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

LAW REFORM COMMITTEE

Inquiry into sexting

Melbourne — 18 September 2012

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Acting Commander N. Paterson, Intelligence and Covert Support Department, and

Detective Senior Sergeant S. Colson, Officer in Charge, Sex Offenders Registry, Victoria Police.

The CHAIR — Thank you, Neil and Scott, for coming today. This is a cross-party committee. The full committee is here today. We are given inquiries by the government to look into various issues in relation to law reform, and this is the third one that we have done. We gather information and then write a report which goes to government, and then government responds to our recommendations. They may or may not be accepted, but this is certainly an issue that has been in the media in the last year or so, which led to government giving us this inquiry, so it is quite an important inquiry that we are doing here today. Thank you for your submission and also for coming in today to assist us with our inquiry. Everything you say is covered by parliamentary privilege, but not outside the room. If you could start with your names and professional address for the purpose of the transcript, then talk us through your submission, that would be great.

Acting Cmdr PATERSON — Firstly, thank you. Neil Paterson is my name, and I am an acting Commander in the Intelligence and Covert Support Department of Victoria Police, and my professional address is 412 St Kilda Road, Melbourne. With me today is Detective Senior Sergeant Scott Colson, who is the Officer in Charge of the Sex Offenders Registry. The Sex Offenders Registry sits within my portfolio of responsibilities as well, so I speak with some authority on the registry because I know that that is a particular focus with regard to sexting.

You should have received a supplementary submission from Victoria Police, which was sent last week. The purpose of the supplementary submission was to clarify a number of points made in the initial submission, and I think the initial submission was done at a time when the subject matter experts were not necessarily around in the organisation. They were away on leave, so we have sought to clarify a couple of points there.

Rather than just walking you through the submission, I thought it might be helpful to particularly take you through the way Victoria Police deals with the offences that a young person or indeed an adult might commit in relation to a scenario of what is colloquially known as sexting.

The CHAIR — Just to interrupt you for a moment, I was just looking through my folder, and I have not received the supplementary submission.

Dr KOOPS — We have not received it.

The CHAIR — So we will get it, no doubt, but perhaps if you could, at the appropriate time, refer to it.

Acting Cmdr PATERSON — What I might do is start with that, and I will just walk you through what the supplementary submission indicates compared to the original submission.

The CHAIR — I should have mentioned before you started that the ABC is filming today. Are you happy to consent to that?

Acting Cmdr PATERSON — Yes. In the supplementary submission Victoria Police noted that sexting was quite a broad term and that there is no offence to cover sexting per se in legislation. However, the three offences which may include sexting in particular circumstances are: section 68(1) of the Crimes Act, which is production of child pornography; section 70(1) of the Crimes Act, which is possession of child pornography; and an offence against section 57A of the Classification (Publications, Films and Computer Games) (Enforcement) Act 1995, which is about the publication or transmission of child pornography. So any context of sending an image of a person under the age of 18 on a mobile phone device, which is a subset of what we generally refer to as sexting, or if there is talk of language involving sexting as well, could fit into one of those three sections of legislation.

The CHAIR — Could you not also use crimes in relation to intimidation or harassment?

Acting Cmdr PATERSON — Yes. There is a Commonwealth offence, which is under the Commonwealth Criminal Code Act 1995: 474.19, which is using a carriage service for child pornography material, or 474.17, which is using a carriage service to menace, harass or cause offence. Certainly you can use that offence in relation to any person who sends images. So two consenting 50-year-old adults who have taken consensual images at one stage and then one of the adults decides to send the images on in order to menace, harass or cause offence certainly could fit within the ambit of that particular Commonwealth offence.

I note the previous person giving evidence spoke about the stalking legislation in Victoria. Stalking legislation is about a course of conduct, so it is never about a singular occurrence. So if you could prove a course of conduct for someone sending images et cetera, then they may well fit into the stalking legislation in Victoria, but a single occurrence would not bring them within the remit of that legislation. But the three main offences that we talk about when we talk about child pornography being transmitted, whether that is by mobile phone or any other method of transmission, are the three I initially spoke to at the start.

The submission gave you a breakdown of the numbers for those three offences for the last 10 years. It gave you the raw number of data for offences in the state of Victoria for offenders that have been charged. What we can see is that in the 2007, 2008 and 2009 period there was certainly a spike in offences, and that relates to a number of international operations that were undertaken around the world but also here in Victoria, targeting people who had possession of child pornography. But all three offences are essentially either on the down or on a flat plane with regard to trending. We felt it was important to provide you with the actual sheer number of offences that people have been charged with in the state of Victoria.

