, so you would have to have the same things. I would go exactly the same as when is consent not consent — coercion, fear, threat, being under the effects of drugs or alcohol and all those sorts of things. That would need to be there as well, because a lot of girls will say, ‘But I said yes’, but when you dig deeper, they only said yes because they were tricked, were fearful or were threatened, so that of course cannot be consent. I think you have got a really good basis to start with by looking at those and then aligning this to them.

I was reading through quite a few of the submissions, and I noted one is factually incorrect. I wanted to mention it, because the woman who wrote it clearly does not know what she is talking about. I think it was 55 or 57. She was talking about the fact that there was no sexting in primary schools and no-one is talking about it in primary schools, which is just so wrong. It was a woman who wrote it. It might have been Shelley Walker, although she is the woman from Melbourne Uni; I do not think it was her.

**Mr NORTHE** — Nonetheless, the point is?

**Ms McLEAN** — There was one where she was saying that her research had shown no-one does anything about primary schools and all that. Well, they do. Sexting and rude photos are part of all the work I do in primary schools. I am obviously not in every primary school there is, but I am certainly in primary schools every week of the year. Primary schools are very aware that they need to be talking about this sort of stuff, so for her to say that nothing is done in primary schools is erroneous, because there is stuff done.

**Mr NORTHE** — We actually just heard from the Macedon Ranges Safety Committee, where they have obviously done some local work, mainly around their secondary schools as I understand it, with their own local project on this that they have been dealing with for a couple of years. So there are obviously some programs delivered within the schools.

**Ms McLEAN** — Yes. As I said, all the stuff I do in primary schools has that component, and I have actually just been asked to write all the parent information sheets for the education department’s new cybersafety website. I am going to be authoring all of those, so when that goes live in September that will be my work that is on that.

**Mr NORTHE** — That is interesting; we will keep an eye on that one.

**Ms McLEAN** — Yes, they are revamping the website, but they are putting a parent portal into it as well. I will be writing those. But that was just an aside to say that there is stuff being done in schools, and it does need to start there. It is pointless starting at 16 or 17; you have missed the boat there.

Have you read the Law Reform Commission of Western Australia's report? They did this before you. I am trying to think when — perhaps late last year or at the start of this year they did a similar —

**The CHAIR** — What recommendations did they make?

**Ms McLEAN** — I do not know, because I have not seen the final report. I was overseas when it was all happening. The lead researcher emailed me, but I did not have the physical time to put a submission in. They asked me to write a submission. I know they were doing it. I think it was towards the end of last year.

**Mr NORTHE** — I know we are not the first, and obviously the Commonwealth through its law reform commission has done the same, as I understand it. So, yes, it is kind of happening all over the place at the moment, but I am not sure of the outcomes of the WA one.

**Ms McLEAN** — Yes, I have not read the Western Australian outcomes at all.

**The CHAIR** — Have you covered everything you wanted to?

**Ms McLEAN** — I think we have to understand that it has to be part of a whole thing; it is not just sexting. It is for legislation, and that needs to be addressed, but if you are going to make inroads into it, there has to be education and there has to be a whole lot of different things. Especially if you change the law, that would need to be aligned to an education campaign and one that was young person friendly, not written by some dorky old person who thinks they are writing some great program that is not. I have seen some pretty awful stuff come out of Canberra that the kids just look at and go, 'You've got to be kidding me!'.

With any change to the law, for the benefit of everyone a really comprehensive education thing and also a really good media campaign around it would be really important. The other thing we know with the sexting images, which is still highly problematic, is that we are seeing these images that kids just took of themselves and shared being traded in paedophile catalogues worldwide. They are getting them off the internet, and they are trading them. People go, 'Oh, kids are kids; just let them make their own mistakes'. These mistakes are catastrophic. This is not, 'I ran too fast and I fell over, so next time I won't run in high heels'; these are really lifelong consequences. I suppose that is where I might be different to some people who say it is just kids exploring, they should be allowed to do this and they will get over it. No, because the consequences are just horrendous.

