

CORRECTED VERSION

LAW REFORM COMMITTEE

Inquiry into sexting

Melbourne — 18 September 2012

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Ms B. Lo, Principal Lawyer, Eastern Community Legal Centre.

The CHAIR — Hello, I am Clem Newton-Brown; I am the chair of the Law Reform Committee. This is a committee set up by Parliament to investigate matters that need looking into in relation to law reform. We get information from the community and invite people in to give us evidence, at the end of which we write a report that goes to the government, and then the government reports back to the Parliament as to whether or not it accepts our recommendations. This is an area where many people think there is a need for some law reform. Thank you very much for your contribution.

Ms LO — Thank you for inviting me.

The CHAIR — Everything gets recorded by Hansard. You have the parliamentary privilege protection for anything you say in the room, but if you are asked questions outside the room, you do not have that protection. Could you start with your name and professional address and then talk us through your submission.

Ms LO — My name is Belinda Lo; I am the principal lawyer at the Eastern Community Legal Centre. The address is Suite 3, 27 Bank Street, Box Hill. In terms of the submission the Eastern Community Legal Centre put forward, it is a very small submission. We wanted to address a discreet area of the phenomenon of sexting that we have been seeing in our case work.

Eastern Community Legal Centre is one of the 60 free community legal centres in Victoria. We are located in the eastern region, so we have a very wide catchment area. We cover six council areas, which are listed in my submission. Because of that, I suppose, we have quite a diverse demographic. Part of our service, obviously, is to see clients and to give them advice for free. We also run a duty lawyer service down at the Ringwood Magistrates Court twice a week. It is there that we have noticed a number of clients come in who are the focus of this submission I put before you today.

Essentially, as you know, family violence happens a lot in Victoria. But what we have noticed, at least at the Ringwood court, is that a number of young adult women — so they are adults; the age range we have noticed is between about 19 to 22 — have come in and disclosed to us that they have made sexual images of themselves, consensually generally, and shared it with their partner, but then the relationship has become one of family violence, unfortunately, and so they have then tried to leave the relationship. In the course of trying to leave the relationship they have then been subjected to a threat of the release of this image, which they may have consented to at the very beginning. If they leave the relationship, they are being threatened with the release of the image to third parties, either through Facebook — I guess that is the demographic; it is Facebook that they want to release a lot of the images to — or I have had a young woman say to me that her ex-partner threatened that he would send it by MMS to all her family members as well. Unfortunately in a number of these cases the young women have felt that they needed to stay in the relationship. When it is already a relationship of family violence, this entrenches further abuse.

I have also had a number of cases where young women have felt that they have had to engage in unwanted sexual relations. They are pretending that they are reconciling, but in fact they are not. They are doing it because they have felt coerced to do so because of the threat of the particular image being released.

I am just speaking anecdotally, and I know that you would prefer statistics but I am sorry; we do not actually have that many because there are not that many young women who even want to put this on their application in the family violence list. What happens is that we are duty lawyers; we have perhaps 15 to 25 minutes with each client, depending upon the client's case. With some of the ones I am talking about now, we have longer with them, and because we have a longer time with them they disclose to us what has happened. They do not want to put it in the application, so it is not written anywhere. The reason why they do not is because generally their family members will come to court with them to support them, and their family members do not know what is happening. Obviously if a young woman comes to see me in my office, I will only see her. I have had a few young women come in and disclose this to me, and their mums have been sitting outside, and then their mums have wanted to come in and talk to me. Obviously I cannot speak to them about it and of course I am not going to say anything. But we have had big discussions about whether or not we even put this information on the application. That is an issue.

In terms of what the family violence legislation can do, there is an order that a client like this could get saying that the other party be prohibited from sending any electronic communication or anything about her. It could seem that this would be effective; however, a lot of the time young women do not want to put that information

in the application in the first place. Sometimes people can agree to actually strike out that order, or if they insist on having that order in, which is what I would advise, then sometimes it can go to a contest because the other party just wants to stick at it. If it goes to a contest, then that particular evidence does have to be led, and then we have requests for the applications to be withdrawn. It is quite a discreet sort of situation that we have been seeing at our legal centre.