There was another clarification in the first part where it said that there was a low number of — I think the words were 'not a large number of' young people ending up on the register due to having pictures taken. The language perhaps in that first submission is not useful because it refers to 'young people'. In terms of the legislation as we know it today, a child is a person under the age of 18 years, and the Crimes Act refers in relation to child pornography to a minor. The definition of 'minor' in the Crimes Act is under the age of 18 years, so it is consistent with the Children, Youth and Families Act, and there are no — I repeat no — juveniles that have ever come on to the Sex Offenders Registry in the state of Victoria for a child pornography offence in connection with anything like sexting.

I note the previous evidence given at this committee by a member from Gatehouse who referred to one young person but she did not elaborate on her example because she did not want to identify the young person. I have spoken to her, but that young person had other serious sexual offending that put them on the register — it was not their instance of sexting that put them on the register.

The CHAIR — As I understand it, the judiciary has the discretion with people under 18 as to whether to put them on the sex offenders register or not. The issue that seems to arise, though, is when someone turns 18, becomes an adult and they are possessing consensual images that were created before they were 18, then there is no discretion, I understand. That seems to be one of the main concerns in the community.

Acting Cmdr PATERSON — I will go on to speak about that because I think that there are some complications with the legislation, and it is really important to understand how it exactly operates, so I hope that we can just work our way through that this morning as well. I reaffirm that there are no juveniles on the Sex Offenders Registry in relation to sexting alone. There is only one that I am aware of but there was much more serious sex offending in relation to that individual. At the present time we only have one juvenile on the Sex Offenders Registry in the state of Victoria. Indeed Victoria Police has a position that we would prefer not to have any juveniles on the Sex Offenders Registry, that people under the age of 18 would be best dealt with in a therapeutic justice outcome rather than being put on the registry. There are a number of reasons why we hold that belief, and we have certainly been speaking with government about that.

The CHAIR — Are they not on the registry because the police have made a discretionary call as to whether to charge them with child pornography offences or not? Or is it that they are going before the judiciary on child pornography offences and the judiciary is exercising its discretion?

Acting Cmdr PATERSON — The judiciary only has discretion in the Children's Court. We have not seen the exercise of discretion in regard to a child pornography offence alone in terms of sexting. So it is up to the judicial officer in the Children's Court to exercise their discretion as to whether they place an individual on the Sex Offenders Registry.

The CHAIR — But are police exercising a judgement call as to whether or not to charge them with child pornography in the first case when it comes down to consensual sexting?

Acting Cmdr PATERSON — Absolutely. We have gone back over the data in particular to look at the number of juveniles who have ever been investigated for the offences that I outlined earlier on, and through a manual search of the data we can certainly identify that there are six juveniles who have been investigated in the

context of a 57A offence — that is, the transmission of child pornography — which best fits the sexting scenario. Only one matter proceeded to the Children's Court, but that matter was also complicated by the young person downloading child pornography from the internet, completely separate to the sexting-type offence. Of the remaining five juveniles, one was cautioned and four were subject to no further police action, which means that the matter was dealt with by police but no charges were laid and no caution was given for the young person. So from what we are seeing, whilst we understand the concept of sexting out there, there are not too many matters that are coming to police attention, and certainly of any of the juvenile matters that are coming to our attention, they are not being charged. We are exercising our discretion of the office of constable and dealing with the matters outside of the court process.

The CHAIR — Would you prefer to have a different charge other than child pornography as an option to charge these kids with?

Acting Cmdr PATERSON — Not necessarily, because I think if there is another charge, a softer charge, then we may actually see more children charged and fronting the Children's Court rather than police exercising their current discretion on the charges that exist, and we will go further into the charges shortly. Because there are no examples of a person under the age of 18 — a child — ever going to court on a sexting offence alone.

Ms GARRETT — When we consider the evidence just given, which you were not here for, from the Kids Helpline, there is obviously a lot more young people than that ringing and seeking help for being impacted.

Acting Cmdr PATERSON — No doubt.

Ms GARRETT — So do you think there is a disconnect between people, seeing that they can go to the police about these matters?