Even when one party gets charged it still really does not help. That is a punitive consequence for breaking the law. It does not get the image back, because you cannot. I remember dealing with a girl in year 9 — this is going back; it was the year before I left the police force, so 2008 — and her boyfriend had continually asked her to make a sex tape, and she said no. They were both 15, they were in a sexual relationship and she was fine with that, but she was not going to make a sex tape, so he went behind her back and he found a friend to set up a tripod and film them having sex in the shower, which the friend kindly did, then she found out about it the next day at school because it was right around the school.

Although I think we charged 35 kids with those offences it really did not help the girl in that she was always called 'Shower Girl'. For the rest of her school days that was what she was known as: Shower Girl. Every time she got on the tram: Shower Girl. That sort of thing cannot be decriminalised; that is a criminal act regardless of their both being 15 and all that. People must understand that there will be criminality in this. In certain situations there will not be, but I would hate to see the laws changed so that that young man faced no consequences.

**The CHAIR** — So the main harm and the main area of potential criminality is in the dissemination rather than the consensual making of?

**Ms McLEAN** — Yes. With consent, you would have to look at it to make sure it was true consent. You do not want it to be tricked, coerced, threatened, drug induced. I think the two years is very important, and that then would still cover people who were in their 20s getting young girls to send photos. The average age of the online paedophile worldwide is under 30, so we are not talking creepy old people; we are talking pretty young, tech-savvy people. You do not want to give them a loophole so that they can get out of it.

The other thing you have to look at is if you have got true consent — two 16-year-olds, happy as Larry — then it gets sent on, that changes the ballpark. That has to move into the next thing. It still does not move it into the traditional ‘manufacture, possess and transmit child pornography’ — far from it — nor should those people be on the sex offenders register because that is not what that was designed for either, but it is about the protection of young people, basically.

We do not have any good data on sexting in Australia. No-one is doing any really good studies on that at the moment. The police cannot do it because it is not a criterion in their crime reports, so basically if you want to know how many people have been charged with sexting, what you have to do is physically pull up every crime report for ‘possess child pornography’, you have to enter the number of the crime report into the computer and you have to read the narrative.

**The CHAIR** — So we have got no figures really?

**Ms McLEAN** — You would have no figures. You could get them. I did a 12-month research project for VicPol before I left, and whilst I do not think I did sexting stats I wanted to try to find the incidence of cyberbullying, which came under 21A of the Crimes Act because it was before Brodie’s Law. I had to put in the parameters of victims between the ages of 10 and 18, I think it was. I think I did a year, then I had to find every crime report for stalking, then I had to read it to see whether it was ‘stalking’ stalking — me following you around — or stalking online or stalking by phone. The basic data capture is not there.

**The CHAIR** — So would you recommend that the police start capturing that data as soon as possible?

**Ms McLEAN** — Yes, absolutely. I know they have changed their LEAP forms in one regard, because I had a meeting with the head of the e-crime unit just a few months ago, and I know one thing I was always concerned about was data getting captured. But technology use in the commission of crimes must be captured for a whole range of reasons. They do not even ask whether you have put on Facebook holiday photos if you get burgled. Britain is doing that; they are way ahead of us. They have done a report called *The Digital Criminal*. That needs to be addressed, as does the other one which is lacking as well — intervention orders granted between minors in relation to why. Again, you have to grab the order and read. There is no ‘tick the box’ for online stuff, which I think would be really helpful in framing anything. I know it happens; I deal with it every week, but I am not a verifiable statistic. You cannot necessarily use that to shape anything because it is not validated. Neither can anyone else tell you that this or that are the stats because they do not have them. I think trying to get good data capture for these sort of crimes involving technology is vital, even if it is for nothing more than the police saying, ‘Look, we have had an increase. We need some more money for extra troops in this area’. All that sort of stuff is why it is really important, but we are not doing that at all.

