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

**LAW REFORM COMMITTEE**

**Inquiry into sexting**

Melbourne — 27 August 2012

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Mr M. Stanton, Member, Policy Committee, Liberty Victoria.

**The DEPUTY CHAIR** — Welcome to the Law Reform Committee's inquiry into sexting. You obviously realise what it is about. I will just inform you that all evidence taken at this hearing is protected by parliamentary privilege, as you would understand, but comments you may make outside the hearing would not be, so just be aware of that. I am Jane Garrett; I am the deputy chair. The chair of the committee, Clem Newton-Brown, is unfortunately at a funeral. With me today are Anthony Carbines, the member for Ivanhoe; Russell Northe, the member for Morwell; and Donna Petrovich, a member for Northern Victoria region. This is an all-party committee, so we all represent the different parties. I would like to ask you now to state your full name and professional address, the capacity in which you are making a submission and your position in that organisation.

**Mr STANTON** — My name is Michael Stanton. I am a barrister. My professional address is care of Foley's List at Owen Dixon Chambers at 205 William Street. My role is on the policy committee of Liberty Victoria; I am a member of that policy committee.

**The DEPUTY CHAIR** — Great. Now, if you would give a short, 10 to 15-minute submission or speak to any written submissions you have made, we will then ask questions as appropriate. Thanks, Michael.

**Mr STANTON** — Thanks very much. First I would like to thank the committee for giving me the opportunity to make this submission on behalf of Liberty Victoria. I am mindful of the terms of reference. This submission will be limited to one of those terms of reference, and that is the appropriateness and adequacy of existing laws, particularly focusing on the Sex Offenders Registration Act as it relates to sexting. I will not seek to repeat what was contained in the written submission of Liberty Victoria, but I will address key concerns and important themes regarding the legislative scheme as it stands.

There are three themes that I would seek to draw to the committee's attention. Firstly, there is the importance of the legislative objective of registration; secondly, there is the effect of the legislative regime on the individual; and thirdly, there is the effect of the legislative regime on the community as a whole.

In summary, with regard to the phenomenon of sexting there is a need to emphasise education and diversion over what at times can be the blunt operation of the criminal justice system. In particular that includes registration under the Sex Offenders Registration Act. In particular, Liberty Victoria submits that there is a need for judicial officers to have discretion in order to determine whether persons engaged in such conduct are appropriate to be placed on the sex offenders register. This is in order to protect the rights of the individual, to advance the public interest and also to improve the efficacy of the register itself.

Firstly, I will address the importance of the legislative objective. There is obviously a vitally important need to try to prevent sexual offences; that is beyond doubt. The effect of such offending is devastating and can lead to further cycles of abuse. The Court of Appeal has recognised as much in the judgement of *WCB v. The Queen* (2010) 29 VR 483, where Chief Justice Warren and Justice Redlich stated:

> Our society is becoming more aware of the incidence of sexual abuse of children and its potentially destructive impact. Such conduct commonly involves a gross breach of trust that is likely to have a profound and lasting effect on the victim, family and community. The frequency with which it appears that an offender before the court was a victim of sexual abuse when they were a child, is another indicium of the irreparable damage that is done to victims of sexual abuse and its consequences for the community.

Liberty Victoria of course endorses that. There is no doubt that registration can be appropriate and proportionate where an offender poses a risk to the sexual safety of vulnerable members of the community. However, as was recently emphasised by the Victorian Law Reform Commission in its report on sex offenders registration, those presently on the register are not part of a homogenous group. There is a difference between those who do not pose a significant risk of recidivism — and it is submitted that often young persons engaged in sexting would fall into that category — and those who act in a predatory manner and who are more likely to reoffend.

As was emphasised recently by the Court of Appeal when it was considering the Sex Offenders Registration Act and regime in *WBM v. Chief Commissioner of Police* [2012] VSCA 159, the social importance of the registration regime is not in doubt, but it is precisely because of the importance of the legislative regime and the legislative end of the regime that it is vital that the register is not diminished by casting the net too wide. In the words of the Victorian Law Reform Commission, there is a need to refine the scheme by strengthening its focus.