Acting Cmdr PATERSON — There may well be. I guess I am not in a fantastic position to comment on that, because we are not an agency, like that of the previous person giving evidence, and indeed other agencies that deal with children in that context. But it would not surprise me, certainly, that children are seeking help from a variety of sources rather than coming to the police with regard to them. Some of the matters that I have talked about — where there were six juveniles, five of whom have not gone anywhere near a court — certainly did involve the pictures being distributed around school environments and police being involved with the schools and talking to them about education and speaking to other children and having photographs deleted, and all of those things. It just never got to the point of any charges being laid because police did not believe it was in the public interest to lay charges against those young people and front them before a court.

The CHAIR — Even for the secondary dissemination of images that were taken consensually?

Acting Cmdr PATERSON — That is the case. We have discretion.

The CHAIR — Your evidence is that even with secondary dissemination with children, you do not think it is appropriate to be charging them with any criminal offence?

Acting Cmdr PATERSON — At the moment there is no example that we have seen of anyone being charged by Victoria Police for secondary dissemination in these circumstances, as a juvenile.

The CHAIR — That is because the police exercise the discretion to not — —

Acting Cmdr PATERSON — Correct.

Mrs PETROVICH — Thank you very much for your presentation so far. A twofold question: are police currently equipped with the appropriate processes to work through these issues when there is a reporting issue in a school environment? The second part of that question is: do you think there is reluctance to report these offences — because we do have some stats that you have said show quite a low reporting rate — for fear of being placed on the sex offenders register?

Acting Cmdr PATERSON — I think the first aspect is that we have youth resource officers who are out there, police officers, who have very close relationships with schools in their respective areas. They kind of keep on top of the issues, and if there was an issue with regard to sexting, they would no doubt hear about it and give advice to the school more generally, and it is generally consistent advice. Victoria Police, particularly with

juveniles, is not the strong arm of the law; we fully appreciate that therapeutic justice outcomes are the most appropriate avenue for children to go through.

In regard to your second question as to whether there is a reluctance to report because they might end up on the Sex Offenders Registry, I think that is assuming that children understand the complexity of the law more than I believe they would. I do not think the reluctance is in relation to possibly ending up on the Sex Offenders Registry; the reluctance is possibly more about embarrassment, confusion, exposure and a whole lot of things with coming to deal with it in an outside environment where you lose control. In a school where you may know your schoolteacher or school counsellor it may be easier to deal with it in that environment. Once the police become involved, they have less control over it, and I do not know that it would enter the young person's mind, 'If I go to the police, I am going to end up on the sex offender register'. That would be my take on it.

There are a couple of things I want to do to really clarify the legislation. I have a handout which I will give you so that I can walk you through it. You might want to distribute that. It talks about the three main offences that I have just spoken about. We will quickly walk our way through the legislation, to give you some idea. There are a couple of anomalies in the legislation. A child who might take a picture of themself can commit the offence of 'production of child pornography' under section 68 of the Crimes Act. However, they will not commit an offence of 'possession of child pornography' for the picture of themself because there is a defence in the act that says they do not commit that offence. If they transmit that image to another person, they commit the 57A offence under the films act. The person who then receives it may commit an offence of possession if they are over two years older than the person who the image is of. For possession of child pornography, there are certain defences in the act, which I will go to in a second.

The CHAIR — So if, unsolicited, an adult gets sent a picture, the fact that it has been sent to them leaves them open to being charged with possessing child pornography?

Acting Cmdr PATERSON — If it was a 17-year-old sending it to a person who was no more than two years older than them, there would be no offence, but if the person is more than two years older, then it could be an offence. The reason why I use 'could be' is that it is about a strict interpretation of the legislation and what the police would do in certain circumstances. I will come to that in a second. However, whilst they might receive it, if they then send it on in any fashion, they certainly commit an offence under section 57A. If it comes over to a group of people, wherever it explodes to, they will then commit the offence of 'possess child pornography', and if they then send it on into the broader worldwide web or wherever it is, they would also commit the offence of 'transmit child pornography'.

I just want to go to section 70 of the Crimes Act, which sets out the offence of possession of child pornography. As you may recall, in 1995 these offences were brought into the Crimes Act, and in 2004 they were amended so that the age of 16 was increased to 18; indeed a number of pieces of legislation were amended in 2004, including the Children, Youth and Families Act, which brought the age of a child to 18 instead of 16. No doubt there were various public policy considerations of the government in doing that. However, in section 70 subsections (2)(c), (d) and (e) bring about certain defences to the possession of child pornography. Those defences are 'that the accused believed on reasonable grounds that the minor was aged 18 years or older or that he or she was married to the minor'; with the next one there is two years' difference — 'that the accused made the film or took the photograph or was given the film or photograph by the minor and that, at the time of making, taking or being given the film or photograph, the accused was not more than two years older than the minor was or appeared to be'; then there is 'or that the minor or one of the minors depicted in the film or photograph is the accused'.