I was hoping that what you would talk to me about today is perhaps recommendations for change or what could be done. I was looking through the Crimes Act and there are, I think, certain sections in the Crimes Act that can apply to these situations. Whilst we have the family violence legislation, that is civil legislation and sometimes people do not take it as seriously as if they were made aware that there are criminal sanctions for the threat of releasing a sexual image — to cause malicious harm, essentially. There is section 21A of the Crimes Act, which is the stalking legislation. Under 'Stalking' somebody must have engaged in a course of conduct of prohibited behaviour under the stalking legislation. Some of that conduct includes — sorry, I just have to get the exact words:

... publishing on the Internet or by an e-mail or other electronic communication to any person a statement or other material —

... relating to the victim or any other person ...

So if the actual image is published on Facebook and it is something that has been done over a period of time, I argue that we have that as a possibility already, under the law. When I have sent clients down to our local police, who are trying to be really helpful — they want to protect our victims of family violence — they have said to our clients, 'There is nothing we can really do about that. He is threatening but nothing has actually happened'. I think there are things that the police can already do, as well, provided that our clients feel that they are able to actually disclose this to the police as well.

Mrs PETROVICH — If I may interrupt you just for a second, obviously there is an issue with onus of proof.

Ms LO — Yes.

Mrs PETROVICH — Would that be open to abuse? Phones are easily — I could pick up Clem's phone and send a photo.

Ms LO — Yes. Do you mean that somebody else could send an image or — —.

Mrs PETROVICH — I am just wondering if — there are cases of manipulation of evidence. How do you prove that that particular person sent the photo? That is what I am asking.

Ms LO — Absolutely. I do not know how you prove that. I guess that would be something that the prosecuting bodies would have to investigate, but in terms of our examples, it is more about threatening to send the images as a way to keep people within an abusive relationship. That is what we have.

Mrs PETROVICH — Didn't you just raise the suggestion about an alteration to the Crimes Act?

Ms LO — No. I am actually talking about the Crimes Act — that this particular section already exists. So in terms of, if the electronic communication has been put up on somebody's Facebook, if they have posted it, then I think it would be quite clear that they were the ones responsible for posting it.

Mr NORTHE — Belinda, if I can go back a step, are you suggesting that your experience is that when these types of activities are presented to the police, whilst you say there are provisions under the Crimes Act which they can enforce, they are not doing so because they are not seeing that there are provisions in there?

Ms LO — I cannot speak on behalf of the police, but my clients come back to me and say, 'Look, the police don't feel that they can do anything about it because they say there is not very much that they can do. There is no sort of power in relation to that'. I am not suggesting that we make extra offences for this particular situation. Certainly for sexting as a whole, clearly there needs to be reform, but in terms of this one — —

Also, when there are situations where our clients have felt that they have had to engage in sexual relations as a way to stop the image from being released, there is another provision under the Crimes Act. It is section 57, which is that you cannot procure sexual penetration by threat. And that is there as well.

However, what we are talking about here as well is the young demographic. I am loath to say that more people should get charged necessarily — that is not what the Legal Centre stands for — but it would be helpful if family violence liaison officers in particular were able to be educated on these particular sections so that when they go out and do their education to schools and young women who might be at risk of sexual harm and all that sort of thing, they know that this is a possibility, that this can happen.

Also quite frankly, as a duty lawyer on this side of the fence, when a family violence liaison officer is speaking with a defendant and mentions that, 'If you continue this type of behaviour, you might be subject to a criminal offence under stalking in the Crimes Act' or, 'You might be charged with an offence under section 57', there is more likelihood that the person will stop that behaviour. Our clients do not want their former partners charged; they want them to stop their behaviour and not threaten them anymore, and they want to get on with their lives. So it is all about abusive relationships and allowing people to have the means to disentangle themselves from that with the support of the wider community.

Mr NORTHE — You have made 12 recommendations there.

Ms LO — No, I didn't.

Mr NORTHE — Didn't you?

