

Law Reform Committee

Inquiry into sexting

May 2013



Inquiry into sexting

Report of the Law Reform Committee for the Inquiry into Sexting

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Committee Members

This Inquiry was conducted during the term of the 57th Parliament.

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The Law Reform Committee

The Victorian Parliament Law Reform Committee is constituted under the *Parliamentary Committees Act 2003*, as amended.

The Committee comprises five members of Parliament drawn from both houses and all parties.

The functions of the Law Reform Committee are, if so required or permitted under this Act, to inquire into, consider and report to the Parliament on any proposal, matter or thing concerned with —

- a) legal, constitutional or parliamentary reform
- b) the administration of justice
- c) law reform.

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Terms of Reference

Received from the Legislative Assembly on 1 September 2011.

That, under s 33 of the *Parliamentary Committees Act 2003*, an inquiry into the creating, sharing, sending or posting of sexually explicit messages or images via the internet, mobile phones or other electronic devices by people, especially young people, (known as 'sexting') be referred to the Law Reform Committee for consideration and report no later than 30 June 2012^{*}, including:

- (1) the incidence, prevalence and nature of sexting in Victoria;
- (2) the extent and effectiveness of existing awareness and education about the social and legal effect and ramifications of sexting;
- (3) the appropriateness and adequacy of existing laws, especially criminal offences and the application of the sex offenders register, that may apply to the practice of sexting, particularly with regard to the creation, possession and transmission of sexually suggestive or explicit messages and images in circumstances where a person:
 - (a) creates, or consents to the creation of, the message or image for his or her own private use and/or the use of one or more other specific persons; or
 - (b) creates, or consents to the creation of, the message or image and without their knowledge and/or their consent the message or image is disseminated more broadly than the person intended.

^{*} The reporting date was extended to 30 December 2012 by resolution of the Legislative Assembly on 28 March 2012. The reporting date was further extended to 18 April 2013 by resolution of the Legislative Assembly on 12 December 2012. The reporting date was further extended to 30 May 2013 by resolution of the Legislative Assembly on 17 April 2013.

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Chair's Foreword

It is my pleasure to present the Law Reform Committee's final report on the Inquiry into Sexting.

Communications technologies are rapidly transforming the way people communicate, form relationships with one another, and find information. For many young people interaction through social media is as natural as face-to-face interaction or conversations over the telephone. The use of online technologies by adults is also becoming ubiquitous, at home or work, through computers and mobile devices.

As young people explore their emerging social selves through online media, some also explore their emerging sexual selves using these technologies. Some adults also make use of online media to express their sexuality. But when they do, the treatment of adults and young people under the law diverges significantly. Any explicit depiction of a minor is regarded as child pornography under the law, and young people commit an offence when they create, possess or distribute images of themselves or their peers.

In contrast to laws surrounding child pornography – which are so strong that they apply even to children who take pictures of themselves – laws protecting people from non-consensual distribution of explicit images are relatively weak. There are few practical options for legal recourse when an adult allows an explicit picture of another adult to 'go viral' by sending it to friends, or uploading it to a social media site, either for malicious reasons or out of disregard for the person depicted in the image.

In the Committee's opinion, the laws that currently apply to 'sexting' miss the mark – the law does not adequately recognise that sexting by young people is different to the sharing of images by paedophiles, and the law does not adequately recognise that real and significant harm is done to people of all ages when explicit images are distributed to third parties without consent.

The Committee has made two significant recommendations that it believes will address these shortcomings. First, the Committee recommends that an offence for non-consensual sexting be introduced in Victoria, to cover circumstances where a person intentionally distributes an intimate image of another person (or persons) without their consent (see page 152). Second, the Committee recommends that minors and young adults have a defence to child pornography offences, provided that they are able to engage in lawful sexual activity with the person depicted in an image (or other sexually explicit media), and that they are not more than two years older than any minor depicted in that image (see page 145).

Of course, the Committee recognises that the law can be a blunt instrument to deal with practices as diverse and complicated as people's interaction online and through mobile devices. Judicial discretion is crucial, as is improved education.

The prevalence of sexting within the community points to the need to educate people, and particularly young people, about cybersafety and

protecting their online selves. All of us also have a responsibility to determine what we want our new, online social world to be like.

We need to be careful that the online social world we create does not undermine our aspirations for a safe and civil society. The Committee heard, for example, that sexting practices by young people often reinforce gendered stereotypes, such as that girls who send intimate images are promiscuous, whereas boys who send intimate images are simply “having a bit of fun”. The Committee also heard that there is more social pressure on girls to make and send intimate images of themselves than boys. The behaviour of celebrities and media representations of men and women also contribute to gendered expectations surrounding sexting.

Some educational resources reinforce these stereotypes, by suggesting that when sexting ‘goes wrong’ – for example, when an intimate image of a girl is sent by her boyfriend to everyone in the school – the girl could have prevented it by not giving her boyfriend the image. However, the actual harm is done in this scenario when the boy distributes the image without her consent. The Committee recommends that media and educational resources about sexting focus more critically on appropriate behaviour by participants in sexting. Education that effectively blames the victim is unlikely to be effective when there is significant social and media pressure for young people to participate in sexting.

This has been a very thought-provoking and interesting Inquiry. The Committee has grappled with the same issues being experienced by jurisdictions around the world. I would like to thank all of the individuals and organisations that took the time and effort to provide the Committee with submissions, and to attend public and in-camera hearings. I would also like to thank the many individuals and organisations that hosted the Committee as it undertook international consultations on this important issue. Your views, advice and opinions were extremely useful to the Committee.

This is the last report that will be tabled by the current membership of the Law Reform Committee. I would like to commend all members of the Committee – Ms Jane Garrett MP (Deputy Chair), Mr Anthony Carbines MP, Mr Russell Northe MP, and Mrs Donna Petrovich MLC – on their contribution to this report and to the Committee’s activities in the 57th Parliament. Members of the Committee have adopted a remarkably collegial approach to the work of the Committee, and as a result the Committee has made a substantial bipartisan contribution to the work of the Parliament.

Finally, I would like to thank the Committee staff for their ongoing dedication to the work of the Committee and for their excellent contribution toward this Report: the Executive Officer, Dr Vaughn Koops; the Research Officer, Ms Amie Gordon; and the Administrative Officer, Ms Helen Ross-Soden.

Mr Clem Newton-Brown MP
Chair

Executive Summary

Chapter One: Introduction

The *Inquiry into Sexting* was sent to the Law Reform Committee by the Victorian Parliament following media reports that teens were being charged with child pornography offences when they sent explicit images of themselves or their peers by email or phone, or if they published them online. These media reports also raised concerns that teens charged with these offences would find themselves registered on the Sex Offenders Register.

For the purpose of this Inquiry, ‘sexting’ was defined by the Parliament as “the creating, sharing, sending or posting of sexually explicit messages or images via the internet, mobile phones or other electronic devices by people, especially young people”.

The principal issues considered by the Committee in this report are:

- whether child pornography charges are appropriate for minors who participate in sexting;
- the extent to which young people are listed on the Sex Offenders Register for sexting-related offences, and whether registration is appropriate for these offences; and
- whether there are adequate legal and other protections available to people who are affected by sexting-related incidents.

A number of reviews on matters related to sexting have been conducted in recent years, focusing either on the management of sexual offenders registers, or on the adequacy of laws surrounding the use of communications technologies, including telecommunications, and online surveillance and communications technologies.

The Committee received submissions from and conducted public hearings with a wide range of individuals and organisations during the course of this Inquiry, including individuals affected by sexting, academics, police, legal aid organisations, the judiciary, youth support services, community organisations, and education sector representatives.

Chapter Two: Sexting: nature, incidence and prevalence

Sexting may occur on a wide range of media, including text-only messages, images, or videos, and may encompass a wide range of behaviours. These may include consensual and non-consensual distribution, and criminal or non-criminal acts.

For this Inquiry the Committee focused primarily on sexting involving images. While sexting can involve text-only communication, in most cases the potential for greatest harm is likely to arise from the transmission of images. In the context of sexting, images of minors are likely to be considered child pornography under current Victorian law, and so are likely

to have the most significant deleterious legal consequences for young people.

Apart from the legal repercussions of sexting by young people, the greatest harms that are likely to arise from sexting occur with the non-consensual distribution of sexting images. Typically this occurs when a person who obtained an image from another person with their consent sends that image on to other people without consent.

Participation rates in sexting by young people in Australia are uncertain. Some surveys suggest that up to 40 per cent of young girls have been asked to send naked or semi-naked images of themselves, while others report that these requests are far less frequent, with one survey finding just 7.3 per cent of young girls had received such requests. Anecdotal evidence suggests that sexting is not uncommon.

The Committee heard that a range of factors influence young people's participation in sexting, including the availability of technology, the desire to initiate or maintain intimate relationships, peer pressure, or simply as a response to a request. The Committee also heard that there are gender differences in sexting, and that there appears to be greater pressure on girls to participate in sexting, and greater repercussions for girls when sexting messages 'go viral'.

Chapter Three: Education about sexting

The Committee received evidence suggesting that most young people are unaware of the potential legal repercussions from participating in sexting. Evidence suggests that most young people do not believe consensual sexting between peers should be a criminal offence.

There are a number of barriers to education for young people about sexting. These include: that young people may be developmentally less able to make informed decisions about their personal safety; that many young people do not regard sexting as inherently risky; that sexting is regarded as an unremarkable social practice; and that popular representations of men and women's behaviours promote sexting practices.

While a number of programs are currently promoted through the Victorian education system, there are opportunities to improve sexting education and cybersafety education more generally in the school curriculum. It is important, however, to ensure that sexting education does not reinforce and embed gender stereotypes. This could be achieved by ensuring that education about sexting focuses on the appropriateness of the behaviour of people who distribute sexting images without consent, rather than suggesting that the person depicted in the sexting image is responsible for the harms she or he suffers.

Chapter Four: Sexting and the criminal law

Child pornography laws have developed over time to cover a wide range of images and texts involving minors. Penalties associated with child pornography offences have also increased significantly over recent decades. In 2004 child pornography laws were altered to include images of people aged 16 and 17 years old, which has created an anomalous situation in which the age of consent does not correlate with child pornography offences. This means that while it is lawful for a 16- or 17-year-old to engage in sexual activity, it is unlawful for an image to be captured of that sexual activity.

A range of criminal offences can currently be applied to sexting, depending on the circumstances in which the sexting occurs. For young people, child pornography offences may apply. Commonwealth criminal legislation, both for child pornography and for using a carriage service to menace, harass, or cause offence, may also apply. Sexting may also, depending on the circumstances, breach laws surrounding the use of surveillance devices, and laws relating to coercive offences, such as stalking and blackmail.

Chapter Five: Young people and the criminal justice system

Generally, child pornography offences are applicable to sexting by young people. Police are able to exercise discretion when choosing how to deal with specific sexting incidents, and are able to issue cautions to minors. There are limits on the capacity of police to offer cautions, however, determined by policies outlined in the Victoria Police Manual. These include that cautions can only be offered in relation to sexual offences in exceptional circumstances, and that police will not ordinarily offer a second caution to an offender.

Diversion may also be offered to offenders for sexting-related offences, although the Committee heard that police informants may be reluctant to offer diversion in some cases because of the seriousness of child pornography offences. The Committee recommends that Victoria Police review its policies to examine whether, in certain circumstances, diversion could be offered for sexting-related offences where there is no evidence of exploitative behaviour by the offender.

Chapter Six: Appropriateness and adequacy of criminal laws

There are some anomalies in criminal law where it is lawful for minors aged 16 and 17 to engage in sexual activity, but it is illegal for those minors to obtain images of this activity.

The Committee also notes that there are currently defences available for the possession of child pornography: where the minor, or one of the minors, depicted in the image is the accused; and when the person who made, took, or was given the image was not more than two years older

than the minor depicted in it at the time. While these defences cover the possession of child pornography, they do not cover the production, invitation to produce, or transmission of images of a minor.

The majority of submissions and public evidence received by the Committee during the course of the Inquiry considered current legislation to be inadequate. Many suggested that consensual sexting between young people should be decriminalised, and most argued that child pornography offences for this behaviour were inappropriate.

The Committee proposes that new defences be made available to child pornography offences, so that young people who possess or distribute sexual images or other media of their peers are not liable to prosecution under child pornography laws in certain circumstances. These defences will not apply, for example, where the age difference between the person who possesses the image or media and the person depicted in it is greater than two years.