**The CHAIR** — You mentioned in relation to the situation of it being between two children with true consent and it not being disseminated that you think there should not be any crime there at all. What happens down the track when the image is retained and you have a 25-year-old who still has his 15-year-old girlfriend on his phone? Should there be a point at which it becomes a crime to possess such an image?

**Ms McLEAN** — That is going to be the problem with putting any sort of specific criteria to try to criminalise it — that is, all the eventualities. The other thing too is — I will give you another one: what if that image of the 15-year-old girl somehow magically ends up on somebody else’s computer? You are never going to prove how it got there. There is no-one to charge for transmission. Then what happens with the image? I think you are going to have to put some sort of ‘... but is held for no more than two years after the image is retained’. There would have to be something, because that is a very real possibility.

**The CHAIR** — You think it is inappropriate for such an image to be retained for a length of time?

**Ms McLEAN** — Absolutely. The problem is that when you are retaining it — if you are saying 10 years — you have to have transferred it, because no-one keeps the same photo on a computer for 10 years. It has to have gone somewhere, and that is concerning. Are you also going to allow charges, whilst it is consensual now, in five years time when it is all shared around, because it was not but it is now?

Anything where you put exclusions or options into laws becomes very messy. What you have to do is, to the best of your abilities, make sure there are no loopholes. It is like the possession of marijuana is always a crime, but if you possess under X amount, then you are treated by way of diversion. If you have two 15-year-olds



consensually sharing the images, yes, that is criminal. But are you going to charge them — or not, because it fits into one of the defences? I think they certainly need some advice and support about it. Most kids do not understand the reality. They are in the instant, they are here for the moment, they do not understand next week let alone 30 years down the track.

**The CHAIR** — Rather than trying to be prescriptive and closing every loophole, in relation to that issue of somebody who is an adult retaining an old photo, for example, would that be most appropriately dealt with by judicial discretion?

**Ms McLEAN** — I think judicial discretion is going to be really important in this. I think it needs to be at that level. I do not think it should be lower down. I just think that at the judicial level they really are learned and they are not prone to really going in trends or the flavour of the month. They are far more consistent in decisions than if you go to the police or anyone else. That was in my report about judicial discretion. I think that is the level it needs to be. Because if they are now married, well, really, does it matter? The problem too is: how are you going to know that person still has it on his phone? You would have to assume that it has got out, because if I am carrying around a naked photo of my husband that I had taken when he was 16 and I still have it, well, really, who knows? If someone else knows about it, it has obviously got out, hasn't it?

**The CHAIR** — Well, it could, I suppose, hypothetically, be the police investigating you for something else and they look at your phone and find it there.

**Ms McLEAN** — That is right, but it has got out, hasn't it? So I think in that regard you would have to look at the how, why, when and what of it.

**Mr NORTHE** — We had some evidence tabled earlier today that suggested the difficulty that the police have in accessing people's phones, Facebook and so forth when there may have been — —

**Ms McLEAN** — Can I ask who gave that evidence to say it was hard to do?

**Mr NORTHE** — It will be on the transcript. I cannot remember the guy's name.

**Ms McLEAN** — A civilian?

**Mr NORTHE** — No, a policeman.

**Ms McLEAN** — A policeman? From Victoria?

**The CHAIR** — I think the point was that if they are using free wi-fi — —

**Mr NORTHE** — The point we are making is that if you are doing the investigation to try to get some of that detail of an investigation that might be on a mobile phone, there is a considerable time lag that they currently experience.

**Ms McLEAN** — I would say 'time lag' is correct. I would certainly say that a lot of it is because they do not have enough resources to do it all really quickly. I think that has always been an issue. A large proportion of police do not know how to investigate this stuff properly, so they flounder and take 10 times longer than they should have. Yes, free wi-fi networks are a problem.

**The CHAIR** — Why are they a problem? How does that work?

**Ms McLEAN** — I am not a technical person at all, but it depends on how they have been transmitted and in what form. If I am just sending you a text message with a picture, that is totally traceable and very easy — call charge record to the telco, reverse call charge record. All of that is pretty simple, and it is not impossible. One of the biggest barriers to police doing a lot of this is cost, because every time they ask for one, they have to pay Telstra \$150, and it has to be signed off by an inspector who is basically looking at whether he is getting bang for his buck, and he is going, 'Don't worry about it'.