It is interesting to note that that defence is only available to a section 70 offence — that is, possession of child pornography. If we come back to the section 68 offence, which is about production of child pornography, and a young person committing an offence of taking their own image, that defence is not available. Yet having read *Hansard* and second-reading speeches with regard to the legislation coming in, I cannot really find good reason as to why this defence is not available for the production of child pornography there as well, particularly in the context of (d) where it says specifically that this is in defence to a possession charge. It says the accused 'made' the film — we are not talking about possession here — or took the photograph or was given the film or photograph. The 'made' or 'took the film' sounds like a production defence, but it is not listed under the production defence.

That said, we are not seeing charges under any of them for juveniles, but it seems a little inconsistent that that defence is available under 'possession' but not under 'production'. It certainly is not available under the section 57A offence in the film classification act. We see that that is an interesting difference in the legislation, but that said, we are not seeing any juveniles who have taken pictures of themselves being charged with the offence of make or produce child pornography.

In respect to adults or young adults, so 18 years or older, who have committed child pornography offences in circumstances that represent, I would say, a sexting sort of environment, our search of the register can only identify five examples. I want to talk through those examples very briefly so you understand that you cannot just take the news article, as has been referenced here, and necessarily extrapolate it out to understand the full meaning of the nature and circumstances of offending, particularly of a young person, and I am talking 18 years or older.

Of the five cases, there was one where there was a victim who was 14 years and the offender was 22 years. He was convicted of 'solicit a child for sexual penetration' and 'solicit a child for pornography' offences. The offences were in 2009. There was a significant age difference between the offender and the victim, and it was really about trying to entice a person into a sexual relationship, which would then have been another offence but it never eventuated to that level because the offending was interrupted, for want of a better term, by the parents of the young person.

There is another person, which is a matter that has been referred to in media articles, where both the victim and the offender were 17 years old when certain footage of them having sex was taken by one of the parties. If you read about the actual nature of the offending, it sounds like a consensual sexual relationship and there is a video and it has been distributed somewhere. It sounds like someone has ended up on the Sex Offenders Registry for something quite minor. The footage was taken when they were both 17, but when the male of the relationship was 19, he then forwarded on to four other people via email the video of the victim and him having sex, so it was not via a text message or sexting sort of process for forwarding the image.

But more worrying is the nature of the offending, because in reading the victim's statement it all came about because the offender had threatened the victim that if she did not have sex with him and allow him to videotape it, he would disclose their sexual relationship to her parents — she came from a very conservative and religious background. The relationship continued and then he also threatened that if she did not have oral sex or anal sex with him on numerous occasions, he would then distribute the video that he had already taken on to her friends and family. So while the offence, or the original capturing of the video, was in a consensual sexual relationship between two 17-year-olds, which is perfectly lawful, when he was 19 he distributed images, which fit within the child pornography definition. Yes, it has been subject to some media reporting, but the underlying details have not necessarily been subject to media reporting, and it is not the habit of Victoria Police to tit for tat on every news media report out there and to say, 'That is actually not quite right' et cetera. We do not often get the opportunity to correct things that are reported.

In relation to the other three matters, one involved an offender — who was 19 years and the victim was 12 years — receiving pictures from a 12-year-old. They were not in a relationship, but they received pictures of the 12-year-old masturbating. The 19-year-old ended up on the Sex Offenders Registry, and we say that is appropriate. It is often exploitative behaviour and in the process of grooming a young person. There is another example where the victim was 15 years old and the offender was 18 years old. The circumstances of that offending though was that he took images of the 15-year-old giving oral sex to a friend. The images were taken without her consent or knowledge and then distributed very broadly. Again he was not involved as the consenting person in the sexual relationship; he was a bystander — a watcher — taking pictures of this occurring and then distributing them.

