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

LAW REFORM COMMITTEE

Inquiry into sexting

Melbourne — 10 December 2012

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Judge P. Grant, President, Children's Court of Victoria.

The CHAIR — Welcome, Judge. This is a cross-party committee, one of a dozen or so set up by Parliament to inquire into various things. This is the Law Reform Committee, and this inquiry grew out of a newspaper report probably about 18 months ago now about the sex offenders register. We have been given this inquiry to do; we have been going for most of the year and are in the closing stages and are about to write our recommendations. We are interested in talking through your submission.

In terms of housekeeping, parliamentary privilege applies in the room but not outside the room. There is some interest from journalists, so no doubt you will be asked questions on the way out. We will receive a transcript of this in a couple of weeks time. We will provide that to you to check over so you are happy with the accuracy of that. For the purposes of the transcript, could you start with your name and your professional address and who you represent, and then take us through your submission please.

Judge GRANT — Thank you. I am Judge Paul Grant and I am the President of the Children's Court. The Children's Court is in Little Lonsdale Street, Melbourne. I thank the committee for giving me an opportunity to come and speak to the submission that I have made in relation to sexting. I thought I might commence, Clem, if it is okay with you, by distributing a paper on young people, the criminal justice system and the Children's Court of Victoria. I do that just to provide background because, as you will all be aware, the Children's Court is a different court to the Magistrates' Court and the County Court. I have just provided this background paper to highlight some of the differences between the jurisdictions. I think that in looking at this issue of how we deal with young people who are charged with offences arising out of sending images of themselves to other people, we need to understand that the Children's Court has a different approach to young people than adult courts.

I have highlighted firstly in the paper the importance of diversion as a fundamental principle in dealing with young people. Of course some offences are too serious to be diverted away from the court process, but we do have in Victoria two ways of diverting low-level offenders or offenders with good prospects for rehabilitation. One way of diversion of course is police cautioning, and the other way is through court diversionary programs — ROPES is one of them, Right Step is another. I just wanted everyone to understand the importance of diversion.

I have also included in the paper some data on young people and offending, which the committee might find helpful, and also set out some of the principles in relation to the law of sentencing of young offenders because, again, with adults we adopt a sentencing regime that tries to achieve a number of objectives — deterrence, denunciation, punishment, rehabilitation and protection of the community — whereas in the Children's Court predominantly the approach is around rehabilitation and trying to support the young offender.

That approach is embedded within the legislation at section 362 of the Children, Youth and Families Act, but it is also consistent with long-established legal principle, and I quote there a decision from a 2007 Supreme Court case where the Supreme Court judge, His Honour Justice Bell, gave two reasons for describing why youth is a mitigating consideration of the first importance. Firstly, he acknowledged that young people, while being criminally responsible, lack the degree of insight, judgement and self-control possessed by an adult, and that in fact is an important matter for us to consider when we are looking at this sort of behaviour; and secondly, of course the community has no greater interest than its young offenders being rehabilitated and becoming law-abiding citizens.

I just conclude the paper by reference to the work of the Children's Court Clinic, which can assist us in both our family and criminal divisions, and I also remind the committee that in Victoria we have the unique dual track system, which allows 18 to 20-year-olds who appear in adult courts to be assessed as to their suitability to undergo a sentence at the Malmsbury facility.

I have really just provided that to give you the sense of the difference in the way that we approach young people and adults. I am sure you understand that, but I thought it might be helpful to have that background paper.

The CHAIR — It is helpful.

Judge GRANT — It does not pretend to be comprehensive. It does not include discussion on things like the children's Koori court; it is just targeting some of the important issues.

The second point I would like to make is that in relation to the paper that I have presented, which is really in three parts — one part about prosecutions in the Children's Court, the second part about the sex offenders

register, and the third part about sexting and intervention orders — in the last paragraph I have suggested that the court does not have the power to order the destruction of offending materials when we are dealing with applications under the Family Violence Prevention Act or the Personal Safety Intervention Orders Act. I have reviewed that position and I am now satisfied that section 67(1) of the Personal Safety Intervention Orders Act is so broad that it does give us the power, and so I would seek to withdraw that last paragraph as really not being applicable.

I suggest in the first part of the paper that there are very rarely prosecutions in the Children's Court relating to what we call sexting behaviour, and I have been able to get some statistics for you, which I hope might be helpful. I have enough copies I think for all members of the committee. I am sorry, Dr Koops might not have one, but I can get one to you. I apologise for that. There may be enough.