Ms LO — No. I think you are looking at the wrong one. I made very few. I made three, I think.

Mr NORTHE — Sorry. Then I will not ask that question. I think I have skipped the page.

Ms LO — But I do support that submission though — the one you are looking at.

Mr NORTHE — You have seen it, have you? Well, I might ask you that question then.

Ms LO — Yes. Okay. That is the National Youth and Children's submission.

Mr NORTHE — So under their recommendations, they mention ministerial order 184, in relation to recommendation 8, and it says:

Ministerial order 184 should be amended to allow for disciplinary action against students for online or mobile phone conduct that harms other students.

This will provide a lower level alternative to criminal proceedings and help schools to maintain a positive learning environment and protect their students from harm.

So my understanding is that two states — New South Wales and South Australia — include cyberbullying away from school as a grounds for disciplinary action because ministerial order 184, I guess, is not in place in Victoria. Do you know much about that?

Ms LO — No, I am so sorry. After I said I have read it — I am from Victoria, though, that is the problem.

Mr NORTHE — After all that preamble. I just thought it was interesting anyway.

Ms LO — Yes, it is a very good submission.

Mr NORTHE — I will go back to another question if I can.

Ms LO — Sure, of course.

Mr NORTHE — I am sure it was around your recommendation. It was around the notion of education.

Ms LO — Sure.

Mr NORTHE — We have heard a lot from other witnesses talking about an informative education program. In your experience, have you seen programs around that that actually do make a difference? Or do you have any suggested improvements to this committee about how we deal with that?

Ms LO — Coincidentally I have just come from giving a presentation at a forum across the road, which is at CASA — the Centre Against Sexual Assault — and it is about sexting and stuff. They have given me this particular poster. You would have seen it because I know they have sent it to you, and you would have seen the postcard campaign they have got, and they have also got these new posters that are aimed at younger people as well. They said they wanted to do that because postcards were for teenagers. What we also discussed at this CASA forum, which is something I had not thought of before but which makes a lot of sense, is that when we have our young clients come to us — so that is the legal young clients but also at this forum you have teachers, guidance officers, all sorts of people — no young person uses the word ‘sexting’.

Mr NORTHE — No.

Ms LO — In fact it is probably a very dorky phrase for young people. So my recommendation is: do not use the word sexting because they do not seem to associate with it. I was thinking back to my clients. They use actual descriptions, so they say, ‘Made a video’, ‘Took a photo’, ‘Yes, I was naked’. I cannot give you a phrase for it, but sexting certainly does not seem to be hitting the mark.

Mr NORTHE — So there is a challenge for journalists — to come up with something that encapsulates the whole issue in one or two words.

Ms LO — That is right.

Mrs PETROVICH — We do not want to make it trendy. We just want to make things safe.

Ms LO — No. That is right. What you also want, though, is to make it understood, and they do not seem to. I spoke to a young woman who had agreed to make a video of herself but sort of had been coerced to do that, and then sent it to her boyfriend. I said to her, ‘You know, sexting is not a great thing’ and she did not even know what I was talking about when it came to that, so I had to take it away from that language.

The CHAIR — Can the crimes family violence legislation only be used when there is a course of conduct?

Ms LO — No, that is the stalking legislation. With the crimes family violence you can have one incident.

The CHAIR — And where these types of issues come up, in your experience do orders prevent or are they effective in preventing or encouraging someone to desist from the threats or the behaviour?

Ms LO — They might in some circumstances, but my argument is that it depends on that. They are civil orders, they are not criminal, so they are only criminal once they are breached. In order for the police to be able to prosecute that, the young person who has the order needs to inform the police that it has been breached. If we go back to the situation where they do not even want to put it in the application and then they find out that the image has already been released on Facebook after a period of time where it has been threatened that the release would happen, they then have to go to the police and say, ‘This is what happened’, and my young lady clients do not want to do that.