As for working with Facebook, there is a law enforcement part of Facebook. Every police officer in the world has a dedicated email to Facebook, even just to get evidence kept. There is a different process to get it given to you, but if they need stuff preserved because it is there, you can get that done in 10 minutes. So that means

Facebook keeps it, pending you going through the processes of warrants and things like that. Once you serve that on Facebook, then you get the information sent back to you. I would not put the blame on Facebook for their lack of work here. File sharing and peer-to-peer is very hard to trace or harder to trace, but law enforcement is catching up and they are tracing file sharing and peer-to-peer stuff now.

I have a very good relationship with Facebook, and I am still afforded the same level of communication with them as I was in the police force. I cannot imagine you could get a warrant and get the information, but if someone reports to me that they have a problem with Facebook and that it is really serious, above and beyond what every other citizen does not report directly, I can have it actioned more quickly because they have allowed me to do that, but I am not the only person that gets that. I am actually going to Facebook headquarters — this is part of my study tour — to see how they work, what they do and how they respond.

**The CHAIR** — Where is the Facebook headquarters?

**Ms McLEAN** — In a suburb of San Francisco. I am having a day there, looking at the inner workings of Facebook and how they respond, what they do and all of that. I will be the only person in Australia who has been afforded that. I think a federal government person once did that but no-one else, so that will be really interesting. I have my little list of things that I want to know as to why you cannot press a button and get this to happen — why is there this convoluted process?

What I think police will find more and more is that there are more what I would call non-mainstream websites being set up that really do not give a toss about you, and they are the ones it is harder to get the information from, not the Facebooks of the world. Facebook and Twitter — anything that is big and legitimate — will work with law enforcement. In fact at the conference I am going to, Joe Sullivan, who is the chief of security for Facebook, is delivering the keynote speech. They are very proactive. It is slightly harder here because they only accept a Californian warrant — so a federal warrant converted. It is not just ‘type it up and send it in the mail’. If you are in America, it is a lot easier. But that should not be an excuse. I do not see that as an excuse.

The biggest barrier when I was in the police force and getting data from telcos was the cost factor and trying to convince my boss that this was important. Unfortunately a lot of police see this as trivial because it is not an armed robber, a murderer or a drug dealer. I think that is an issue — the cost. There is the argument of whether the telcos should actually be charging police exorbitant fees for this sort of stuff. That is a whole other argument. I do not think they should be using it as a moneymaking opportunity. It is not like in the old days where someone had to flick through 50 000 pieces of paper to find the information; you press a button on a computer screen. I do not agree that there are problems getting stuff from Facebook at all. I think that is a lack of understanding, because I know there is a dedicated email straight to Facebook. When I first left the police force I used it until they contacted me and gave me different access. I never pretended at all. I said, ‘Look, I have had this access. I need to find a physical person to talk to’, and they were great. They were very proactive and helpful.

**The CHAIR** — Thank you very much for that. You obviously have a wealth of experience that you have shared with us. Thank you for taking the time to both put it on paper and come here today to assist us.

**Ms McLEAN** — That is all right. If you have any other questions or concerns, you know where to find me, so you can just email me. If you want to find out what I learned in Dallas you can also —

**The CHAIR** — That would be really interesting.

**Ms McLEAN** — If you want to chat later on, I am happy to have a chat about that. I am on the federal coalition’s cybersafety working party, and I am meeting with Paul Fletcher when I come back because he is very interested in that. I am also doing a whole lot of work with indigenous communities in the Northern Territory, so he will obviously catch up with that as well.

**The CHAIR** — Perhaps we can stay in touch. Getting some information back from you would be fantastic. Thank you very much.

**Ms McLEAN** — Pleasure.

**Committee adjourned.**