There is probably only one example of anyone ending up on the Sex Offenders Registry for something that is perhaps more in line with sexting. The victim was 16 and the offender was 19 and they were in a relationship. He had taken photographs of the victim but without her consent — they were photographs of her without her consent — and he had sent the images on to friends and also placed those images on a website. That last one is possibly the closest to a simple sexting scenario, but there is no example of a juvenile coming on to the registry for a sexting scenario. From those five examples that I have spoken to you about of young adults ending up on the Sex Offenders Registry for these types of offences that may have involved a camera capturing the images in the first place, none of them are straightforward. There is no example of a very basic, 'I have got an image from

a boyfriend or girlfriend' — say, boyfriend of 19 and a girlfriend of 15. Yes, the sexual relationship would be unlawful, but there is no example of sexting behaviour in that age group proceeding through the court process and a young person ending up on the register.

Ms GARRETT — Thank you very much for your submission. Just to go back to earlier comments you made that perhaps if there was a softer option available in terms of the suite of offences, you might see more people being charged or looked at by Victoria Police or by the community. While we obviously accept that education and research and all these things are necessary in a rapidly changing environment, I have deep concerns because of the horrific and lasting impact of the dissemination of naked images of an individual, particularly of such a young and vulnerable person. We know the devastation that can cause. Do you have a view about what would be an appropriate criminal response? I accept that therapeutic justice should be the central component. Just looking at the damage done — —

Acting Cmdr PATERSON — Are you saying for children?

Ms GARRETT — Yes, for 16 or 17-year-olds who are disseminating what could be such a damaging act to someone's entire life. Do you have a view on that?

Acting Cmdr PATERSON — We probably have not turned our mind to that specifically, but what I do know is that as soon as juveniles enter the justice stream — so are in the court process — it is often the start of their cycle of offending. We try to divert everyone who is a juvenile from the justice process. The best method for Victoria Police to do that at the moment is through cautioning, and we can caution for any offence for a child. We cannot caution adults for any offence; however, we have diversion programs for adults. So if there was an adult in this situation who could possibly be subject to a child pornography charge, we can go through a diversion program for them if it is low level and not end up with them on the Sex Offenders Registry. But again, there are no examples of that out there either.

Coming back to your question, there is no doubt that it has a very negative impact on the young person whose image is shared more broadly, than the other side. But it is about whether there needs to be a criminal law response in relation to a child who does do that. Our preference is that again we avoid the justice processes for children; it should be a therapeutic stream, and ideally there will be other interventions that will be possible to put in place without charging any young person and fronting them before the Children's Court, even though it has a quite drastic effect on the victim. In the cases that I have spoken about, certainly we have been able to delete images, call back images as much as possible with the help of parents and schools and teachers when they have been distributed more broadly. So it is a public policy question really as to whether it is then helpful to put that young person, on a single example of that occurring, through a court process as a punishment result.

Mr NORTHE — In relation to the number of examples you raised of persons from the sex offenders register, if I take the fourth example, if hypothetically at the time the offender was 17 years and 364 days and by the time the police conducted its inquiry and so forth there was some time lapse and the offender had turned 18, how do you deal with those types of situations?

Acting Cmdr PATERSON — It is not about when the police conduct the inquiry; it is about when they did the action. So if we went over the day limit, it is still about when they did the offence, not about when police conducted the inquiry. The two years is about the offending, not about when police conduct the inquiry. The law is strict. If an adult, a 40-year-old, wants to have sex with a 16-year-old in a consenting sexual relationship, the law is fine with that unless the adult is in a caregiving or guardianship relationship with the young person. However, if the young person is 15 years and 364 days old, then the law is not fine with that. The law draws the line in the sand. We see it for sex offending more broadly, as I have just described, so having sex with a person under the age of 16; it is very specific in the law. One day does make a difference. The law needs to draw the line in the sand at some point. You cannot say, 'Let's have a look; if they are just 16' — or 'they are just 18' or 'they have just turned 18' — 'then we will make it a defence'. There do need to be specifics in legislation, and that is why it is drawn out the way it is at the moment.

I noticed in some other questions for other individuals here before that you spoke about cautioning and diversion programs. Certainly cautioning is available for child offenders. As I said, there is only one example of a child being cautioned with regard to a sexting-type offence, and certainly any adult offending in this regime, if it fell into that age bracket of, 'How do police exercise their discretion under the law?', we could certainly agree

to a diversion for an adult that fitted into the line of a low-level, sexting-type example. It is just that we do not have any examples of that because people have only offended in a way that is greater than just a sexting example by the nature of their actions. But we could proceed down the line of a diversion for an adult offender.

The CHAIR — Under the current law you could?

Acting Cmdr PATERSON — Absolutely. Under the current law we can proceed down the line for a diversion for an adult offender for any of the three offences that I have spoken about.