However, the Committee recognises that the distribution of intimate images and media without consent is a serious matter, whether the person depicted in the image or media is a minor or an adult. For this reason, and to complement defences to child pornography offences, the Committee recommends that a new criminal offence for non-consensual sexting be introduced.

Chapter Seven: Non-criminal law and sexting

A range of non-criminal laws may also apply to sexting, including copyright law, breach of confidence, intentional infliction of harm, and defamation. However, in general, these laws do not provide effective redress for circumstances where harm is done through the distribution of sexting images or media without the consent of the person depicted in that image or media.

A number of reports have considered the adequacy of current laws to deal with issues arising from the misuse of images and other media that have been obtained without consent, or distributed without consent. The Victorian Law Reform Commission, New South Wales Law Reform Commission, and Australian Law Reform Commission have all proposed the introduction of a statutory cause of action for invasions of privacy. While a statutory cause of action for invasion of privacy would apply to a greater set of circumstances than only those surrounding sexting, the Committee recommends that proposals by the Victorian Law Reform Commission be supported.

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Recommendation 4: That the Victorian Government ensure that educational and media campaigns directed toward sexting focus on the appropriateness of the behaviour of people who distribute intimate images or media without consent, rather than on the person who initially creates the intimate images or media.	71
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Recommendation 12: That the Victorian Government consider introducing legislation to create a statutory cause of action for invasion of privacy by the misuse of private information, following recommendations 23, 25, 27, and 29 to 33 of the Victorian Law Reform Commission’s *Surveillance in Public Places: Final Report 18 (2010)*. 188

Recommendation 13: That the Victorian Government consider creating a Digital Communications Tribunal, either as a stand-alone body or as a ‘list’ within the Victorian Civil and Administrative Tribunal, to deal with complaints about harmful digital communications. Development of the Digital Communications Tribunal should be informed by the New Zealand Law Commission’s proposal for a Communications Tribunal. 201

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List of Abbreviations

ACER	Australian Council of Educational Research
ACL	Australian Christian Lobby
ACMA	Australian Communications and Media Authority
ALRC	Australian Law Reform Commission
CASA	Centre Against Sexual Assault
CBA	Criminal Bar Association
CECV	Catholic Education Commission of Victoria
Charter	<i>Charter of Human Rights and Responsibilities Act 2006 (Vic)</i>
DEECD	Department of Education and Early Childhood Development
ECLC	Eastern Community Legal Centre
Gatehouse	Gatehouse Centre, Royal Children's Hospital
IIA	Internet Industry Association
JSC	Joint Select Committee on Cyber-Safety, Parliament of Australia
LIV	Law Institute of Victoria
LRCWA	Law Reform Commission of Western Australia
MRLSC	Macedon Ranges Local Safety Committee
NCYLC	National Children's and Youth Law Centre
NSWLRC	New South Wales Law Reform Commission
NZLC	New Zealand Law Commission
Oasis Hunter	Salvation Army Oasis Hunter
OCSC	Office of the Child Safety Commissioner
OPP	Office of Public Prosecutions
OVPC	Office of the Victorian Privacy Commissioner
RANZCP	Royal Australian and New Zealand College of Psychiatrists
SAC	Sentencing Advisory Council
SCLJ	Standing Council on Law and Justice (the successor body to the Standing Committee of Attorneys-General (SCAG))
UNCROC	United Nations <i>Convention on the Rights of the Child</i>
VCAT	Victorian Civil and Administrative Tribunal
VEOHRC	Victorian Equal Opportunity and Human Rights Commission
VLA	Victoria Legal Aid
VLRC	Victorian Law Reform Commission
WHG	Women's Health Grampians
WHW	Women's Health West

Chapter One: Introduction

On 1 September 2011, the Legislative Assembly of the 57th Parliament passed a motion that the Law Reform Committee conduct an Inquiry into 'sexting' – defined for the purposes of the Inquiry as “the creating, sharing, sending or posting of sexually explicit messages or images via the internet, mobile phones or other electronic devices by people, especially young people”.

In particular, the Committee was asked to consider and report on:

- 1) the incidence, prevalence and nature of sexting in Victoria;
- 2) the extent and effectiveness of existing awareness and education about the social and legal effect and ramifications of sexting; and
- 3) the appropriateness and adequacy of existing laws, especially criminal offences and the application of the sex offenders register, that may apply to the practice of sexting, particularly with regard to the creation, possession and transmission of sexually suggestive or explicit messages and images in circumstances where a person:
 - a) creates, or consents to the creation of, the message or image for his or her own private use and/or the use of one or more other specific persons; or
 - b) creates, or consents to the creation of, the message or image and without their knowledge and/or their consent the message or image is disseminated more broadly than the person intended.

The Committee was asked to report by no later than 30 June 2012. By resolution of the Legislative Assembly on 28 March 2012, the reporting date was extended to 30 December 2012. The reporting date was further extended to 18 April 2013 by resolution of the Legislative Assembly on 12 December 2012, and to 30 May 2013 by resolution of the Legislative Assembly on 18 April 2013.

1.1 Background

The topic of sexting, particularly by young people, has become an issue of national, and international, interest and concern over the past few years. With the advent of smartphones and the increasing take-up of technology by teenagers and young people, the intersection between sex and

technology has widened, with technology playing an increasing role in young people's exploration and expression of their sexuality.

1.1.1 The origins of sexting

The phenomenon of sexting is relatively new. One of the earliest appearances of the term 'sexting' was in July 2005, in an article in the Sydney newspaper *The Daily Telegraph* in reference to Australian cricketer Shane Warne sending explicitly-worded text messages to women.¹ While some mobile phones had camera capabilities at this time, the capturing and sending of photographs via mobile phone did not become commonplace until several years later.

Virtually all mobile phones sold in Australia now can be used to access the internet, and have in-built high-resolution cameras. Apple, Samsung, HTC, Nokia and others have all released smartphones with video recording, messaging, email and internet capabilities. In a matter of seconds, a person using a smartphone can record a photograph or a short film, upload the image to a social networking site, and 'tag' a person in the image.

The meaning of the term 'sexting' has evolved concurrently with the evolution of mobile phones and their usage. While 'sexting' referred to text-based messages with sexual content when it first came into usage, it is now commonly understood to refer to the sending of explicit images.

'Sexting' appeared for the first time in the fifth edition of the Macquarie Dictionary, which was published in 2009. It is defined there as "the receiving or sending of a sexually explicit photograph or video clip on a mobile phone."² The dictionary entry also notes that the term sexting is a blend of 'sex' and 'texting'.

1.1.2 Concerns leading to the Inquiry

In July and August 2011, a number of feature articles on the topic of sexting appeared in *The Age* newspaper, drawing attention to the prevalence of sexting in high schools in Victoria, and noting the serious potential consequences both for the young persons photographed, and for those who receive or disseminate such photographs.

Two articles were published on 10 July 2011. One recounted the story of a 13-year-old girl, "Zoey", who sent a photograph of herself from the neck down to a boy a year older than her, who had been asking her by text message for an explicit photograph for several weeks. The article

¹ Oliver James, 'He's clean bowled by a sick need for pleasure', *Daily Telegraph*, 2 July 2005. Part of the article reads: "A telling aspect of his sexual farragoes is the use of his mobile for sexting (texting). Although "kiss and sell" newspaper accounts must always be treated with caution, there is a suspiciously similar theme to the sexts. Three women, from different continents, have accused him of harassing them with unwanted phone calls or sexts..."

² Macquarie Dictionary Publishers Pty Ltd, *Macquarie Concise Dictionary, 5th Edition*, Macquarie Dictionary Publishers Pty Ltd, Sydney, 2009.

described what sexting was, and the possible consequences for those who engage in sexting:

[Susan McLean, a cybersafety consultant] identifies a range of sexting scenarios. There are the cases like Zoey's where pressure is applied, and girls who send shots to their teenage boyfriends "because I love him". Commonly, there is the "party aftermath", the wash-up from a drunken night when girls either lose their inhibitions and pose for racy pictures or pass out and have no say in the pictures that are taken.

Sometimes the pictures stay with the boy they were meant for, but often they go viral and are circulated around schools, sporting clubs and peer groups.

While only a few teens send pictures of themselves, many others are "bystanders" who forward them on. "They all know it's happening, even the ones who think it's disgusting know about it," McLean says.

For the girls, the impact is often devastating. "It's social suicide," says McLean. "You cannot underestimate the social and emotional impact on a young person."

...

The old double standards hold true, too. Girls caught up in sexting are labelled as sluts; boys are studs. But while the social consequences are different, the legal consequences are identical: sexting involving those under the age of 18 is a crime under child pornography laws.

A girl who takes a naked picture of herself can be charged with manufacturing child pornography; if she sends it to someone she can be charged with transmission of child pornography; the recipient can be charged with possession of child pornography.³

The other article from 10 July 2011 commented on the prevalence of sexting in Victorian schools, and suggested that responses to sexting incidents were varied:

Police and schools are struggling to cope with a surge in teenage "sexting", forcing senior police to commission guidelines on how to respond to new cases.

Almost every Victorian secondary school has been faced with at least one incident involving graphic pictures of students being circulated on mobile phones or the internet, cyber safety experts and teachers have told *The Sunday Age*.

...

Under Victorian child pornography laws, it is a crime for anyone to transmit or possess naked pictures of a person aged under 18. But recent incidents show that while police have the power to charge or caution those under 18 who transmit sexts of themselves or of their peers, they do not respond consistently.

³ Nicole Brady, 'Scourge of the school yard: how one rash moment can ruin a young life', *Sunday Age*, 10 July 2011.

In one case, a boy and a girl, both 17, from the eastern suburbs made a sex tape and sent it to their friends. Both were charged under child pornography laws, and then given formal police cautions.

In another case, police questioned a 16-year-old girl who sent naked pictures of herself to her 19-year-old boyfriend, but did not charge or caution them.

Few cases have gone to the Children's Court, indicating schools and police are dealing with sexting themselves. But schools are struggling to cope with the rise in sexting and, with no guidelines, are dealing with it on an ad hoc basis.

Teachers from a range of Melbourne government and private secondary schools have told *The Sunday Age* they know of cases in which naked or topless photographs of students have been shared throughout a year level or the entire school.⁴

A series of articles appeared in newspapers over several months. One noted that some Victorian teenagers who have engaged in sexting have been listed on the Sex Offenders Register as a result.⁵ An editorial also appeared in the 24 July 2011 edition of *The Sunday Age*, suggesting that educators and the law were struggling to keep up with the phenomenon of sexting. Finally, on 15 August 2011, *The Sunday Age* reported the comments of a "senior Victorian magistrate", who had presided over one of the cases reported by *The Sunday Age* in which a young man received sexting messages from a friend, and was listed on the Sex Offenders Register as a consequence:

A senior Victorian magistrate who presided over a case in which a youth pleaded guilty to teenage sexting offences has condemned as "so unjust" the mandatory laws that meant the young man was registered as a sex offender.

The magistrate, who works in country Victoria, said the lack of judicial discretion in such cases meant severe consequences for young people who posed no threat to society and were often guilty of little more than naivety.

...

"These people shouldn't be regarded as sex offenders. It's going beyond the pale in relation to the imposition of long-term penalties which are not judicial penalties, they're not fines or community-based orders or even sex offender treatment programs. This is a limitation on what a person can and can't do for the next eight years of their life, for God's sake," the magistrate said.

The magistrate said that in the sexting cases coming before him in court the offenders "have a minimal amount of culpability attached to them and a minimal amount of danger to any other person in the community. That's when it becomes so unjust."

⁴ Nicole Brady, 'Teen sexting: it's illegal, but it's in every high school', *Sunday Age*, 10 July 2011.

⁵ Nicole Brady, 'Sexting' youths placed on sex offenders register', *Sunday Age*, 24 July 2011.

He called for magistrates and judges to be given discretion over who ought to be listed as a sex offender. "We're the ones that see the material, we hear the pleas from the legal practitioners, we get to hear the prior convictions if there are any, we get to see the actual participants – the people who have been involved in this sort of activity," he said.⁶

Following the *Sunday Age's* series of reports on sexting, the state Attorney-General, Hon. Robert Clark MP, announced in August 2011 that the state government would launch an inquiry into sexting, to investigate whether the law required amending to respond more appropriately to the phenomenon of teen sexting.