Mrs PETROVICH — Yes, we have enough.

Judge GRANT — I copied six. Yes, thank you.

The CHAIR — Judge, you made the point that the police are probably using their discretion not to charge for child pornography offences.

Judge GRANT — Yes.

The CHAIR — Do you think that it is appropriate that the offence is available for that type of behaviour which would not have been contemplated when the legislation was drafted and that that power, if you like, is put in the hands of the police to decide whether or not to proceed? Is it appropriate to have that as an option?

Judge GRANT — I think, quite properly, as far as young people are concerned police have a discretion as to whether they caution or not. That cautioning process is governed by guidelines, and you would need to talk to the police about those guidelines, but those of us who work in the court have a strong belief that the police cautionary system is a good system and that the police should have discretion in determining whether a matter is so serious that it should warrant a charge or whether in fact it is a relatively minor form of the offending that could be best dealt with by way of caution.

But what I suspect — and I may be wrong on this — is the very serious way that some of these offences would have to be dealt with if it was a charge means that that probably acts as a discouragement to some police in dealing with it in that way. They might think, 'Well, is this appropriate to caution or not? The alternative is to charge with that very serious top-end offence; we won't do that'. So it may be working in that way.

The CHAIR — With consensual sexting between children of comparable age, do you think there should be any criminal penalty in those circumstances?

Judge GRANT — I think it is a very good question, because I have seen commentators who suggest that there should be a low-level specific offence for that type of behaviour. The alternative view might well be: why would you want to criminalise that sort of behaviour at that very low level?

Ms GARRETT — Certainly in terms of the graduated nature clearly the most harm is done with the dissemination of the images.

Judge GRANT — Yes.

Ms GARRETT — And it is usually girls who are the subject of that, and the damage can be very, very significant and long-lasting. I note that you suggest perhaps a separate offence for sexting?

Judge GRANT — Yes.

Ms GARRETT — Would you see that encompassing the different levels of harm?

Judge GRANT — I would.

Ms GARRETT — And that that would be serious enough to warrant an offence, with the dissemination?

Judge GRANT — Yes, I think there are gradations of offending in this area. If you have a young, say, 16-year-old woman who sends a photo to her 17-year-old boyfriend, with the way we describe child pornography now, that would be an offence — —

Ms GARRETT — Captured.

Judge GRANT — Captured. If both of them consented to that behaviour and neither of them did anything more and, say, it only came to the attention of the police because the 17-year-old man had not deleted the image and he was searched one day and they discovered this on his phone, then you would really wonder what benefit there is in prosecuting either him or her for doing that in an area where there was consensual behaviour that had caused no harm to anyone, as far as we could see. I am not sure what benefit we would derive from criminalising that behaviour. But I accept that there is a contrary view, and the other view I have heard expressed is, 'Well, no, that does constitute an offence and therefore you should have a low-level offence that reflects that sort of behaviour'.

Mrs PETROVICH — So on that basis, Judge, do we need to look at those layers, that intent, whether there is a maliciousness — —

Judge GRANT — I think we do have to look at layers of intent, because once you move beyond just dissemination from one person to another, once it is disseminated to a third person, we then have to start to think about whether or not the third person was a willing recipient of that. What happens if someone sends me the image and I say, 'Gee, I don't like that image', but for some reason I forget to delete it? Should I be as culpable as someone who gets the image and then says, 'You beauty, I want to really cause humiliation to this person; I'm going to forward it on as broadly and as widely as I can'.

So even at that level of the receiver of an image sending it to a third person, the third person may be acting innocently at one level, not solicited the image but received the image, you would expect the person would delete the image but if they do not, should they be charged with an offence? But then we have, of course, those other people who would receive an image and distribute it very widely. Sometimes a person would do that because they are naive and unthinking, and other times someone would do that because they are malicious and want to cause harm. Those distinctions are hard to prove sometimes, and that is what probably makes this whole issue very tricky.

Mrs PETROVICH — Do we have existing charges that could be used to accommodate those sorts of subtleties?

Judge GRANT — We have, of course, the Commonwealth legislative provisions, but as far as I am aware they are never used. Indeed the Commonwealth provisions I think carry maximum penalties of 15 years, which are more severe penalties than the state provisions, which carry a penalty of 10 years. The description perhaps of transmitting offensive material might be nicer than describing an offence as possession of child pornography, but it still seems to reflect very serious offending and probably does not cover a lot of the behaviour that is caught up in what we are describing as sexting behaviour.