The CHAIR — But if you choose not to and you charge them with child pornography offences, then there is a mandatory requirement — —

Acting Cmdr PATERSON — And they are convicted and found guilty, then they will be on the sex offenders register. However, we have not seen anyone in a simple sexting case on the Sex Offenders Registry, and the legislation has been in place since 2004.

The CHAIR — But the reason for that seems to be the police exercising judgement as to whether or not to charge with child pornography offences.

Acting Cmdr PATERSON — Certainly for juveniles that is the case, but I cannot provide that evidence for adult offenders because, as I have indicated, we have the five examples which are greater than just simple sexting.

The CHAIR — But is the reason there are not more than five examples extending to simple sexting, is that because of the examples of kids who turn 18 and hold images on their phones just do not come before the police, or because — —

Acting Cmdr PATERSON — It may well be. I cannot answer that, but it may well be for that. But it is certainly not because they are being diverted at the moment, because we have looked through all the offences and their age groups and we can see the results through the process — whether they have a court diversion or whatever. If they have a diversion, they will be out of the court system — there is no conviction, no finding of guilt, no coming onto the register — but I can still see them because they would have been charged from our data. But there are no examples of that.

The CHAIR — Are there changes to the law as it stands that you would recommend?

Acting Cmdr PATERSON — I certainly think you can take it from the way I have gone through the legislation that I think there are some anomalies with regard to the defences available. If there were defences available for the make/produce offence and the 57A offence, then it would bring them into line with the possession offence, from a reading, so that is about the two years and the accused being in the photograph with the other person — the defences I have raised. That would bring some consistency. Is there a need for a further offence, something that is tailored specifically to sexting? I do not see the need, Victoria Police does not see the need, for a further offence at this stage. Because of the way we have dealt with everything that we are aware of to date, we could not see justification for a further offence.

I note that the inquiry has also turned its mind to the term or the word 'consent'. It is a very difficult word. When a young person consents to something at a particular time, when do they or when can they withdraw their consent from the photograph? And then how is that consent withdrawn? Indeed when you come to investigating a matter where the offender alleges consent at a particular point in time and they are either still in a relationship or not in a relationship, they still have the opportunity to exert influence and pressure over the other person, particularly if they are young, as to whether they consented or did not provide consent. It is a particularly prickly issue for police to deal with. We deal with it clearly in the investigation of sexual offences, where it is a little bit easier because there are often signs of force or something else that can go to indicate consent in a sexual encounter. But those signs are not there necessarily in sexting offences.

Mr NORTHE — Just on some of the offences, are you aware of how often the federal laws are being utilised to prosecute people — for transmitting an offensive image, for example?

Acting Cmdr PATERSON — No, I am not. The offences I have reported on are only under the state-based legislation, so I am not aware. Certainly it is available — Victoria Police is certainly aware that it is available. It

is listed in our documents, in our advice to all Victoria Police members, that that offence is there. But I am not sure how much of it is taken up.

The CHAIR — There are other jurisdictions, which we have looked at briefly, including in the United States, where they have created new offences. Have you considered what other jurisdictions are doing and whether we should be going down that track or not?

Acting Cmdr PATERSON — Yes. Certainly I was more recently in the United States having a look at some of their systems with regard to sex offending. It was not specifically on sexting, but was more to do with the sex offender register and their difficulty in managing their processes over there. I do not know that just because another jurisdiction takes a direction that necessarily we see the same need to take that direction. We always look for evidence on why we make certain decisions and why we would support a new offence or not support a new offence. I think the current legislation, with minor amendments with regard to defences, for young people in particular, would be sufficient with the exercise of police discretion. Because we are just not seeing the evidence base that people are being charged or convicted or going on the Sex Offenders Registry for sexting, or what is colloquially known as sexting.

For me it is more about ensuring that the defences to young people are available and clearly distinguished in the legislation, rather than the need to create a new offence. And as I said earlier, I have partly a fear that if we create a lower level of an offence, then we will see more young people fronted before the court — for, say, a summary offence rather than an indictable, because it is low level — and the police discretion will say that it is actually more appropriate to front them before a court for a low-level offence because it is not as tough as the bigger one. Whereas I think that with children really the main aim of the whole game is diverting them from the criminal process, just about at all cost, unless there are consistent offending patterns and behaviours.

The CHAIR — But are you not then in effect saying, 'Child pornography — terrible offence; you have not done that. Police are making a call as to whether or not that has occurred, and because you have not done that, you have done nothing wrong. We are not going to charge you with it'.