According to the *Sunday Age*, the Attorney-General said that sexting raised serious issues for victims and offenders, and the law needed to catch up with changes in behaviour and technology.⁷ The Attorney-General indicated that the proposed inquiry should "examine all aspects of the phenomenon of sexting: its prevalence, its nature, its implications and its consequences."⁸ The Attorney-General also indicated that whether or not sanctions should apply to conduct involving sexting was an open question, and that the inquiry would consider the issue of sex offender registration:

In the cases of youths who were registered as sex offenders after sexting offences, Mr Clark said: "The implications of the sex offender register are a key part of what we would expect the inquiry to look at. This seems to be an example of where the law can apply in a context which was not in mind at the time the law was enacted and which may well be having consequences that the community would not think were appropriate or intended."⁹

On 1 September 2011, the inquiry was referred to the Law Reform Committee.

1.2 Context of the Inquiry

1.2.1 Major concerns for the Inquiry

As raised in the newspaper articles discussed above, a major concern with regard to young people engaging in sexting is the possibility that child pornography offences can apply to young people who create, send, receive or possess sexting messages. A person who is convicted of a child pornography offence faces mandatory registration on the Sex Offenders Register if they were over the age of 18 at the time they committed the offence.¹⁰

⁶ Nicole Brady, 'Sexting punishment unjust: magistrate', *Sunday Age*, 14 August 2011.

⁷ Nicole Brady, 'Inquiry ordered as law lags behind teen sexting', *Sunday Age*, 21 August 2011.

⁸ *ibid.*

⁹ *ibid.*

¹⁰ If a person was younger than 18 at the time they committed the offence, the court has the discretion to include that person on the sex offenders register: see *Sex Offenders Registration Act 2004* (Vic), sections 11(2), 11(2A).

Inclusion on the Sex Offenders Register has serious consequences. A person who is listed on the register must provide detailed personal information to Victoria Police when they are initially registered¹¹ and on an annual basis thereafter.¹² A person who is a registered sex offender is also prohibited from working in any “child-related employment”,¹³ which includes a broad range of occupations and volunteer undertakings such as working in schools, paediatric wards of hospitals, and clubs and associations that involve children.¹⁴ A registered sex offender must also report to the police any changes in their personal details, including any regular, unsupervised contact that they have with children.¹⁵

Another major area of concern is the devastating consequences that can result from an intimate image ‘going viral’ and spreading throughout a community, whether or not the image relates to children. There have been several high-profile incidents of sexting messages being widely disseminated in Victoria, and there is concern about the impact these incidents can have on the victims, who are generally young women. The Committee examines the nature of sexting in Chapter Two, and considers in Chapter Six whether there should be specific criminal consequences for those who intentionally disseminate an intimate image of someone else.

1.2.2 Other relevant Inquiries

A number of state and federal inquiries have been undertaken recently on matters that are relevant to this Inquiry.

The Victorian Law Reform Commission (VLRC) completed a review of Victoria’s sex offenders registration scheme in 2011, and made several recommendations relating to which offenders should be listed on the register.

The VLRC also released a report on surveillance in public places, which discusses, among other things, the possibility of a statutory cause of action for a breach of privacy. The New South Wales Law Reform Commission (NSWLRC) and the Australian Law Reform Commission (ALRC) have also released reports recommending that a statutory cause of action should be created for breaches of privacy.

There have also been two relevant federal Parliamentary inquiries, with a Joint Select Committee undertaking an inquiry into cybersafety, and a Senate Committee reviewing a bill that proposed to amend Commonwealth criminal legislation relating to sexual offences against children.

In addition, the New Zealand Law Commission (NZLC) recently released a Ministerial Briefing Paper regarding harmful digital communications, which touches on several issues relating to sexting.

¹¹ *ibid.*, 12(1), 14(1).

¹² *ibid.*, 16.

¹³ *ibid.*, 68(1).

¹⁴ *ibid.*, 67(1).

¹⁵ *ibid.*, 17.

Each of these inquiries is briefly described below.

1.2.2.1 VLRC report: Sex offenders registration

In February 2011, a report from the Victorian Ombudsman raised concerns about the effectiveness of Victoria's sex offenders registration scheme.¹⁶ As a consequence, the Attorney-General requested that the VLRC review and report on the registration of sex offenders under the *Sex Offenders Registration Act 2004 (Vic)*.¹⁷ The purpose of the review was "to ensure that the legislative arrangements for the collection and use of information about registered sex offenders enable law enforcement and child protection agencies to assess the risk of re-offending, prevent further offences, and protect children from harm."¹⁸

The VLRC delivered its final report on Victoria's sex offenders registration scheme in December 2011.¹⁹ The report focused on how to strengthen Victoria's sex offenders registration scheme to play a more effective role in protecting children from sexual abuse.²⁰ The VLRC found that because the current registration scheme does not discriminate between dangerous offenders and those who pose no risk of further harm, the value of the information on the register is likely to decline as the number of registrations continues to increase.²¹

The VLRC observed that the current registration scheme involving automatic registration for adult sex offenders is unsustainable, and recommended against mandatory registration for adults who are convicted of sex offences.²² The VLRC also recommended against the registration of minors in all but exceptional circumstances.²³ The VLRC recommended establishing a panel of experts to review the circumstances of each person currently listed on the sex offender register, to determine how they should be dealt with under the new scheme proposed by the VLRC.²⁴

The Law Reform Commission of Western Australia (LRCWA) also recently undertook a review of its sex offender registration legislation, releasing a report in January 2012,²⁵ and made recommendations similar to those made by the VLRC. The LRCWA and the VLRC reports are discussed in more detail in Chapter Six.

¹⁶ Ombudsman Victoria, *Whistleblowers Protection Act 2001: Investigation into the failure of agencies to manage registered sex offenders*, Ombudsman Victoria, Melbourne, Session 2010-11, Parliamentary Paper No. 9, 2011.

¹⁷ Victorian Law Reform Commission, *Sex offenders registration: Final report*, Melbourne, 2011, p. vi.

¹⁸ *ibid.*

¹⁹ *ibid.*

²⁰ *ibid.*, x.

²¹ *ibid.*, xii.

²² *ibid.*, 67-68.

²³ *ibid.*, 76-77.

²⁴ *ibid.*, 153-157.

²⁵ Law Reform Commission of Western Australia, *Community Protection (Offender Reporting) Act 2004*, Perth, Final Report, Project No. 101, 2012.

1.2.2.2 VLRC report: Surveillance in public places

One form of sexting that the Committee considered during this Inquiry is the use of technology to record another person in a sexual context without their knowledge, or without their consent – for example, using a hidden camera to record a person engaging in sexual activity, or engaging in ‘up-skirting’ conduct.

Relevant to this aspect of the Inquiry, in May 2010 the VLRC released a report on surveillance in public places.²⁶ In this report, the VLRC noted that surveillance devices have become increasingly affordable, sophisticated, and easily available. The VLRC considered a range of matters surrounding the use of surveillance devices, and how to ensure that the use of surveillance devices does not infringe on the rights of the Victorian public.²⁷

The report’s recommendations included:

- clarifying, modernising and strengthening the *Surveillance Devices Act 1999* (Vic), including a new offence dealing with improper use of a surveillance device, such as “happy slapping”,²⁸
- prohibiting surveillance in public toilets and change rooms;
- prohibiting a person recording an activity or conversation which they are part of without the consent of the other parties;
- broadening the role of the Victorian Privacy Commissioner to include regulation of public place surveillance; and
- creating two new causes of action (the right to sue) dealing with serious invasions of privacy.²⁹

While the VLRC’s report focused on surveillance in public places, its recommendations regarding causes of action for serious invasions of privacy are not necessarily limited to conduct occurring in a public place, or involving the use of a surveillance device.³⁰

To the Committee’s knowledge, there has not as yet been any progress towards implementing any of the VLRC’s recommendations.

The Committee considers the VLRC’s report and recommendations, as well as the NSWLRC and ALRC reports on privacy, further in Chapter Seven of this report.

²⁶ Victorian Law Reform Commission, *Surveillance in public places*, Melbourne, Final Report 18, 2010.

²⁷ *ibid.*, 11.

²⁸ “Happy slapping” refers to the practice of making audio and/or video recordings of assaults in public places.

²⁹ Victorian Law Reform Commission, ‘Commission recommends modernising surveillance laws’, viewed 10 January 2013, <www.lawreform.vic.gov.au>.

³⁰ Victorian Law Reform Commission, *Surveillance in public places*, Melbourne, Final Report 18, 2010, p. 14.

1.2.2.3 Joint Select Committee report: Cybersafety

In March 2010, the Australian Parliament established a Joint Select Committee on Cyber-Safety, as a response to community concerns about the impact of threats to young people arising from the online environment.³¹ The terms of reference required the Joint Select Committee to undertake a broad inquiry into the online environment in which young Australians engage, and to consider cybersafety and cyberbullying issues affecting young people.³²

The Joint Select Committee tabled its inquiry report – *High-Wire Act: Cyber-Safety and the Young* – in June 2011.³³ Sexting was one of the many matters considered and reported on by the Joint Select Committee. The report briefly noted some statistics about the prevalence of sexting, and commented on some of the potential consequences (including long-term consequences) for those who engage in sexting.³⁴

The report did not make any recommendations specifically relating to sexting.³⁵ However, several of the recommendations are relevant to cybersafety more broadly, particularly cybersafety education. The Federal Government provided its response to the report in December 2011.³⁶

As far as the Committee is aware, none of the Joint Select Committee's recommendations have yet been implemented. Many of the report's recommendations were accepted by the Government "in principle", pending the outcomes of a Cyber White Paper process. The Government had announced in early June 2011³⁷ that it would develop a Cyber White Paper, examining "the full spectrum of cyber issues such as better coordination of awareness raising activities, development of skills, more centralised reporting of cyber incidents and a more coherent approach to cyber education".³⁸ The Cyber White Paper was to provide "a long-term strategy for Australia's engagement in cyberspace [to] ensure we can take full advantage of the opportunities that are available, while at the same time ensuring the risks can be managed".³⁹ The Cyber White Paper was intended to be released in the first half of 2012,⁴⁰ but has not yet been completed. In October 2012, it was reported that the scope of the paper

³¹ Joint Select Committee on Cyber-Safety, *High-wire act: cyber-safety and the young*, Parliament of the Commonwealth of Australia, Interim report, 2011, pp. 6, para. 1.13.

³² *ibid.*, xxii-xxiii.

³³ *ibid.*

³⁴ *ibid.*, 136-145.

³⁵ *ibid.*, xxvi-xxxii.

³⁶ Australian Government, *Government statement of response: Joint Select Committee on Cyber-Safety Interim report - High-wire act: cyber-safety and the young*, Commonwealth of Australia, 2011.

³⁷ Australian Government Department of the Prime Minister and Cabinet, 'Statement by the Secretary - 3 June 2011: Announcement of the Cyber White Paper', viewed 15 November 2012, <www.dpmc.gov.au>.

³⁸ Australian Government, *Government statement of response: Joint Select Committee on Cyber-Safety Interim report - High-wire act: cyber-safety and the young*, Commonwealth of Australia, 2011, p. 4.

³⁹ Australian Policy Online, 'Cyber White Paper: Inquiry on now, paper due mid-2012', viewed 12 April 2013, <<http://staging.apo.org.au/notice/cyber-white-paper-inquiry-now-paper-due-mid-2012>>.

⁴⁰ *ibid.*

had been significantly broadened – the paper has been renamed the “Digital White Paper”, and rather than being restricted to its original cyber-security agenda, the paper will now also encompass a high-level cloud computing strategy for both business and government.⁴¹ No release date for the Digital White Paper has yet been indicated.⁴²

In making its findings and recommendations regarding education around sexting, discussed in Chapter Three, the Committee considers and refers to the Joint Select Committee’s recommendations on cybersafety education.

1.2.2.4 Senate Committee report: Crimes Legislation Amendment (Sexual Offences Against Children) Bill 2010

On 4 February 2010, the Crimes Legislation Amendment (Sexual Offences Against Children) Bill 2010 (Cth) was referred to the Senate’s Legal and Constitutional Affairs Legislation Committee for inquiry and report.⁴³ The Bill proposed to amend several pieces of Commonwealth legislation, with the aim of ensuring a comprehensive regime of sexual offences against children, where those offences occur across or outside Australian jurisdictions (such as over the Internet or overseas).⁴⁴

Among other things, the Bill proposed to consolidate the existing Commonwealth child sex offences – relating to child sexual abuse and child pornography and child abuse material – and to create some new child sex offences.⁴⁵ During its inquiry into the Bill, the Senate Committee heard some concerns about the possible impacts of the child sexual offences regime in relation to sexting.⁴⁶

In its report, the Senate Committee recognised the potential for existing and proposed child sex offences to apply to young people who engage in sexting, and expressed concern in this regard:

... the committee notes that police and prosecutorial discretion is an important element of ensuring that the new and existing child sex offences will not operate to unduly capture young people who may be involved or participate in the practice of ‘sexting’. While the committee acknowledges that the practice may be undesirable, it agrees with arguments that young people engaged in such behaviour should not be exposed to the grave consequences and stigma that attach to allegations of, and convictions for, child sexual offences.⁴⁷

⁴¹ Julian Bajkowski, ‘Conroy seizes Cyber whitepaper’, 29 October 2012, viewed 15 November 2012, <www.governmentnews.com.au>.