The CHAIR — The police gave us evidence today that they try to avoid people who engage in this behaviour coming into the criminal system, so they do not charge them with child pornography; they try to divert them or caution them. Given that in the legislation you have referred to there are civil orders, do you think that could be a way of bringing the offenders to the attention of the courts but without wrecking their lives? In effect it would give them a second chance: ‘You have to desist from this behaviour under this legislation, but if you keep doing it, then there are criminal penalties’.

Ms LO — Yes, it would. I completely agree that the child pornography offences should not apply in relation to these circumstances. When I refer to the criminal offences that are already there, I am not saying that people should be charged necessarily; it is just that I think these offences are available. If it is a situation where the people are made aware that these offences are available and that they might be at risk of being charged under these offences, then I think it is an education campaign about that. I do not want more people having criminal

records against them at all. It is more about being aware that we already have offences. Maybe they could be strengthened, but we definitely already have them.

In terms of family violence as well, having a threat of an image being released when there has already been an abusive relationship further entrenches the family violence. At the stage when it does go to getting a family violence order, immense harm has already been done, and that harm continues to be done with the idea that there is this image hanging over a young woman's head, as well as the threat of the image being released. I do not know if this is the role of the parliamentary inquiry, but some sort of shift in parents being made aware that this is going to continue happening, and if there is some sort of campaign that you support your children if this is happening. Thinking about my clients, it is possibly more likely then that they will be able to disclose that. From my point of view, if they are able to put it in an application without fear that it is going to implicate them in any way, then perhaps it will be a better result.

Mrs PETROVICH — Is this worse in some cultural or religious groups than others?

Ms LO — Not that we have seen. All the ones that we have seen — and when I say that, we have less than 10; I have only been in the workplace for less than 12 months though — have been of non-ethnic origin. They have not identified themselves to be of any particular ethnicity.

Mrs PETROVICH — So there is no requirement to ensure our message is across language?

Ms LO — Not that I have seen. I think it would always be good to in Victoria, but I cannot narrow it to any — —

Mrs PETROVICH — In our multicultural society.

Ms LO — Of course, but I cannot point to any community that might require more education than others.

Mrs PETROVICH — Okay. So it is a common problem.

Ms LO — I think it is.

Mr NORTHE — It is an interesting observation about parents — and this is a very general comment — the majority of parents probably would not understand the impacts of the activities of their children in this space.

Ms LO — Absolutely.

Mr NORTHE — And the consequences potentially that might occur.

Ms LO — There is just one thing I have not put in my submission. I hope it is okay for me to bring it up, and I am sure you have thought about it anyway. It is about when considering law reform in this area to look at the intent of somebody when they are sending the image. In regard to requesting the image, creating the image and sharing the image the intent may be quite innocent, but when it is about distributing the image to third parties I would recommend that you look at perhaps what the intent of that person is. If it is a malicious intent, then there should be legislation to protect the victim in that regard.

The CHAIR — Do you think some new offences should be created for the secondary dissemination of the images?

Ms LO — Yes, including having special regard to the intent of that dissemination.

The CHAIR — Does the intent make any difference, though, insofar as the impact on the victim goes?

Ms LO — No. It can sometimes. I think certainly harm is caused either way, so I think there should be some sort of acknowledgement of that. But in our family violence situations when it has been deliberately intended to humiliate somebody as a way of trying to get back at them or to punish them for leaving a relationship, that is really malicious and horrible behaviour. Certainly thoughtless behaviour also does cause harm, but I would argue that when there is real malice behind it, it should be recognised as that as well, because that is what criminal law also provides: it does look at the intent of people when they are charged with certain offences.

The CHAIR — I think it is a very interesting idea, Belinda. I think a lot of parents in particular obviously want to protect their kids but they are also cognisant of the situation of the person who has distributed the images — they do not want to totally wreck their lives forever.

Ms LO — Yes.

The CHAIR — This is a way whereby, without going to the police, they can take some pretty assertive action, which would haul the kid before the courts and which would likely stop any further dissemination in the future. It would be a good idea to consider your information in our report and make appropriate recommendations.

Ms LO — Thank you.

The CHAIR — Thank you very much for coming in.

Ms LO — No, thank you.

Committee adjourned.