Acting Cmdr PATERSON — No, I would not agree with that. I think that police exercise discretion on many instances and occasions, whether it is these offences or other offences. From police involvement for a young person — in speaking to them and in being engaged in an investigation of this sort — I think they get very clear messages that what has occurred is certainly not appropriate and should never be appropriate. I would probably come back a step further and say that the message about what is appropriate and not appropriate really needs to be dealt with in an educative framework where young people are educated on what is appropriate and what is not appropriate with regard to their own image and bodies and things like that in a sexual context. But I do not think that in any of the matters where police have been involved and exercised their discretion that the children, parents, caregivers or schools of a young person who has not been charged would ever assume that police thought it was not a problem.

The CHAIR — I am not suggesting that the police do not think it is a problem, but by not having an alternative offence you are in effect making a call as to child pornography or not. It seems to me the evidence that we have received so far has been that the overwhelming majority of pictures that are taken between kids just do not fall within what we as a community would consider to be child pornography. That is why I question whether it is appropriate that there is not some other separate charge — —

Ms GARRETT — Given the damage that can be done.

The CHAIR — Given the damage, yes.

Acting Cmdr PATERSON — It is a difficult question to toil with. The exercise of police discretion is across a broad range of offending, and there are guidelines within which we exercise our discretion.

The other aspect of these images, particularly if they are taken of a young person and go viral, is about the opportunity to feed the deviant sexual behaviour of other people who like to capture younger people in images. The issue that you are toiling with is about where in the chain do you stop that process and say that it is okay for this group of people to do it but as soon as it hits over here, then really it should fit into the child pornography realm because it has gone too far and broad and it is now being captured, owned or possessed by someone who

has got deviant sexual behaviour rather than just a young person or the next young person who might receive it. It may be difficult to frame.

The CHAIR — But is it not right that the nature of an image can depend on who is possessing it? If it is another child and it has been done in a consensual form, then it takes on a different nature than somebody who is a 40-year-old who has somehow got hold of that same image.

Acting Cmdr PATERSON — Absolutely correct. That is why we would suggest that the defences in the current legislation should be consistent. The first part of that scenario would be captured in what we submit would be a defence under the three sections that we have spoken about, rather than creating a new offence. If it was a defence consistently across that legislation rather than just in the possess, then it would be captured.

Mr CARBINES — Neil, we have had evidence to our committee about the use of intimate images to coerce a person to remain in an abusive relationship. Does Victoria Police have incidences along those lines you have had to deal with? Do you feel that the criminal sanctions and legislation around those issues are adequate?

Acting Cmdr PATERSON — One of the examples I spoke to of the adult examples probably borders on that, so that the image is being used to coerce the person to continue in sexual behaviour. We believe the criminal sanctions available in the legislation as it stands today are adequate to cover that situation if you are just talking about the pornography offences. But if you are coerced to stay in a sexual relationship, then we would come out with the offence of rape, because consent is not by coercion, and you would say down the line that the sexual relationship was non-consensual, and that would fit the definition of a rape offence on the consent. Sex by coercion is not consensual.

Mrs PETROVICH — We have talked a lot about young people and sexting and about when no means no. Some people have consumed too much alcohol or have consumed drugs of their own will or have been drugged, and there have been many reported cases of people who have been assaulted under those conditions. When that act is then filmed and purveyed, should there be an additional charge on top of the charge of rape to accommodate the filming and purveying of that material?

Acting Cmdr PATERSON — Between adults where one of the adults may not have consented due to drugging or whatever? I have not turned my mind to it. It is about whether it adds to the justice outcome for the individual who is charged. If they are charged with a rape offence, which they should be in the scenario that you have just spoken about, will it add anything to the justice outcome for another offence with regard to capturing an image of that person in whatever form because of the sexual relationship? My thinking would be that you would probably not see an increase in penalty because of that. It may be a sentence that is given concurrent. It is about the justice outcome. If it is just the capture of an image, at the moment there is no extra offence; however, if they have sent that image on, then we have the Commonwealth offence, or if there is broader behaviour that could be taken into account as a course of conduct, then you have the criminal sanctions of the stalking offence that can be brought into that as well. I do not know that Victoria Police has turned its mind to whether there is enough evidence of examples of what you are talking about that would warrant the sanction of a further offence.