⁴² As of May 2013, the Digital White Paper had a presence on twitter (https://twitter.com/Digital_WP), but the link to the relevant website from the twitter account was broken (<http://www.cyberwhitepaper.dpmc.gov.au/>).

⁴³ Legal and Constitutional Affairs Legislation Committee, *Crimes Legislation Amendment (Sexual Offences Against Children) Bill 2010 [Provisions]*, Parliament of the Commonwealth of Australia, 2010, p. 1.

⁴⁴ *ibid.*

⁴⁵ *ibid.*, 5.

⁴⁶ *ibid.*, 29-30.

⁴⁷ *ibid.*, 34, para. 3.55.

To reduce the risk of young people facing child sex offence charges for engaging in sexting, the Senate Committee recommended that the consent of the Attorney-General be required before proceedings could be commenced against a person under the age of 18 for a child sex offence under the Commonwealth legislation. This safeguard was already proposed in the Bill in relation to Division 272 (child sex offences outside Australia – i.e. child sex tourism), but not in relation to Division 273, which related to offences involving pornography material or child abuse material. The Senate Committee explained:

In light of the evidence provided in relation to sexting, the committee is inclined to favour calls for the discretion of the Attorney-General to be extended in relation to prosecutions of people under 18 years of age for child sex offences. This would mean that a young person could not be prosecuted for an offence under Division 272 (as already proposed) or Division 273, without the consent of the Attorney-General. The committee is of the view that the extension of this safeguard may ensure that behaviour which is not exploitative of, or harmful to, children is not captured by the child sex offence regime (particularly where that behaviour involves children themselves).⁴⁸

This recommendation was incorporated into the bill that was passed by the Commonwealth Parliament to become the *Crimes Legislation Amendment (Sexual Offences Against Children) Act 2010* (Cth) in March 2010.⁴⁹

1.2.2.5 NZLC report: Harmful digital communications

In August 2012, the NZLC released a Ministerial Briefing Paper, *Harmful Digital Communications: the adequacy of the current sanctions and remedies*.⁵⁰ The report was fast-tracked at the request of the responsible New Zealand Minister, as a consequence of rising concerns about cyberbullying and the ways in which abuses of technologies are contributing to serious issues for adolescents.⁵¹

This report addressed three questions:

- a) how to adapt [the] laws to ensure they are fit for purpose in the digital era;
- b) how to ensure these laws can be understood and accessed by ordinary citizens; and, critically
- c) how citizens can access meaningful remedies when they have experienced significant harm as a result of digital communication.⁵²

The NZLC's report dealt with cyberbullying broadly, considering all types of harmful digital communications. This included harmful sexting. Two of the NZLC's key recommendations were that:

⁴⁸ *ibid.*, 35, para. 3.56.

⁴⁹ See *Criminal Code Act 1995* (Cth), section 474.24C.

⁵⁰ New Zealand Law Commission, *Harmful digital communications: the adequacy of the current sanctions and remedies*, Wellington, Ministerial briefing paper, 2012.

⁵¹ *ibid.*, 5.

⁵² *ibid.*, 6.

- a new criminal offence tailored to digital communications should be created; and
- a new Communications Tribunal should be established to provide citizens with a speedy, efficient and cheap means to access remedies such as takedown orders and ‘cease and desist’ notices.⁵³

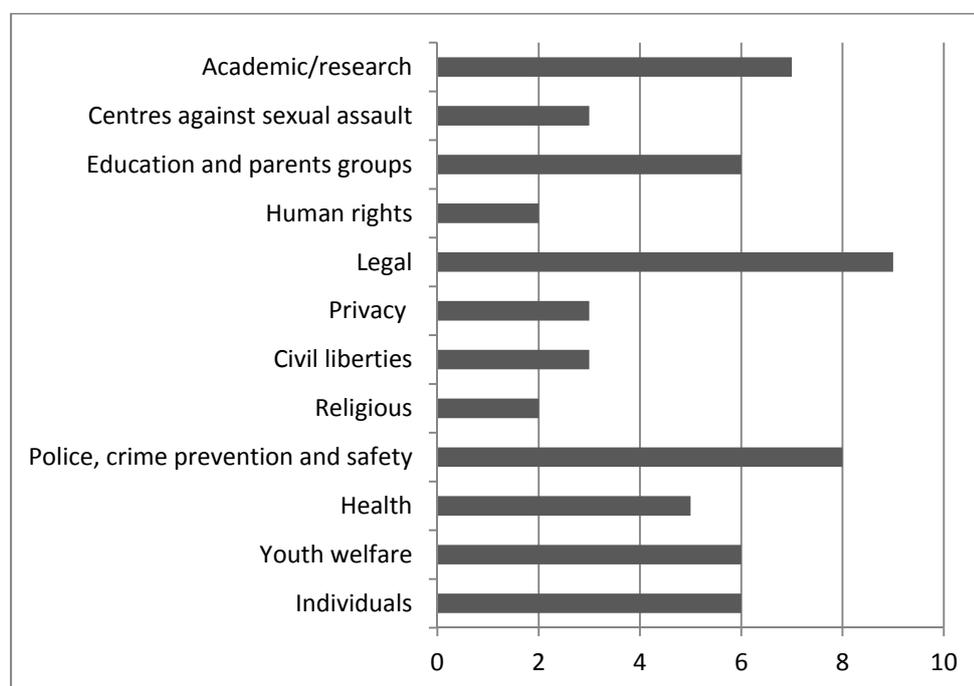
The Committee reviews the NZLC’s report further in the context of considering whether a specific criminal offence should be created for non-consensual sexting (Chapter Six), and in considering administrative mechanisms to allow sexted images to be removed from the internet (Chapter Seven).

1.3 Inquiry process

1.3.1 Submissions and public hearings

In May 2012, the Committee advertised the Inquiry’s Terms of Reference in Victorian and national newspapers and called for written submissions. The Committee received a total of 60 submissions (see Appendix One), from a range of individuals and organisations. Figure 1 provides a breakdown of the submissions received in terms of the main professional focus of the organisations and persons making the submissions.

Figure 1: Submissions to the Inquiry by type of organisation



The Committee convened six public hearings between September and December 2012. Details of the hearings are set out in Appendix Two. The

⁵³ *ibid.*, 7.

Committee heard evidence from a total of 45 witnesses, including 1 individual, and 44 witnesses representing 19 organisations. Witnesses included academics who have undertaken research into sexting and cyberbullying; representatives of organisations that provide legal advice or health services; and representatives of non-profit organisations, government departments and agencies, including representatives from Victoria Police and the Victorian Children's Court. The Committee considered evidence presented *in camera* as part of its Inquiry deliberations.

The Committee is grateful to the many individuals and organisations who contributed to this Inquiry by making written submissions and participating in the public hearings.

1.3.2 Study tour of Canada and the USA

From late October to early November 2012, the Committee undertook a study tour of parts of Canada and the United States of America.

In Canada the Committee visited Toronto and Ottawa, and in the USA the Committee travelled to New York, Washington DC and Los Angeles. During its investigations, the Committee consulted with a range of key stakeholders in academia, the public sector, law enforcement, and legal sectors. In total, the delegation met with 64 people representing 31 organisations while overseas.

A summary of the organisations and individuals with whom the Committee met is provided at Appendix Three.

Chapter Two: Sexting: nature, incidence and prevalence

In many respects, 'sexting' is an evolving term that encompasses a wide range of practices, motivations and behaviours:

Sexting episodes are very diverse and complex and cannot be categorized or generalized very easily. In some cases a youth takes pictures and sends them to an adult in what is an exploitative sexual relationship. In other cases, the taking and sending appears to be a feature of a developmentally appropriate adolescent romantic relationship. In still others, it may be hard to determine whether youth who exchange images are agreed about to what use the images may be put.⁵⁴

In this Chapter, the Committee discusses some characteristics of sexting, with a focus on peer-to-peer sexting by young people. The Committee examines the frequency of peer-to-peer sexting, explores motivations for sexting, and considers harms that can arise from sexting. The need for Australian research into sexting is also discussed.

2.1 The rise of connected technologies and social media

The emergence of sexting is associated with increased availability of diverse communication technologies, including mobile devices and social media and networking sites.⁵⁵ These media allow images and videos to be shared instantaneously, easily, and with many other people, each of whom can in turn share that material with others.

While many benefits arise from increased access to mobile and internet technologies, these technologies also have characteristics that can exacerbate the harms resulting from an intimate or sexual picture being taken and passed on to someone else. These include that:

- images can be sent anonymously via MMS (with the caller ID blocked) or email (from a fake account), and can be posted online anonymously, or using a pseudonym. The New Zealand Law Commission suggests that:

The ability to send anonymous texts and comment anonymously may have a disinhibiting effect on the communicator, disconnecting them

⁵⁴ Janis Wolak and David Finkelhor, *Sexting: a typology*, Crimes Against Children Research Centre, University of New Hampshire, Durham, 2011, p. 9. quoted by Amy Shields Dobson, Mary Lou Rasmussen and Danielle Tyson, *Submission no. 34*, 15 June 2012, p. 5.

⁵⁵ Victoria Legal Aid, *Submission no. 58*, 17 July 2012, p. 3.

from their victim and the consequences of their actions; while from the victim's perspective, the anonymity of the abuser can exacerbate the victim's sense of powerlessness.⁵⁶

- the ease and speed with which images can be created and shared creates the risk that images will 'go viral', with the potential for a large number of a person's peers and others to view the image. An image can easily spread rapidly through an entire school community, or multiple school communities.
- once digital information is created and shared, it is very difficult to retrieve or destroy. Images can survive on the internet for a long time after they are posted, and can resurface and cause further trauma to the person depicted. It can also be distressing for a person to not know how widely an image has spread, who has viewed it, and who may have downloaded or saved it.⁵⁷

These aspects of technology contribute to the dramatic, harmful and long-lasting consequences that can potentially result from sexting conduct.

2.1.1 Smartphone and social media use

2.1.1.1 Internet and social networking

Use of the internet and through it, social networking, is becoming increasingly ubiquitous among all age groups, and particularly among younger people. Children and young people regularly use the internet at school and at home. As children grow older, familiarity with and use of the internet and social networking websites tends to increase – younger children's exposure to the internet and social networking is typically through game-related websites, whereas from high school age children tend to become regular and proficient users of social networking services.⁵⁸

In 2010-11, 79 per cent of Australian households had access to the internet at home (up from 64% in 2006-07).⁵⁹ More households with children under 15 had access to the internet (93%) compared with other households (74%).⁶⁰ People aged 18 to 24 years were most likely to have accessed the internet in the past year, with 96 per cent accessing the internet in 2010-11.⁶¹

Social networking websites allow users to share personal and other information, develop relationships, and stay in contact with family and

⁵⁶ New Zealand Law Commission, *Harmful digital communications: the adequacy of the current sanctions and remedies*, Wellington, Ministerial briefing paper, 2012, p. 38.

⁵⁷ *ibid.*

⁵⁸ Australian Communications and Media Authority, *Click and connect: young Australians' use of online social media - 01: Qualitative research report*, Commonwealth of Australia, 2009, p. 5.

⁵⁹ Australian Bureau of Statistics, *8146.0 – Household use of information technology, Australia, 2010-11*, Commonwealth of Australia, 2011.