It is the view of Liberty Victoria that a realistic way of achieving that end is to confer discretion upon judicial officers to determine when people should and should not be placed on the register. That would seem to have

direct relevance to young persons engaged in sexting where those persons do not pose a risk to the sexual safety of the community.

Moving on to the effect on the individual, Liberty Victoria endorses Victoria Legal Aid's submission insofar as it provides a powerful account of how being placed on the register can affect the individual, and particularly a young person. There is significant shame involved in being on the register, and for many young people this may be their first interaction with the criminal justice system. For some, as it presently stands, it may be an obligation that extends for life. The reporting conditions are known to be onerous and ongoing. The effect of registration and all that it entails was recently summarised by Justice Bell in the judgement of *WBM v. Chief Commissioner of Police*. He emphasised in his judgement at paragraph 163 that:

> … if the legislation applies to an individual, they really do lose something fundamental and important. It is the fundamental civil right or liberty not to report to the police or other officials and not to give them personal and private information, absent positive law. That is what engages the principle of legality: the fundamental civil right or liberty not to report to police and other officials and to give them personal and private information cannot be abrogated or curtailed without legislative authority in terms which are unmistakably clear.

For young persons who are engaged in sexting where criminal sanctions may be appropriate, Liberty Victoria endorses the submission of the Criminal Bar Association that a Commonwealth offence pursuant to the Commonwealth Criminal Code Act 1995, the offence of using a carriage service to harass or cause offence, is a far more appropriate charge than branding a young person a sex offender, potentially for life. Liberty Victoria also endorses the other submissions — it seems the vast majority of submissions made to this committee — that emphasise the need for further education and the need to emphasise diversion as a sentencing pathway.

Further, Liberty Victoria submits that the prohibition on child-related employment can be devastating to the individual. Often there is not a nexus between such employment and the offending conduct in question, especially where the young person was engaged in age-appropriate sexual misconduct not related to any form of paedophilic intent.

As the committee would be aware, the terms of child-related employment under the Sex Offenders Registration Act 2004 are exceptionally wide. Section 67 of the registration act defines child-related employment as employment involving contact with a child in connection with a religious organisation, community organisation, health service, boarding organisation or transport organisation. Contact itself is defined to include written communications. Child-related employment extends to include the performance of work as a volunteer.

Justice Bell further in *WBM v. Chief Commissioner of Police* at paragraph 169 eloquently, and far more eloquently than I could, summarised how this can affect the individual. His Honour noted:

> The interests which are at stake for the individual go beyond the right to enter into a contract of employment and are encompassed in the right to work, which has great personal, social and economic importance to individuals.

His Honour there cited a text by Owens and Riley entitled *The Law of Work*, where the authors stated:

> It is largely through work that we become who we are: work is central to personhood, to identity. And because work is intricately entwined in the creation of our sense of self, it has an infinitely complex meaning for us as human beings. Work is intimately linked with human dignity.

It is for that reason and the relevance of work to dignity that Liberty Victoria submits that often the net is cast too wide and people, particularly young persons who have engaged in conduct such as sexting, are being prevented from engaging in child-related employment when really it has no relevance to their offending conduct.

More broadly and lastly there is the issue of the effect on the community. In Liberty Victoria's submission there are two key effects on the community from the legislative regime as it stands. Firstly, there is a great loss to the community in having persons who pose no risk to the sexual safety of children being prohibited from engaging in child-related employment, which is obviously often very important public work. That is at a cost not merely to the individual but also to the community as a whole.

Secondly, there is the cost of not having a focused register that provides protection against those who truly are a risk to the community. As the committee would know, there are thousands of people on the register and it is projected to grow dramatically over the coming years, with some projections estimating over 10 000 persons by

2020. This has a necessary impact on police resources and the ability to administer the register effectively. Happily, Liberty Victoria endorses the submission of Victoria Police to this end that the judiciary should have a discretion to place individuals convicted of child pornography offences on the sex offenders register, which should be based on the risk of further offending towards children. It is Liberty Victoria's submission that that is in the interests of the individual, the community, the register itself and those who administer it.