The CHAIR — So in the circumstances of the secondary dissemination, which I think is where we all agree the real harm occurs — —

Judge GRANT — Harm lies, yes.

The CHAIR — — and which we want to try to prevent, is your view that to deal with that behaviour using child pornography laws is inappropriate and that there should be some new offence created?

Judge GRANT — I think we should again, as part of the graduated response, recognise that sometimes child pornography offences will be entirely appropriate. But at other times, where again the third-person recipient has not solicited the information or has forwarded it on to a very narrow group of people with the intention that it would not go any further and they have not done it for any malicious purpose, you might have a specific type of offence that recognises that — being the recipient of offensive material, did disseminate further, or something like that, as opposed to the much more serious child pornography offending.

Mrs PETROVICH — That is one of the issues that has been raised with us previously in another place — that any softening of the child pornography law may allow paedophiles or predators to slip through and use that as an escape clause or a lesser offence.

Judge GRANT — The only other alternative then is to recognise particular defences that acknowledge that the type of offending is not anywhere near as severe as the upper level offending.

The CHAIR — Your court has the discretion, when someone is found guilty of a child pornography charge, whether or not to put them onto the sex offenders register whereas the adult court does not. One of the issues we are considering is whether the adult court should have a similar discretion. Do you believe that by having the discretion in the Children's Court you are able to make a judgement, which is the right judgement in most cases, whether or not to put them on the register?

Judge GRANT — I suspect that one of the reasons why there is so much concern about what is happening at the moment is the requirement to put young adult men on the sex offenders register. I do not understand why it should be compulsory for a 19-year-old, 20-year-old or 21-year-old, especially when some of those young people would not be a risk to anybody else. I do not understand why we would want to have a system that puts, in a compulsory way, people on the register who do not need to be there. Some of these young people do not need to be there.

The interesting thing, and I have circulated those statistics to you, is that of the sex offender registration orders we have made in the Children's Court, not one of them relates to a section 68, 69 or 70 offence. In fact I have indicated that in the last five years we have granted variously between zero and four orders each year, and we have refused a number of orders in some years. In the Children's Court we have a very sensible test, which is that we have to be satisfied beyond reasonable doubt that we need to put the child on the order in the interests of protecting the community. It is a pretty good test. You are assessing the risk to the community from this person and who they are. That test could be applied, it seems to me, in the adult courts for this sort of behaviour.

Perhaps if I can just talk to the statistics as well. I just need to explain them, because you have probably not got much statistical information. The first column talks about the number of cases finalised. That is probably not going to be that helpful to you because 'finalised' means proved and a sentencing order made, not proved and charges dismissed or not proved and charges struck out. So 'finalised' seemingly means we have finished the case.

What you are going to be much more interested in is the second table, which is the number of cases finalised with at least one offence found proven. Sometimes of course young people appear with, say, sections 68 and 70 as alternatives, and both might be proved. That is why we have specified at least one offence proved. When you look at those figures for 'make or produce child pornography' there are not many cases, except in '07–08 when there were 12 cases.

I can speak to that case because I dealt with 11 young men who were all charged with offences coming out of very bad behaviour — shockingly bad, criminal behaviour — towards a young woman, which involved them recording their behaviour. They were all charged with a number of criminal offences, including making and producing child pornography. It was entirely appropriate that that charge be laid against them, and the charge was proved. That explains why in that year the figures seem so high, because 11 of them relate to one particular incident. Otherwise, as you can see, we found in the 2009–10 year, for example, 7000 young people guilty or having had charges proved against them in our court. You will see that there were seven charges where making and producing child pornography was proved and seven where knowingly possessing child pornography was proved. All seven offenders may have been charged with both offences; we just do not know. Just for completeness I have given you the sex offender registration orders, and it is important to note, as I have said, that none of them relate to sexting offences.

Chair, I think the question you asked me earlier goes to the heart of this question, and it is about the severe consequences that have attached to many, usually, young men from the fact that they have been prosecuted for child pornography offences in circumstances where you would not have expected a consequence to be that you are on the register for 8 years or 15 years or whatever the period of time is. If you change that aspect of the law, then this might not be quite so difficult. That consequence is causing considerable difficulty, it seems to me.