⁶⁰ *ibid.*

⁶¹ *ibid.*

friends. Social networking sites are characterised by free access, lack of geographical restrictions, and access from any internet-enabled device.⁶² Popular social networking sites include Facebook, Twitter, LinkedIn, Tumblr, YouTube and Pinterest. Use of social networking sites in Australia is widespread, particularly by young people aged 12 to 17 years (90% compared to 51% aged 8 to 11 years). By age 16 to 17 years, 97 per cent of young Australians use at least one social networking service.⁶³

2.1.1.2 Mobile phones, smartphones, and mobile internet access

Australia has one of the highest rates of mobile digital technology ownership and access, with the second highest smartphone usage by population density in the world (behind only Singapore).⁶⁴ In 2011-12, the total number of mobile phone services in Australia reached 30.2 million – approximately four mobile phone services to every three people.⁶⁵ People aged between 18 and 24 years have the highest level of mobile phone use, with 99 per cent using a mobile phone, and 74 per cent using a smartphone.⁶⁶ During the six months to May 2012, 51 per cent of Australian adults accessed the internet via their mobile phone handset.⁶⁷

Mobile phone and internet use by 14- to 17-year-olds is significant, and is likely to increase as these youths enter adulthood. In 2011-12, 43 per cent of youths in this age group had a smartphone, 83 per cent had use of a mobile phone, and 38 per cent accessed the internet through their mobile phone.⁶⁸ Over coming decades, it is likely that only very young people will have low rates of access to mobile phone, smartphone, and mobile internet technologies.

2.1.2 Examples of recent sexting incidents

A number of accounts of sexting incidents have been reported by Australian media over the last few years. Several sexting incidents involving young people have occurred in Victoria, including in Victorian schools, attracting significant media attention. In October 2012 the *Herald Sun* reported on a “sexting scandal” affecting a number of Melbourne schools:

More than 100 students from some of Melbourne's most prestigious schools have been caught up in a sexting scandal involving a 13-year-old girl.

⁶² Australian Communications and Media Authority, *Communications report 2010-11*, Commonwealth of Australia, 2011, p. 164.

⁶³ Australian Communications and Media Authority, *Click and connect: young Australians' use of online social media - 01: Qualitative research report*, Commonwealth of Australia, 2009, p. 8.

⁶⁴ Susan McLean, *Submission no. 12*, 13 June 2012, p. 2; The Alannah and Madeline Foundation, *Submission no. 42*, 18 June 2012, p. 5.

⁶⁵ Australian Communications and Media Authority, *Communications report 2011-12*, Commonwealth of Australia, Melbourne, 2012, p. 14.

⁶⁶ *ibid.*, 34.

⁶⁷ *ibid.*

⁶⁸ *ibid.*

Police and school authorities were alerted after the sexually explicit video of the girl went viral after she sent it to a male friend from another college.

Sources say teenage boys from at least seven elite schools have shared the video, as teachers and welfare staff battle to contain its spread.⁶⁹

Another case of a sext “gone viral” at a Geelong school was reported in December 2012:

Students from an elite Geelong private school have become embroiled in a ‘sexting’ scandal after an explicit image of a year 8 girl was spread among her classmates via text message.

The Geelong College contacted police around two months ago when staff at the \$20,000 per year school learned that the image had gone viral within a group of 13-14-year-old boys.⁷⁰

Social networking sites have also been used by teens to post and share intimate photographs. In late 2011, there were reports of a “sneaky hat” craze, where teenagers would take photographs of themselves naked but for a strategically placed hat, and would post the photos to a Facebook page, or another webpage created for the purpose:

A new Facebook craze where teenagers take near-naked photos of themselves has cyber-safety experts horrified.

The Sneaky Hat trend has been branded a “paedophile’s paradise” and involves mostly young people posing in nothing but a hat covering their genitals.

Countless Facebook pages and other sites, open for anyone to see, have sprung up showing male and female teens in provocative poses after reportedly originating at a Queensland highschool. ...

The craze has spawned spin-offs such as girls and boys-only sites, and location-specific groups such as ‘Sneaky Hat Brisbane’.⁷¹

These cases represent some of the activities and events that young people may become entangled with, or participate in, through connected technologies. What is not clear, however, is whether these particular cases represent the common experience of youth in regard to social media, or are extreme or unusual events.

⁶⁹ Evonne Barry and Amelia Harris, ‘Sexting scandal: Elite private school kids in video wildfire’, *Herald Sun*, 20 October 2012.

⁷⁰ Courtney Crane, ‘“Sexting” rocks school: Students counselled, explicit images on phones erased’, *Geelong News*, 5 December 2012.

⁷¹ Angus Thompson, ‘Teenagers pose near-naked in Sneaky Hat trend on Facebook’, *Herald Sun*, 23 November 2011, viewed 6 February 2013, <www.heraldsun.com.au>.

2.2 Sexting as a practice

2.2.1 What is sexting?

The Inquiry's Terms of Reference define sexting as:

... the creating, sharing, sending or posting of sexually explicit messages or images via the internet, mobile phones or other electronic devices by people, especially young people ...

This broad definition encompasses a wide range of behaviours, and the use of a range of media. It may include behaviours as diverse as:

- a 15-year-old girl taking a topless photograph of herself and sending it via mobile phone to her 16-year-old boyfriend;
- the boyfriend showing the photograph to his friends on the screen of his mobile phone;
- romantic partners engaging in a webchat where they 'flash' one another;
- a person posting a sexually explicit image on someone else's Facebook page;
- a person recording a sexual assault using their mobile phone camera;
- a person installing a hidden camera in a swimming pool changing room to record people getting changed; and
- a person sending an 11-year-old child explicitly-worded text messages as part of 'grooming' the child.

Clearly, as the examples above illustrate, the term 'sexting' may encompass a wide range of behaviours, some of which may cause little or no harm to the people involved, and some of which can cause significant harm to participants. In approaching this Inquiry, the Committee considered issues surrounding all types of sexting. However, the Committee's main focus is on issues surrounding peer-to-peer sexting by young people, and non-consensual sexting by young people and adults. This includes consensual sexting, where intimate photographs or videos are willingly created and shared and do not go beyond the person or persons with whom they were intended to be shared, and non-consensual sexting, where an image is distributed to a person or persons whom the person depicted in the image did not intend to see it.

The Committee also focuses mainly on sexting involving images. While sexting can include text-only communication, in most cases the potential for greatest harm is likely to arise from the transmission of images. In the context of sexting, images of minors will likely be considered child pornography under current Victorian law, and people who create, send or receive such images, including minors, commit child pornography offences.

Consequently, sexting involving images is more likely to have deleterious legal consequences for young people than sexting involving text-only communication.

For the purposes of this Inquiry, 'young people' is a general term that includes minors under the age of 18, and also young adults.

While the term 'sexting' is commonly used by the media and others, and is used throughout this report, the Committee heard that this term is not used or necessarily recognised by young people themselves.⁷² This may need to be taken into account when conducting research on, or introducing education about, sexting to young people. However, while 'sexting' is not necessarily a term widely used by young people, the Committee heard that young people are readily able to identify the types of activities encompassed by this term when it is explained to them. The Committee believes that, rather than causing a 'disconnect' with young people, increased use of the term 'sexting' by educators, law enforcement, and government will likely inform young people about formal views on this group of practices, regardless of the terms or phrases used by young people to describe those practices themselves.

2.2.2 Young people and peer-to-peer sexting

As noted above, the main focus of this Inquiry is on young people engaging in peer-to-peer sexting – that is, young people sending sexually explicit or suggestive images to other young people of a similar age. This may include a situation where a young person creates and sends a self-portrait to another young person consensually, as well as situations where a young person distributes an image of another young person without their consent. For the purpose of the following discussion, peer-to-peer sexting does not include sexting where one or more of the participants attempts to use sexting to sexually exploit another person or persons.⁷³

2.2.2.1 Forms of sexting

Given the diverse and growing range of devices and technologies through which images, text, and sound can be communicated, it is impractical to list the technical means through which sexting can occur. Essentially, sexting may comprise any text, audio or visual media, or a combination of these – such as through online video, for example.

BoysTown, the organisation that operates the national children's advice service Kids' Helpline, told the Committee that the sexting reported to its counsellors included the transmission of still images, online video streaming and, less commonly, the transmission of sexually suggestive

⁷² John Dalglish, Manager, Strategy and Research, BoysTown, *Transcript of evidence*, Melbourne, 18 September 2012, p. 4; Belinda Lo, Principal Lawyer, Eastern Community Legal Centre, *Transcript of evidence*, Melbourne, 18 September 2012, p. 35; Shelley Walker, *Submission no. 55*, 6 July 2012, p. 3.

⁷³ Although note that it is possible that a young person or young people could engage in sexting that is sexually exploitative of a peer.

text-only messages.⁷⁴ As well as direct transmission of video between people, online video streaming may occur through websites that connect users with one another randomly.

As noted in the Committee's Terms of Reference, sexting is not restricted to immediate or direct electronic communication of sexually explicit materials with others. Sexting can also include sexually explicit images of young people posted on social networking sites or public web pages.⁷⁵ Ms Shelley Walker, who recently completed research on sexting by young people, told the Committee that rather than being sent an explicit image via email or messaging, many young people come across 'sexting' materials when their peers show them those materials on their hand-held devices.⁷⁶ In some cases, therefore, sharing of sexting materials may be through interpersonal contact, rather than electronic distribution.

The majority of sexting involves sexually explicit images of girls rather than boys. Most images are sent to boys, and most images are produced by the person they portray (that is, they are self-portraits). While boys may also produce images of themselves (usually involving their penises), this occurs far less frequently than images produced by girls of themselves.⁷⁷

2.2.2.2 The stages of peer-to-peer sexting

Through the Inquiry, the Committee heard that while the range of circumstances in which sexting occurred was diverse, most cases of sexting by young people involved a typical set of circumstances. Mr Bill Byrd, Safe Schools Administrator for the Toronto District School Board, told the Committee that sexting typically occurs when small groups of same-sex (usually upper-middle class) younger children meet. Often sexting occurs when that group of children get bored, and one of the children introduces something different (often alcohol or marijuana) to the group, and an additional motivator is introduced – for example, a boy may send a text to them (or vice versa) asking them to “show us something”. While children are often coerced into sexting, at the time it simply “looks like fun” to them. Mr Byrd told the Committee that often the exhibitionist of the group, or the most reclusive person, is co-opted into sexting – and invariably once they have done it they immediately recognise that they have made a mistake.⁷⁸

In its submission to the Inquiry, the National Children's and Youth Law Centre (NCYLC) outlined what it considered to be the four stages of peer-to-peer sexting, and the harms potentially associated with each stage, together with examples of real-life scenarios that young people have sought advice on through Lawmail or Kids Helpline:

⁷⁴ BoysTown, *Submission no. 9*, 12 June 2012, p. 9.

⁷⁵ Shelley Walker, *Submission no. 55*, 6 July 2012, pp. 3-4.

⁷⁶ *ibid.*

⁷⁷ *ibid.*, 3.

⁷⁸ Bill Byrd, Safe Schools Administrator, Toronto District School Board, *Meeting*, Toronto, Canada, 30 October 2012.

Figure 2: Stages of peer-to-peer sexting⁷⁹

Stage	Potential negative social consequences
1. Requesting an image	Depending on the nature and the source of the request, the recipient of the request may feel upset by it. He or she may also feel pressured to comply with the request.
<i>Amy (13 y/o) reported that her friend was being pressured by her 15 year old boyfriend to take a picture of her breasts and send it to him. While Amy was sure her friend wouldn't do this, she expressed concern that this boy might hurt her friend if she didn't as he had been hurtful in the past.(Kids Helpline)</i>	
2. Creating an image	If the image is a self-portrait, its creator may be acting in response to peer pressure. If the image is captured by someone else, there are additional concerns, including a possible lack of understanding or consent by the subject.
<i>Sarah (16 y/o) recently had sex with Nathan (19 y/o), who filmed it on his mobile phone. Sarah didn't want to be filmed, but Nathan insisted that nobody else would see it. Sarah contacted [NCYLC] to get some information about the laws that might apply. (Lawmail)</i> <i>Lila (17 y/o) wrote to [NCYLC] to ask for some advice about a problem that her friend, Jennifer (17 y/o), was having with her ex-boyfriend, Stephen (19 y/o). While Jennifer and Stephen were dating, Stephen took naked photos of Jennifer. Some of these photos were taken without Jennifer's consent. Lila wanted to know what laws applied and if there was anything she and Jennifer could do to make Stephen delete the photos. (Lawmail)</i>	
3. Sharing an image with an intended recipient (consensually)	Again, peer pressure is the primary concern. The subject of the image may also feel obliged to refrain from doing anything that could upset the recipient, for fear that the recipient might share the image with others. This may give the recipient a means of control over the subject.
<i>Sam (19 y/o) contacted [NCYLC] to get some information for his friend, Bethany (age unknown). Bethany had texted nude photos of herself to her ex-boyfriend, John. After they broke up, Bethany became worried that John would send these photos to other people. Sam was wondering what the law says about this and what Bethany can do to prevent John from releasing the photos. (Lawmail)</i> <i>Gemma (13 y/o) recently sent some boys from school naked photos of herself. She contacted [NCYLC] for advice about how she can make the boys delete the photos. (Lawmail)</i>	
4. Sharing an image with others (non-consensually)	At this stage, harm is more probable and substantial. The subject of the image is likely to feel betrayed, humiliated, angry and upset. If the photo is shared widely, the subject is likely to feel a sense of helplessness and loss of control. The subject is also likely to worry about long-lasting damage to his or her reputation and even job prospects. If the image is passed around among the subject's peers, he or she may also experience bullying and harassment.
<i>Joshua (age unknown) recently filmed himself masturbating on a webcam and sent the video to someone else. The recipient posted the video to YouTube. Joshua contacted [NCYLC] to get information about whether his actions were illegal, and whether he could be charged or end up with a criminal record if someone reported the video to the police. (Lawmail)</i> <i>Angela (17 y/o) sent Michael (17 y/o) a photo of herself posing in her underwear. Michael then logged into Angela's email account without her permission and, purporting to be Angela, sent the photos to some of her friends. Michael contacted [NCYLC] to ask if he had committed a crime. (Lawmail)</i>	