**Mr NORTHE** — Well done, Michael; very good. I am just trying to extrapolate a little bit more on that last point when you were talking about the sex offenders register and giving judicial officers some discretion around the period of time for which an offender might be sentenced. Are you suggesting that those who undertake the activity of sexting should or should not be on the sex offenders register, or are you saying it is really a case-by-case basis?

**Mr STANTON** — It depends what the conduct involves, and as the committee would be aware, sexting can encapsulate a vast array of human behaviour. Where the sexting behaviour is predatory and where there is expert evidence that there might be a risk of reoffending, then it may be appropriate in some circumstances for people engaged in that conduct to be on the sex offenders register. But Liberty Victoria's submission is that the best people to make assessments of risk are those who are dealing with offenders day to day and who will be able to consider expert evidence, if it is provided, as to the risk of reoffending.

Liberty Victoria would not submit as a blanket policy that people engaged in sexting should never be on the register. It depends what that conduct involves. But certainly there is a difference — and that is well recognised in the submissions — between young persons engaged in consensual activity between themselves and young persons engaged in activity where material is disseminated to a wider audience.

Within that second category the submission would be that that can encapsulate a broad array of behaviours as well. In an example where someone is acting in a predatory way where the person poses a risk to the sexual safety of the community, then potentially registration is appropriate; but for many young persons that is not the case and they are branded with the same brush really.

**Mr NORTHE** — I have two supplementary questions. In terms of that, would you consider there should be nonetheless a minimum term, if you like, for those who are put on the sex offenders register, despite giving some discretion to the judicial officers?

**Mr STANTON** — Liberty Victoria's submission in that regard would be that it should be for judicial officers to determine the period of reporting, and that is the best way for a proportionate registration period to be imposed in a given case. The submission of Liberty Victoria noted that there should also be a right of review for people who are placed on the register.

Liberty Victoria's position is that the more discretion afforded to judicial officers the better, because the only effect of mandatory registration is that it prevents a judicial officer from imposing registration that the officer thinks is proportionate and appropriate in a given case. If a judicial officer is empowered to register someone for a period that they deem appropriate, then in an appropriate case they will impose that period of registration. The only effect of mandatory registration is to prevent judicial officers, who are at the front end and who are the best placed to make assessments of risk, in a just case from imposing a lesser period of registration or no registration at all.

**Mr NORTHE** — The other question was: if a couple are engaged in a consensual sexual relationship which includes sexting, what would you see as being age-appropriate, something which has been referred to quite a bit in your submission?

**The DEPUTY CHAIR** — Would it need to be defined?

**Mr NORTHE** — Yes, would it need to be defined? 'What is age-appropriate' is the thing that we are grappling with in some sense.

**Mr STANTON** — Certainly as it stands at the moment there is a paradox insofar as a young couple might be engaged in consensual sexual activity which is legal at law — the actual physical act of intercourse — yet if there was a production of photographs as part of that, that could in theory be captured by the registration provisions in relation to child pornography offences. Insofar as young persons are engaged in legal sexual

relationships then Liberty Victoria would certainly submit that that should not be captured by the criminal justice system. But for even younger persons than 16 year olds I suppose there is a real issue as to whether that behaviour should be captured by the criminal justice system at all. Perhaps there is a further need for education and other resources to be called into play for those young people.

**Mr NORTHE** — Thanks, Michael.

**Mrs PETROVICH** — Further to that point, there seems to be a real conflict between what is the age of consent in consensual sexual relationships between young adults, or even older adults, but in relation to the age of consent one of the things I would like to seek your response on is that there seems to be a conflict between the child pornography laws and that consensual age. You can have a 17 or 18-year-old couple engaged in a consensual relationship, and one of those people may well be charged with purveying child pornography and end up on the sex offenders register. Whilst you talk about discretion of the judiciary, is it appropriate that we clarify those key issues as a starting point?

**Mr STANTON** — Liberty Victoria's submission in relation to that would be certainly that it would assist and no doubt it would also be something that the judicial officers would then be able to take into consideration if there was to be discretionary registration.