Ms GARRETT — In terms of the Children's Court and the capacity to hear from victims of conduct, is it similar to the adult court? Are there victim impact statements?

Judge GRANT — Yes. In the case that I was talking about that I heard in 2007 — I heard eight offenders in late 2007 and another three in February 2008 — we had victim impact statements from the young woman involved and from her mother and father. We have the exact same requirements in our court as in the adult court.

Mr CARBINES — With regard to the discretion and the work in the adult courts around the sex offenders register, and based on what has been said by some of the people that we have spoken to throughout our committee's deliberations, while there is, as you say, obviously the test around the danger the individual might pose to the community, what has been interesting to reflect on, setting that aside, has been the effect on an individual of being on the register, their capacity, once placed there, and the range of constraints that are placed on them. While part of the discussion is about the threat an individual might pose to the community — that being the test for going on the sex offenders register — do you have any thoughts about how we deal with those individuals when they seem to be more affected, I suppose, by the range of constraints that are, from their perspective, inadvertently placed on them by being put on the sex offenders register? I suppose that is their punishment, but it has a lot of other effects on their capacity to get on with their lives in light of the mistakes they have made.

Judge GRANT — Yes, I think it does, and I think if you were to change the law, then you would have to look at some way of reviewing the position of people who are currently on the register, especially those people about whom it could perhaps be said that they would not be on the register if we had a discretionary regime.

Mr CARBINES — Following on from that I suppose you would expect that if we were to go down the path of suggesting changes around youths being put on the sex offenders register, there would need to be a mechanism for judicial review of the cases of those who are there currently? Is that how that would work? Is there a mechanism to do that?

Judge GRANT — I imagine it would have to be some form of judicial review. The Victorian Law Reform Commission recently did a comprehensive review of the register. I have not followed fully their suggestions about adults. I was interested to see that as far as children are concerned they made a very strong recommendation that children should only be placed on the register in exceptional circumstances. My understanding of the VLRC position was that there should be discretion as far as adult offenders are concerned, because it is incredibly difficult to administer I would have thought. The numbers seem to be increasing quite considerably every year, which is placing a real and significant pressure on those who have to administer the scheme. But you have to accept that if you change the law, some people who are now part of the scheme will have an opportunity to review their position. How you do that is perhaps for you people to work through, not me. It might be some sort of appeal process or judicial review process.

Mr NORTHE — Judge, can I ask another question, if that is all right? Just in terms of the prospects of maybe creating a new offence, a gradual offence, and just in terms of penalties that might apply or discretion that may be provided to the courts for that, can you suggest to the committee any diversion programs that work well that might be a requirement for offenders to undertake, or if you are thinking something differently, if there were the creation of a new offence?

Judge GRANT — No, I have always been concerned. My concern in this area was really because I felt that to describe some of this behaviour as child pornography was an unwise thing to do. I think the law and the offences that you have should match the type of behaviour that you are dealing with, and I think the child pornography laws were developed for a certain purpose and they are now being used for a different purpose. That concerns me, and that is why I have suggested we should have perhaps a different type of charge — a lower level charge — which would attract a less serious penalty.

But of course a court, in determining what it is going to do with any offender, has to take into account the circumstances of the offending itself, any aggravating circumstances and any mitigating circumstances. The court also has to take into account those matters that are relevant to the individual circumstances: does the person have a prior history or not? Has the person pleaded guilty or not? So at one level those matters will always be relevant and a court has the discretion — and it should have the discretion — to weigh all these

factors up in determining whether this is a serious form of this offending or a less serious form and how it should respond. That is as a general principle. I suppose really what I am saying is that the response needs to be proportionate to the offence in the circumstances of the offender, but in the Children's Court we have got to recognise that a lot of our focus is on supporting the young person, so referral into appropriate education programs would be a good thing and a positive thing.

One of the points that I make in my background paper is that we have police cautioning, but as far as Children's Court diversion is concerned, the programs at the moment are ad hoc, they are not funded and they are confined to particular geographic regions. We are working with government about developing a comprehensive, statewide diversionary program. If you do have such a program, then one of the things you might do is, as part of a court diversion, refer a young person to a particular program that assists them to deal with this sexting issue. It could be an education program, it could be to go to a particular program run by a CASA on the evils of disseminating these sort of pictures. That might be one of the things that you would want to do, but you need to have a full range of responses and you need to have flexible responses.