The NCYLC noted that the possible harms associated with each stage of sexting are potentialities only, suggesting that in many cases involving just

⁷⁹ National Children's and Youth Law Centre, *Submission no. 36*, 15 June 2012, p. 3; Kelly Tallon, Ahran Choi, Matthew Keeley, Julianne Elliott and Debra Maher, *New Voices/New Laws: School-age young people in New South Wales speak out about the criminal laws that apply to their online behaviour*, National Children's and Youth Law Centre and Legal Aid New South Wales, 2012, pp. 12-13.

the first three stages, the “victim” will not see or experience any harm.⁸⁰ As the NCYLC noted, the examples provided for each stage of sexting are cases in which young people have contacted Kids Helpline or the NCYLC seeking advice – and so necessarily reflect situations where harm has been experienced.⁸¹ Young people who are not experiencing any harm or concerns arising from sexting activities are unlikely to seek advice from Kids Helpline or Lawmail about sexting.

2.2.2.3 Non-consensual sexting

Of the four stages of peer-to-peer sexting, the potential for greatest harm occurs when sexting is non-consensual. Non-consensual sharing of an image may occur when a person passes on an image to a third party without the agreement of other people portrayed in that image, and when any other people distribute that image without consent.

The reasons people share images without consent are diverse. In some cases, the person sending on the image may give little thought to the possible repercussions of that action – he or she may simply see it as a bit of a joke, and fail to consider the effect on the person depicted in the image. In other cases, a person may act maliciously by distributing an image. Non-consensual sexting often occurs during the breakdown of relationships, when a person seeks to humiliate an ex-partner by distributing an embarrassing image. For example, the Committee received a submission from the father of a young man who had acted in such a manner – after he and his girlfriend broke up, he forwarded still images from a sex video to three other young people.⁸²

As well as sharing an image without consent, intimate images may be used non-consensually in a number of ways:

- using the image for a purpose other than that consented to by participants;
- refusing to delete the image when asked to do so;
- threats by one party to ‘do something’ with the image that the other person would not want; and
- using images to degrade or harass another person (i.e. sending or showing someone unwanted images).⁸³

In the Committee’s opinion, all of the examples listed above describe uses of intimate images that are intensely disrespectful and inappropriate, and all of these acts should be strenuously discouraged. However, the

⁸⁰ National Children's and Youth Law Centre, *Submission no. 36*, 15 June 2012, p. 3.

⁸¹ Kelly Tallon, Ahran Choi, Matthew Keeley, Julianne Elliott and Debra Maher, *New Voices/New Laws: School-age young people in New South Wales speak out about the criminal laws that apply to their online behaviour*, National Children's and Youth Law Centre and Legal Aid New South Wales, 2012, p. 13.

⁸² See Name withheld, *Submission no. 3*, 15 May 2012.

⁸³ These possible acts of non-consensual sexting were suggested by the Macedon Ranges Local Safety Committee, *Submission no. 54*, 3 July 2012, p. 10.

Committee notes that even where the intent of the person disseminating the image has an element of malice, it is often not the case that they are acting in a manner intended to be sexually exploitative. The Committee considers sexually exploitative sexting separately below.

2.2.3 Adult 'recreational' sexting

The Committee heard that young people are not the only people who engage in peer-to-peer sexting – many adults have also incorporated technology into their sex lives. The Office of the Child Safety Commissioner (OCSC) noted that there are many well-known cases where high-profile adults have engaged in sexting.⁸⁴ Celebrities such as Scarlett Johansson, Blake Lively, Vanessa Hudgens, Miley Cyrus and Lily Allen have all had nude photographs of themselves 'leaked' online.⁸⁵

According to a telephone survey of 2252 adults undertaken in the United States in 2009:

- six per cent of adults have sent a sexually suggestive nude or nearly nude image to someone else by text, and 15 per cent of adults have received sexting messages;
- thirteen per cent of adults aged 18 to 29 have sent a sexting message, and 31 per cent have received them; and
- five per cent of adults aged 30 to 49 have sent a sexting message, and 17 per cent have received them.⁸⁶

It is likely that rates of sexting among adults in Australia are similar, however, the Committee is not aware of any Australian research confirming how widespread sexting is among adults.

2.2.4 Sexting in a family violence or coercive context

The Committee heard evidence that sexted photographs or footage can sometimes be used as a tool to coerce or threaten the person depicted. This occurs most often in the context of a relationship breakdown, where a person may have originally sent their partner an intimate image of themselves willingly, or were happy for their partner to create the image, and the relationship has subsequently deteriorated. The nature of electronic communication makes the threat of releasing an intimate image or footage a powerful one – images can be posted online or transmitted to a large number of people quickly and easily.

⁸⁴ Office of the Child Safety Commissioner, *Submission no. 25*, 15 June 2012, p. 1.

⁸⁵ Australian Herald, 'Celeb nude photo scandals 'may be contributing to young women sexting'', *Australian Herald*, 19 February 2012, viewed 12 February 2013, <www.theaustralianherald.com>.

⁸⁶ Amanda Lenhart, Rich Ling and Scott Campbell, 'Teens, adults and sexting: Data on sending/receiving sexually suggestive nude or nearly nude photos by Americans', viewed 12 February 2013, <www.pewinternet.org>.

The Eastern Community Legal Centre (ECLC), a community legal centre that offers free legal advice and assistance to the community, told the Committee that in the course of providing its family violence services, it has noticed:

... a concerning trend whereby generally young adult women have felt coerced to stay in abusive relationships for fear of a sexual image (which may have originally been provided consensually, or non-consensually) being released to third parties.⁸⁷

The ECLC provided a 'typical' case study of how sexting can occur in a family violence context, based on its experience with victims of family violence.

*Case Study 1: Sexting in a family violence context*⁸⁸

"Maria, 21, has been in a relationship with Peter, 22, for two years. Maria ended the relationship three months ago due to Peter's possessive and jealous behaviour. During the relationship, Peter recorded a sexually explicit recording of Maria. Although she consented to making the recording, Maria felt that she was only doing so to stop Peter from 'complaining that she wasn't a good girlfriend'. Maria later requested that Peter destroy the recording as she felt embarrassed about making it. Peter agreed to do so.

However, since the break-up, Peter has insisted that Maria reconcile with him, or else he will send the recording to Maria's friends and family. Maria engaged in unwanted sexual relations with Peter as a way to stop him from releasing the images, but she ultimately wanted to end the relationship.

When Maria finally refused Peter's demands, he also [alluded] to possessing an explicit recording of 'someone he once knew well' on his Facebook page. Although he does not name Maria as being the subject of the recording, Maria is aware that he is referring to her and feels extremely humiliated and trapped. Maria's mutual friends are also aware that it is clear that Peter must be referring to Maria. This has caused Maria to feel further humiliated and ashamed. Maria does not want to tell her family about the existence of the recording, but lives in fear that it will be released."

The Committee heard similar evidence from Women's Health West (WHW), one of 13 women's health services across the state of Victoria.⁸⁹ WHW indicated that sexting in a family violence context is an issue that affects older women as well as young women:

... coercion and the use of sexted images is also an issue for older women. We have women who come in as victims of family violence who have sent consensual images to a partner. Then there has been a breakdown of that relationship due to family violence, and he is using that as a mechanism by which to get her to come back to the relationship to ensure access to the

⁸⁷ Eastern Community Legal Centre, *Submission no. 23*, 15 June 2012, p. 2.

⁸⁸ *ibid.*

⁸⁹ Stephanie Rich, Health Promotion Worker, Women's Health West, *Transcript of evidence*, Melbourne, 27 July 2012, p. 8.

children. I think that whilst it is an issue that is specific to young people — and hence the need for education — it is also an issue that affects adults as well.⁹⁰

The ECLC noted that harassing and threatening a former partner from an abusive relationship through communication technology continues the controlling behaviour of the abuser, and allows the abuser to continue their abuse through a very public forum,⁹¹ as illustrated in Case Study 1. This abuse can cause immense trauma and distress to a victim of family violence.⁹²

The Office of the Victorian Privacy Commissioner (OVPC) also noted that sexting images are increasingly being used as tools for coercion and harassment, particularly when a relationship goes sour.⁹³ The OVPC suggested that one in ten teenagers have received a threat from a romantic partner, and noted that researchers report sexting has become “an increasingly popular method of abuse for teens in dating relationships”.⁹⁴

Coercive sexting has not attracted much media coverage, unlike young people’s peer-to-peer sexting; however, it appears to be a serious issue, particularly for a significant number of women who are victims of family violence. The use of sexting images to coerce a victim can also occur in contexts other than family violence. The case of 23-year-old Melbourne man Shawn Rye provides an illustrative example.

*Case Study 2: Shaun Rye*⁹⁵

Melbourne man Shaun Rye allegedly engaged in chatroom conversations with young men on the internet and then demanded money from them by threatening to reveal to their family and friends explicit images that he had taken of them. Rye would pretend to be a young and sexually available woman on webcams, playing a pre-recorded video of a young woman to the men on his webcam, then urging them to strip naked and masturbate on a promise that ‘she’ would then strip naked.

When the men had performed the sexual acts, Rye would show a recording of what they had been doing on the computer screen. He would then send a text message demanding that the men pay him money or the video recording would be released to friends and family via Facebook and other web pages. Rye blackmailed 43 men from Australia, Canada, the UK and the US over a six month period in 2011, stealing almost \$8000. He was convicted of 47 charges of blackmail in September 2012, and sentenced to two and a half years’ jail with a non-parole period of 15 months.

⁹⁰ Elly Taylor, Sexual and Reproductive Health Coordinator, Women’s Health West, *Transcript of evidence*, Melbourne, 27 July 2012, p. 13.

⁹¹ Eastern Community Legal Centre, *Submission no. 23*, 15 June 2012, p. 3.

⁹² *ibid.*

⁹³ Office of the Victorian Privacy Commissioner, *Submission no. 51*, 29 June 2012, p. 11.

⁹⁴ *ibid.*

⁹⁵ The facts in this case study are drawn from Mark Russell, ‘Bodybuilder’s blackmail ruse exposed’, *The Age*, 13 September 2012, viewed 13 September 2012, <www.theage.com.au>; Mark Russell, ‘Bodybuilder jailed over sex ruse’, *The Age*, 21 September 2012, viewed 21 September 2012, <www.theage.com.au>.

Coercive sexting in family violence contexts and in other contexts is of concern to the Committee, given the considerable power that a person holding intimate images of another person may wield over the person depicted. The Committee considers how the criminal law applies in these situations in Chapter Four.

2.2.5 Unauthorised intimate recordings

Another type of behaviour that can fall within the broad definition of sexting is the recording of, and the transmission of, explicit or intimate footage without the knowledge or consent of the person, or one of the people, in the footage. The case study example of Shaun Rye, provided above in relation to coercive sexting, also falls into this category of sexting.

Unauthorised recordings can take a variety of forms – for example, a hidden camera in a change room to capture children or adults in a state of undress; a concealed camera in a bedroom recording consensual sexual activity; using a mobile phone to surreptitiously film up a woman's skirt; or photographing or videoing a sexual assault.