Victoria is unusual in defining a minor as being a person under the age of 18, as opposed to other Australian jurisdictions where, in relation to child pornography offences, a minor is defined as being under 16. That creates a real lacuna, I suppose, in the legislative regime and the paradox you have identified.

**Mrs PETROVICH** — Further to that, we have that scenario where we have a relationship, but should we also seek further definition because there is potentially still that predatory behaviour of purveying child pornography which probably cuts across a range of age groups? From Liberty Victoria's perspective, is that something that, whilst we have discretion in other areas, we should still be hard and fast on those who are purveying child pornography in its real sense?

**Mr STANTON** — There is no doubt that child pornography in its real sense is a horrible trade that needs criminal sanction. The issue is whether or not young persons engaged in sexting conduct really are purveying child pornography. For young persons who are acting in a more predatory or offensive manner, there is a live issue as to whether the Commonwealth offence is still the more appropriate offence, especially for a first-time offender, in relation to using a carriage service to harass or intimidate or using a carriage service in an offensive manner.

There is an issue as to whether or not a young person engaged in sexting behaviour, even potentially in a predatory way, for the first time should be charged with child pornography offences given the stigma that involves and given the effect that might have on their life moving forward. That would really depend on the expert evidence in a given case as to whether or not the behaviour was aberrant and whether or not someone was acting in a way that was out of character or whether someone has a real predatory interest in younger persons.

**Mrs PETROVICH** — If, in the case we see, that these photographs or texts or sexts find their way into a chain, should we then be looking at education or systems of seeking qualification as to why those things happen? Should we also be looking at whether these sorts of chain sexts or texts are still to be considered as purveying child pornography?

**Mr STANTON** — Certainly if someone is forming a first link in a chain and then those files or photos are disseminated to a wider audience and then on to a wider audience and a wider audience again, there would be a live issue as to whether or not the young person or the person who disseminated the photo in the first instance had the intent to actively participate in the dissemination of child pornography. If someone is reckless about that or if someone acts with some foresight as to the wider distribution, then potentially it may be appropriate that there is criminal sanction. But often young persons — as is made clear by some of the submissions: the Criminal Bar Association submission and the Youthlaw submission — act without thinking about the consequences of their actions, and that is why in Liberty Victoria's submission things such as diversion and things such as the Ropes program for juvenile offenders are really useful tools because they can provide young persons with education and a better understanding of the dangers of this kind of conduct without resulting in them being branded sex offenders potentially for life. That is not in the interests of their rehabilitation, and if

young persons who are having their first interaction with the criminal justice system are not being treated in a way that maximises their potential for rehabilitation, then that is not in the public interest.

**Mrs PETROVICH** — Michael, thank you very much.

**Mr NORTHE** — I am interested, Michael, if you have an understanding of breaches of the federal laws in this space, in your experience. Saying that, there is obviously the existence of some federal laws, but I am not sure if the committee understands the take-up on that, if you like, and breaches of that.

**Mr STANTON** — Putting my barrister hat on for a moment, it is certainly the case with these kinds of offences that as part of a resolution of matters to a plea of guilty sometimes there will be negotiations between defence lawyers and the Office of Public Prosecutions that result in child pornography offences being withdrawn and charges being laid for alternative offences under the Commonwealth regime — of using a carriage service in an offensive manner or to intimidate or harass — but of course that is at the discretion of prosecutors, and whilst in a perfect world common sense would reign supreme, particularly in relation to young persons being exposed to the criminal justice system for the first time, it is not always the case that there will be the opportunity of having alternative charges laid.

If the prosecution proceeds on the state child pornography offences as they stand and does not charge the alternatives under the Commonwealth code, really if a young person does not have a defence at law, then the Sex Offenders Registration Act kicks in and there is mandatory registration. In a case where someone may pose no risk to the sexual safety of the community at all but where they have acted in an aberrant way and where for some reason prosecuting authorities are not willing to substitute alternative Commonwealth charges, that person faces the real and lasting consequences of registration, which includes the prohibition on child-related employment.

**Mr NORTHE** — Interesting.

**The DEPUTY CHAIR** — Thank you.

**Witness withdrew.**