I know that, again, looking back at those young men that I dealt with back in 2007–08, one of the things that we required them to do was participate in the MAPPS program — the Male Adolescent Program for Positive Sexuality — and that was over a very long period of time. That is a program that is very highly regarded and produces good results, but that tends to be for young people involved in more serious sexual offending.

If there are particular programs that deal on an appropriate level with sexting type of behaviour, I am not sure. We just do not have enough people coming into our court. It is not something that we see that frequently. I suspect, and I know, because I have read what the police have said in their evidence here, which is that they have a strong view — or it was expressed to this committee that you should not have another charge because the police are dealing with it adequately by way of diversion. I am not quite so sure whether that is — —

Ms GARRETT — I have concerns about that approach, particularly its impact on the victims.

Judge GRANT — I think you have to recognise that there will be appropriate cases for police cautioning, there may be appropriate cases for court diversion and there may be appropriate cases to go through the full Children's Court process with the wide range of orders attached.

The CHAIR — Just to be clear on what your view is in relation to that, is it that if a lesser offence were available, more kids would be dealt with under it, and perhaps the deterrent effect would be greater because there are more people being dealt with rather than police using their discretion at a very early stage with the child pornography laws?

Judge GRANT — Look, I know that it is the police view that if you have the lesser offences, more people will be charged, and that is probably a correct assessment.

The CHAIR — Is that a bad thing?

Judge GRANT — Not necessarily, no. If we have a situation at the moment where because the offence is so serious some people who potentially might have come into court are not coming into court, then we need to acknowledge that. I do not know how you measure it, and I know that a number of people have said we should be making policy based on what the evidence tells us. I do not know what the evidence tells us in this area, except I am not that happy with an approach that says that every single case should be cautioned unless you get the really serious ones that go into court. There has to be a recognition that there are some areas in between here, and they probably have to be recognised by the creation of a specific offence.

Mrs PETROVICH — But that is around the intent after purveying?

Judge GRANT — Yes, I mean, my concern, as I said right at the outset, is about criminalising behaviour that involves, say, two 17-year-olds sending images to each other that do not go any further. Theoretically you could build a definition of a sexting offence that would include them, bring them into court, and you would think, 'Why would we do that?'.

Mrs PETROVICH — The age of consent is 16.

Judge GRANT — But on the other hand, if you have a 12-year-old sending images to a 17-year-old, then you would be concerned, and you would be saying, 'Okay, even if this was done by a 12-year-old willingly, is that person able to formulate a view about being able to do that willingly? What is the purpose of a 17-year-old getting this material?'. Should we acknowledge that that is actually a more serious form of misbehaviour, and therefore should attract a charge? It might not be a possession of child pornography. It might be receiving materials when there is an age difference of more than two years between the parties or something.

The CHAIR — If we were to construct a new offence, do you think it would be appropriate to use a similar age gap for physical sexual relations between children?

Judge GRANT — I think it is a good question, and we have tended in the law in Victoria to use that two years as an important signifier. I think there are some states in America that are looking at using four years. I have not got a definitive view on it, except that perhaps you should try to be as consistent as you can be in the application of law, and two years is the sort of recognised period. When you are talking about 16, 17 and 18-year-olds, the two years seems probably right to me, but there are some states in America, I understand, where they are suggesting that four years is the appropriate age range.

Ms GARRETT — One of the issues with not wanting to delve into what two consenting 16 or 17-year-olds may choose to do I guess is because the risk factor in the behaviour can be so quickly exposed, and you have that image there forever and it has been forwarded on, we are talking a lot about education and perhaps advising kids, 'Just do not go there, because the relationship turns sour', as they often do when you are 16, and it ends up all over the school. I know that with young people, deterrence and all of that is complicated and messy, but if we are saying to two 17-year-olds, 'Actually, this is okay, it is only if it is disseminated on', do you think that has an element of encouraging the kids or saying it is okay, despite the risk factor?

Judge GRANT — We say it is okay for them to have sex together and do all sorts of other things together, so there must come a stage where we can say, 'Look, if you are 17 and you make the choice to send that image to your boyfriend, that is your call'.

Ms GARRETT — Just be aware of the risk.

Judge GRANT — Just be aware of the risk.

The CHAIR — Thank you very much for coming in today. That has been very helpful.

Judge GRANT — Thank you very much for the invitation, and again if there is any further material you might want, all you have to do is let us know.

Witness withdrew.