The NCLYC gave an example of a young person who was recorded without her consent:

Karen (14 y/o) approached us after some girls had made a film of her while she was in the school showers. The girls had filmed her exposed private parts, then circulated the video online. Karen took the matter to the police, but felt that nothing was being done about it. She wanted to know whether there was anything else she could do.⁹⁶

There have been a number of cases of 'upskirting' in recent years in Victoria where men have been caught secretly filming up the skirts of women on public transport and at public events such as the Australian Open tennis tournament. As discussed in Chapter Four, these incidents led the Victorian Parliament to introduce criminal offences to specifically prohibit this type of behaviour.⁹⁷

A number of particularly shocking incidents involving the recording of a sexual assault have also occurred over the last few years:

In October 2006 the media was filled with reports of a sexual assault 3 months earlier of a 17-year-old woman. The 12 young men responsible had recorded and since continued to distribute digital video images of the assault. The "Werribee DVD" was initially sold in Werribee schools for \$5 and later emerged for sale on Internet sites for up to \$60 with excerpts also made freely available on YouTube. Six months later, Sydney newspapers reported a sexual assault of a 17-year-old woman involving five teenage

⁹⁶ Kelly Tallon, Ahram Choi, Matthew Keeley, Julianne Elliott and Debra Maher, *New Voices/New Laws: School-age young people in New South Wales speak out about the criminal laws that apply to their online behaviour*, National Children's and Youth Law Centre and Legal Aid New South Wales, 2012, p. 15.

⁹⁷ The Hon. Robert Hulls MP, Member for Niddrie, *Parliamentary debates*, Legislative Assembly, 21 June 2007, p. 2146.

young men who filmed the assault on their mobile phones and distributed the image among fellow school students. In May 2007, news stories were again filled with reports of a recording of a sexual assault, this time five men attacking two young women aged 15 in Geelong and recording the assault on their mobile phone.⁹⁸

WHW noted that when sexting involves the recording of a sexual assault, the severity and impact on victims/survivors is heightened by the potential use of technology to distribute the images globally, and for them to remain on the internet permanently.⁹⁹

2.2.6 Sexting in a sexually exploitative context

While the Committee heard a number of examples where sexting occurred between young people who were peers, sexting can also occur in a context that is best described as sexually exploitative. This includes circumstances where sexting is accurately described as child pornography, because the intent of the person who produces, possesses or procures the sexual image is to gratify a desire to sexually exploit children. As new technologies have become available, they have been utilised by people who seek to sexually exploit children. Paedophiles can make use of social media to interact with and groom children, and photo and video sharing capabilities of mobile phones facilitate child sex offenders capturing, sending and soliciting pornographic images and footage of children.

Case Study 3: Distribution of indecent videos and stories¹⁰⁰

In December 2012, a 23-year-old man who met a 14-year-old girl online was convicted of offences including producing, possessing and disseminating child pornography, and inciting an indecent act by a child. The man met the girl, who was Victorian, on an art-sharing website in 2011, and sent her indecent videos and stories he had written. According to the judge, the man, who was living in Adelaide, had used child pornography to influence "a suggestible child to debase herself in front of a camera" for his own sexual gratification. The man was jailed for two and a half years, with a non-parole period of one year and eight months.

While the use by adults of sexual images (and other media) of children clearly constitutes child pornography, minors may also be involved in sexting conduct that is sexually exploitative of other minors. For example, it was reported in October 2012 that a 17-year-old girl and her 18-year-old boyfriend had been charged with offences relating to coercing three girls

⁹⁸ Anastasia Powell, 'New technologies, unauthorised visual images and sexual assault', *ACSAA Aware*, no. 23, pp. 6-12, 2009, p. 7. (citations omitted)

⁹⁹ Women's Health West, *Submission no. 21*, 15 June 2012, p. 4.

¹⁰⁰ The facts in this case study are drawn from Candice Marcus, 'Child porn conviction ends man's dream career', *ABC News*, 18 December 2012, viewed 16 January 2013, <www.abc.net.au>.

aged between 13 and 15 into sending explicit pictures of themselves to the couple.¹⁰¹

There is also a possibility that through online grooming a sex offender may blackmail a young person into continuing to provide images of themselves under the threat of making public and/or further distributing their images.¹⁰² For example, notorious online sexual predator John Zimmerman used threats of releasing images of teens to coerce them into engaging in sexual acts with him, as described in the case study below. This case study demonstrates sexting in a sexually exploitative context, as well as being an example of coercive sexting.

*Case Study 4: John Raymond Zimmerman*¹⁰³

“John Raymond Zimmerman, 26, the former tour manager of popular but now-defunct teen band The Getaway Plan, used MySpace, Facebook and MSN to lure young girls into sex, via webcam and in person, and then forced some to continue submitting to his depraved acts by threatening to post naked photos of them or telling friends and family, the County Court heard.

Zimmerman, who must serve a minimum of 12 years as a serious sex offender, was convicted of 87 charges including three rapes, 23 counts of sexual penetration of a child under 16 years, multiple indecent acts and using the internet for procuring minors and child pornography.

The sickening crimes began in 2006 and continued until 2010, with a further victim claimed by Zimmerman even after his initial arrest in November 2009 following a complaint by one girl’s mother, before police became aware of the full extent of the offences or victims, the court was told.

All but two of Zimmerman’s 55 victims were aged between 12 and 15 years, with a number subjected to gross sexual acts at school grounds and in vehicles, while many were threatened with violence or further harassment if they refused to comply.

Zimmerman used his position in the music industry to entrap victims with offers of concert tickets, or fame and money which never materialised, the court heard. ...

‘It is abundantly clear that teenage users of social media applications such as MySpace and Facebook are constantly vulnerable to manipulative online attack from determined, skilful, unscrupulous and serial sexual predators,’ Judge Maidment said.”

¹⁰¹ Lacey Burley, 'Couple charged with child sexting', *The Chronicle*, 2 October 2012, viewed 11 February 2013, <www.thechronical.com.au>.

¹⁰² Australian Federal Police, *Submission no. 57*, 11 July 2012, p. 2.

¹⁰³ Mark Dunn, 'John Raymond Zimmerman jailed for multiple rapes and grooming online', *Herald Sun*, 16 December 2011, viewed 16 January 2013, <www.heraldsun.com.au>.

The Committee is cognisant that this type of sexting behaviour can and does occur. The Committee recognises the need to ensure that sexually exploitative conduct and materials, including but not restricted to child pornography, remains criminal under the law and attracts appropriate criminal sanctions.

2.3 How common is peer-to-peer sexting?

Several submissions to the Inquiry noted that to date there has been little robust research on sexting in Australia, and that consequently it is difficult to ascertain how common sexting is among young people.¹⁰⁴ The Australian Privacy Foundation noted that statistics available from Australia and elsewhere suggested that sexting “is more than a myth, and less than an epidemic”.¹⁰⁵

The Committee reviewed available statistical data in the course of this Inquiry, and also heard anecdotal evidence about the frequency and character of sexting from a number of key stakeholders.

2.3.1 Statistics

A number of submissions to the Inquiry¹⁰⁶ drew the Committee’s attention to a 2011 review of US sexting studies that found studies on sexting to date had used inconsistent methodology, and that many had design flaws. The authors of the review warned that citing statistics about sexting could be unwise, and recommended that journalists reporting on the topic simply say: “there are no consistent and reliable findings at this time to estimate the true prevalence of the problem.”¹⁰⁷ These concerns should be considered when reviewing the studies referred to below.

To date little research has been conducted in Australia or internationally on rates of sexting by young people. Ms Shelley Walker told the Committee that around 13 studies have been conducted around sexting internationally. Less than a third of these are Australian, and only three studies have been published in academic journals.¹⁰⁸ The proportion of young people who practice sexting reported in these studies varies significantly – from around four to 40 per cent.¹⁰⁹

¹⁰⁴ Australian Council of Educational Research, *Submission no. 35*, 15 June 2012, p. 1; Lesley-Anne Ey, *Submission no. 5*, 30 May 2012; headspace, *Submission no. 22*, 15 June 2012, p. 1; Law Institute of Victoria, *Submission no. 46*, 22 June 2012, p. 4; Women’s Health West, *Submission no. 21*, 15 June 2012, p. 6.

¹⁰⁵ Australian Privacy Foundation, *Submission no. 8*, 8 June 2012, p. 1.

¹⁰⁶ Office of the Victorian Privacy Commissioner, *Submission no. 51*, 29 June 2012, p. 5; Women’s Health Grampians, *Submission no. 14*, 14 June 2012, p. 5.

¹⁰⁷ Kaitlin Lounsbury, Kimberley J Mitchell and David Finkelhor, *The true prevalence of ‘sexting’*, Crimes Against Children Research Center, University of New Hampshire, 2011. cited by Office of the Victorian Privacy Commissioner, *Submission no. 51*, 29 June 2012, p. 5.

¹⁰⁸ Shelley Walker, *Transcript of evidence*, Melbourne, 18 September 2012, p. 23.

¹⁰⁹ *ibid.*

2.3.1.1 Australian statistics

Rates of sexting by young people in Victoria, and in Australia more broadly, are uncertain. The first investigation into the prevalence of sexting was an online survey conducted by Australian *Girlfriend* magazine in 2007.¹¹⁰ The magazine reported that of 588 young Australian women who participated in the survey, 40 per cent had been asked by others to send a naked or semi-naked image of themselves.¹¹¹ While this finding generated significant media attention in the media worldwide, the study was not population representative, and the results of the study are not available to the public, bringing into question the credibility of the research.¹¹²

In its submission to the Inquiry, the Australian Council of Educational Research (ACER) cited a Victorian study on the prevalence of sexting, which reported substantially lower rates than the *Girlfriend* study:

A 2009 survey of 4770 students in years 5-11 from 39 independent schools in Victoria found that overall, 7.3% of girls had been asked to send a nude picture of themselves. This figure tended to increase with age: 9.3% of girls in Year 8, 14.8% in Year 9, 11.8% in Year 10 and 16.3% in Year 11.¹¹³

BoysTown, which operates the national youth counselling and telephone advice service Kids Helpline, also provided some statistics on sexting to the Committee, based on research it undertook with 548 young Australians under the age of 25 who had experienced cyberbullying.¹¹⁴ Around 35 per cent of youths surveyed reported that the cyberbullying they had suffered involved what could be described as sexting behaviour – that is, having ‘embarrassing’ images of them posted online, and/or ‘gross’ images sent to them.¹¹⁵ A poll question on the Kids Helpline website operated by BoysTown found that 40 per cent of 1121 respondents had reportedly engaged in sexting behaviour.¹¹⁶

WHW told the Committee that in 2011 it conducted research with 187 year nine students in Victoria. This research did not ask students whether they had engaged in sexting, but sought their perceptions about whether sexting was occurring and whether they thought it was problematic. When asked if sexting was an issue for students at their school, around one in three boys (30%) and one in four girls (23%) reported that sexting was

¹¹⁰ AAP, 'Technology fuelling sexting craze: study', *The Age*, 12 May 2009, viewed 13 February 2013, <www.theage.com.au>.

¹¹¹ Shelley Walker, *Transcript of evidence*, Melbourne, 18 September 2012, p. 23.

¹¹² *ibid.*

¹¹³ Australian Council of Educational Research, *Submission no. 35*, 15 June 2012, p. 1. However, ACER noted that the survey referred to was a convenience sample rather than a representative sample, and no data were collected about the contexts in which the girls were asked for such images, nor how many chose to comply with the request.

¹¹⁴ Megan Price and John Dalglish, 'Cyberbullying: Experiences, impacts and coping strategies as described by Australian young people', *Youth Studies Australia*, vol. 29, no. 2, pp. 51-59, 2010.

¹¹⁵ BoysTown, *Submission no. 9*, 12 June 2012, p. 7.