Does it just go to sentencing as the circumstances of offending for a particular offender who has committed a rape? We have had media examples of different people who have drugged lots of women. A couple of men have been charged and convicted, and police have gone through their computers and found large amounts of images et cetera. That has been fantastic evidence to prove what has occurred and helped the conviction. All of that is taken into account by the sentencing judicial figure in coming to a sentence for that particular person.

Mrs PETROVICH — Thank you, Neil. The reason I raise it is because I think technology has got ahead of us in a whole range of ways.

Acting Cmdr PATERSON — Indeed.

Mrs PETROVICH — Perhaps our legislation does need to keep up with technology. Thank you, and thanks for answering that so honestly.

The CHAIR — Neil, you have given evidence of the five people on the sex offenders register who you think are correctly on the register. Of the ones who are not on the register, are they in a different situation because of the discretion which the police have exercised not to charge them with child pornography offences?

Acting Cmdr PATERSON — Juveniles, yes.

The CHAIR — You could have an 18-year-old who holds a picture that was taken when he was 17 with his consenting 17-year-old girlfriend, and your evidence is the police simply would not charge him with child pornography offences. If the police did choose to charge such a person, then it is mandatory that they be placed on the sex offenders register. Should there be some defence available to people so that they are not relying on the good judgment of the police officers investigating the situation?

Acting Cmdr PATERSON — Again we always look for evidence as to why we would go down a particular course or direction. There is no-one in that field who has ever hit the Sex Offenders Registry for a simple sexting matter. However, if they did, the Chief Commissioner has the power under section 39A of the Sex Offenders Registration Act to apply to the Supreme Court to remove a person from the registry. People often and can ask the Chief Commissioner to exercise his power under that particular section.

The CHAIR — Was it 39?

Acting Cmdr PATERSON — It is 39A of the Sex Offenders Registration Act:

> The Chief Commissioner may at any time apply to the Supreme Court for an order suspending the reporting obligations under this Part of a registrable offender.

Since the VLRC report we have been working towards getting an understanding of those people who are on the register whom we might take applications to the Supreme Court to remove. We are working through that process. It is a complicated process because you do not want to remove people from the register who are of continuing harm to the community, but certainly we are starting with those who often have an infirmity due to age and are old and geriatric and might now be in nursing homes and cannot offend. It is proceeding, with that particular cohort, to the Supreme Court to remove them from the register. Certainly the Chief Commissioner can make application to remove a person from the register if that were the case.

The CHAIR — All right, but should there be a defence available? Should they be charged with a child pornography defence, should there be some defence such that they do not have to rely on the good judgment of the police investigating it?

Acting Cmdr PATERSON — Again, I come back and say that we have not seen anyone in this situation, so it is about the hypothetical person who would get charged with child pornography offences in circumstances, as you explained it, of simple sexting. They should not end up on the register in Victoria Police's understanding and submission, but similarly we would not be charging them to get them on the register in the first place, because we do not take that line with people we charge under the Crimes Act.

The CHAIR — But in effect you are saying that, yes, a crime has been committed under the Crimes Act — this is child pornography under the definitions in the act — but police choose not to charge for that crime.

Acting Cmdr PATERSON — As we do with many offences. We can do this with any offence. We have boundaries which we exercise our discretion in. I will pull you over as a motorist for speeding. I can issue you a caution — a verbal warning — or I can issue you a penalty notice. Police use their discretion every day for a variety of offending, and this is but one category. From 2004, since the Sex Offenders Registry has been in place, I would say there was no example available where police should have used their discretion and have not.

The CHAIR — All right. We have gone a bit over time. Are there any other further questions?

Acting Cmdr PATERSON — Apologies for that.

The CHAIR — Is there anything you would like to add that you do not think has been covered or needs to be clarified?

Acting Cmdr PATERSON — No, I do not. Victoria Police always looks for an evidence base as to why we need to change the law. We certainly agree that there is a need for further education, and I think most parents and adults out there with young children would agree with that. There is a mishmash way that different schools and different educative processes teach young people, and that is probably where the focus needs to be. As I said, we believe there are a couple of tweaks with regard to defences which are absolutely appropriate to

make — to make it consistent — so that offending within a close age bracket to a young person is captured within a defence. There does need to be a line drawn in the sand. Images that are captured of young people and that go more broadly fuel deviant sexual behaviour — fuel the desire for further images — and should remain a criminal offence for people who should not have what we submit is a defence available to them.

The CHAIR — All right. Thank you very much for that. That has given us lots of new information to think about, so thank you for putting so much thought into it.

Witnesses withdrew.