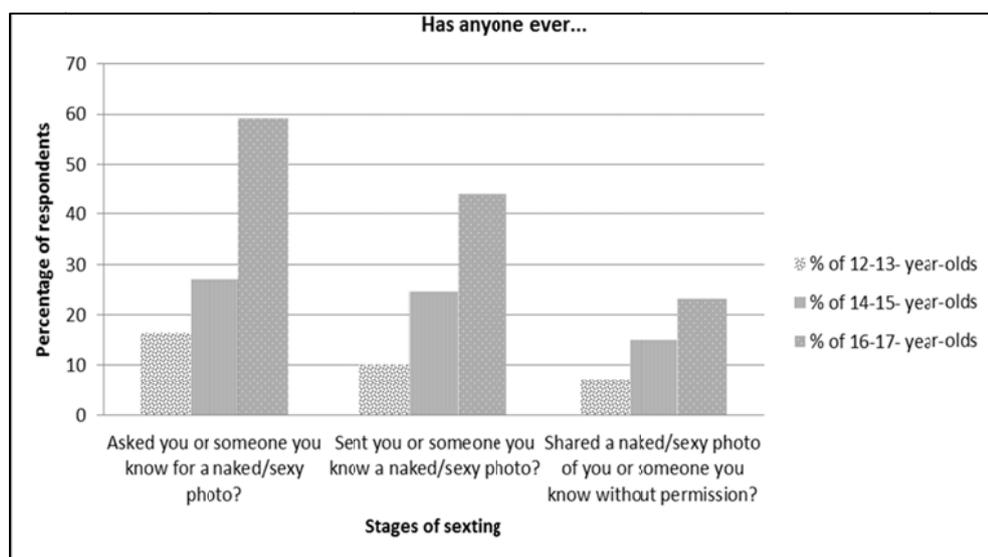
¹¹⁶ *ibid.* Note the self-selecting nature of this poll – the percentage of respondents who have engaged in sexting behaviour is unlikely to be representative of the general population of young people, as the young people who are not engaging in sexting may be less likely to have visited the Kids Helpline website.

“somewhat of a concern.” Around one in six girls (14%) and one in ten boys (11%) reported that sexting among students was both frequent and serious in nature.¹¹⁷

In 2012 the NCYLC and Legal Aid NSW released a report on sexting and cyberbullying.¹¹⁸ The report described results from a survey undertaken with around 950 students, mostly from New South Wales, and mostly aged in their mid-teens (82% were 14 to 17 years old).¹¹⁹ Survey respondents were asked (among other things) whether they or someone they knew had ever been involved in sexting. The survey found that:

- the most common sexting-related experience was being asked for a photo (37.1%), followed by being sent a photo (29.5%) and having a photo shared without permission (17.2%);
- rates of sexting varied across demographic groups. More girls than boys had been asked, or knew someone who had been asked, to share a nude or ‘sexy’ photo (39.3% vs. 27%); and
- rates of sexting increased with age – 16- to 17-year-old respondents were more than three times as likely as 12- to 13-year-olds to have experienced, or know someone who has experienced, any kind of sexting event.¹²⁰

Figure 3: Sexting experiences by age¹²¹



¹¹⁷ Women’s Health West, *Submission no. 21*, 15 June 2012, p. 5.

¹¹⁸ Kelly Tallon, Ahran Choi, Matthew Keeley, Julianne Elliott and Debra Maher, *New Voices/New Laws: School-age young people in New South Wales speak out about the criminal laws that apply to their online behaviour*, National Children’s and Youth Law Centre and Legal Aid New South Wales, 2012.

¹¹⁹ *ibid.*, 28.

¹²⁰ *ibid.*, 28-34.

¹²¹ *ibid.*, 34, Figure 4.12.

The NCYLC/Legal Aid NSW survey also found that respondents with a disability were more likely to have experienced, or know someone who had experienced, every form of sexting (that is, being asked for a photo, being sent a photo, or having a photo shared without permission).¹²² Respondents from a non-English speaking background were slightly less likely to know or have experienced any form of sexting, and Aboriginal and Torres Strait Islander respondents were significantly more likely to have experienced, or know someone who has experienced, every form of sexting.¹²³

The Committee notes that while the survey may shed some light on sexting practices by youth, it provides a very limited insight into the young people's individual experience with sexting. Because the survey questions requested information about third-party experiences (has anyone ever asked you *or someone you know* for a naked or 'sexy' photo?), one or two well-publicised sexting events could have informed the responses of multiple survey respondents.

2.3.1.2 International statistics

Most of the limited research undertaken on the prevalence of sexting has been conducted in the United States. Two American surveys in particular, described below, have been widely referred to in media and reports about the rates of sexting.

In late 2008, the National Campaign to Prevent Teen and Unplanned Pregnancy and *Cosmogirl.com* commissioned a survey of 1280 American teens (ages 13 to 19) and young adults (ages 20 to 26) about their sexting activity. The survey found:

- 20 per cent of teens said they had sent or posted nude or semi-nude pictures or videos of themselves (22% of teen girls, 18% of teen boys);
- 33 per cent of young adults said they had sent or posted nude or semi-nude images of themselves (36% of young adult women, 31% of young adult men);
- 25 per cent of teen girls and 33 per cent of teen boys said they had nude or semi-nude images originally meant for someone else shared with them; and
- 24 per cent of young adult women and 40 per cent of young adult men said they had had nude or semi-nude images originally meant for someone else shared with them.¹²⁴

¹²² *ibid.*, 31-32.

¹²³ *ibid.*, 31-33.

¹²⁴ The National Campaign to Prevent Teen and Unplanned Pregnancy and *Cosmogirl.com*, *Sex and tech: Results from a survey of teens and young adults*, 2008, pp. 1,3.

Subsequently, the Pew Research Center undertook a nationally representative survey of young Americans aged 12 to 17. This survey was conducted via landline and mobile phones in 2009, and reported substantially lower rates of sexting among young people, finding that:

- four per cent of teens aged 12 to 17 who own mobile phones reported that they have sent sexually suggestive nude or nearly nude images of themselves to someone else via mobile phone messaging, while 15 per cent said they had received this kind of image on their phone;
- eight per cent of 17-year-olds with mobile phones have sent a sexually suggestive image and 30 per cent have received such an image on their phone;
- teens who pay their own mobile phone bills are more likely to send sexually suggestive images: 17 per cent of teens who pay all costs associated with their phones send sexually suggestive images via text; while three per cent of teens who do not pay for, or only pay for a portion of, the cost of the mobile phone send such images.¹²⁵

However, Ms Shelley Walker expressed reservations to the Committee regarding the reliability of the Pew Research Center survey, and of other US studies reporting low sexting rates, due to the conditions in which the surveys were conducted:

A couple of studies that were population representative reported very low rates of sexting. One of the studies reported that 4 per cent of young people have been involved, and one of the concerns I have about the results of that study is that young people were interviewed over the phone. They were US studies, and in order to participate in the study parents or guardians were required to give consent for the young person to participate. As a result, my concern is that young people might not have felt comfortable to actually disclose honest information if a parent or guardian was there in the home with them.¹²⁶

2.3.2 Anecdotal evidence

2.3.2.1 Sexting is not uncommon

Anecdotal evidence suggests that a number of young people under the age of 18, including primary school children, are engaging in peer-to-peer sexting behaviour:

From my extensive experience as both a Police Officer (27 years and the first Victorian Police officer appointed to a position involving cybersafety and young people) and being in a school, somewhere in Australia on most days, I can safely say that I have not visited a secondary school anywhere

¹²⁵ Amanda Lenhart, *Teens and sexting: How and why minor teens are sending sexually suggestive nude or nearly nude images via text messaging*, Pew Research Center, 2009, p. 2.

¹²⁶ Shelley Walker, *Transcript of evidence*, Melbourne, 18 September 2012, p. 23.

in Australia, that has not had to deal with the fall out associated with a 'sexting' type issue. Interestingly, a number of primary schools are now reporting issues with children taking photos of each other in toilets, change rooms and even 'upskirting' fellow students ...¹²⁷

The Gatehouse Centre, based at the Royal Children's Hospital, indicated that it has seen a "marked increase" in sexting by children and young people referred to the service, or by their friends and associates.¹²⁸ Gatehouse also noted a marked increase in the age range of users and the type of sexting brought to the clinician's attention by the person themselves, or by the referrers, as the main reason or one of the reasons for referral.¹²⁹

Similarly, the NCYLC noted that its work in this area indicates that sexting is happening with some frequency.¹³⁰ The Children's Legal Service of Legal Aid New South Wales advised that it had received inquiries regarding sexting on its Legal Aid Youth Hotline.¹³¹

The Macedon Ranges Local Safety Committee (MRLSC) reported that since 2009, when a sexting incident in the area was brought to the attention of the authorities for the first time, there have been approximately ten sexting incidents reported to local police.¹³² However, MRLSC noted that possible sexting violations are often being addressed only by the young people involved, their parents, or their schools,¹³³ stating that "It appears that it is only when a potential violation poses its greatest risk to a young person, and that the social ramifications cannot be controlled or managed by aware adults, that the issue is brought to the attention of local police."¹³⁴

Following its discussions with young people and organisations working with young people from the Ballarat area, Women's Health Grampians (WHG) commented that there were inconsistencies in people's opinions on the incidence of sexting as well as their opinions on whether the act of sexting was problematic. One young person described sexting as "something everyone's done at least once" while others described it as not common, and thought that only "a few" people would have participated in sexting.¹³⁵

2.3.2.2 'Problem' sexting is not as widespread as reported

On the other hand, a number of submissions argued that sexting resulting in harm is not as widespread as media reports suggest. For example, Electronic Frontiers Australia noted that while sexting may be a widespread phenomenon, in many if not the majority of cases, it is likely to

¹²⁷ Susan McLean, *Submission no. 12*, 13 June 2012, pp. 2-3.

¹²⁸ Gatehouse Centre, Royal Children's Hospital, *Submission no. 40*, 18 June 2012, p. 1.

¹²⁹ *ibid.*

¹³⁰ National Children's and Youth Law Centre, *Submission no. 36*, 15 June 2012, p. 2.

¹³¹ Children's Legal Service, Legal Aid New South Wales, *Submission no. 50*, 27 June 2012, p. 1.

¹³² Macedon Ranges Local Safety Committee, *Submission no. 54*, 3 July 2012, p. 12.

¹³³ *ibid.*, 13.

¹³⁴ *ibid.*

¹³⁵ Women's Health Grampians, *Submission no. 14*, 14 June 2012, p. 5.

be harmless.¹³⁶ Similarly, headspace noted that there is a tendency for the media to sensationalise sexting, and noted that the majority of young people use technology responsibly.¹³⁷ This accords with the NCYLC's evidence regarding the stages of peer-to-peer sexting (described above in Figure 2), and its suggestion that in many cases, no harm will be experienced by those engaging in sexting.

In most cases, an intimate image does not go beyond the person for whom it was intended. Sharing intimate images with third parties without consent appears to occur infrequently – although as discussed below, where this does occur, significant harm is experienced by victims.

Victoria Police was not able to supply statistics regarding the number of sexting offences it has investigated, as there is no specific crime of 'sexting', but it did note that no people have been placed on the Sex Offenders Register simply for having pictures of their naked girlfriend or boyfriend on their mobile phones.¹³⁸

Organisations that represent young people in criminal matters in Victoria confirm that few prosecutions for acts associated with sexting occur. Victoria Legal Aid (VLA) noted that despite increasing numbers of young people engaging in sexting behaviour, young people are not commonly charged in association with this behaviour.¹³⁹ However, VLA noted that prosecutions do occur – VLA has represented a number of young people charged with child pornography offences as a result of sexting.¹⁴⁰

The Gippsland Community Legal Service noted that sexting is an emerging issue in local high schools, but noted that the Latrobe Valley Magistrates Court, the local Gippsland court, has advised that no offences for sexting have been listed at that court to date.¹⁴¹

Youthlaw lawyers advise and represent young people on a range of criminal offences, including child pornography offences, and in intervention orders that may involve sexting. Youthlaw was not able to provide specific statistics on sexting-related offences, but advised that generally, the numbers of young people seeking casework advice or legal information about sexting are very low.¹⁴²

Similarly, the Children's Court of Victoria, which hears almost all criminal prosecutions of young people,¹⁴³ noted that even though sexting is alleged to be rife among young people, prosecutions relating to this type of behaviour are very rare in the Children's Court. The Children's Court reasoned that this could occur because police warn or caution alleged

¹³⁶ Electronic Frontiers Australia, *Submission no. 38*, 15 June 2012, p. 3.

¹³⁷ headspace, *Submission no. 22*, 15 June 2012, p. 2.

¹³⁸ Victoria Police, *Submission no. 24*, 15 June 2012, p. 1.

¹³⁹ Victoria Legal Aid, *Submission no. 58*, 17 July 2012, p. 2.

¹⁴⁰ *ibid.*, 3.

¹⁴¹ Gippsland Community Legal Service, *Submission no. 17*, 14 June 2012, p. 1.

¹⁴² Youthlaw, *Submission no. 20*, 14 June 2012, p. 1.

¹⁴³ Prosecutions of children for fatal criminal offences are heard in the County Court or the Supreme Court; all other criminal prosecutions of children are heard in the Children's Court.

offenders and divert them from the criminal justice system, which is an approach supported by the Children's Court.¹⁴⁴ Victoria Police confirmed that its approach is, indeed, to keep juveniles out of the criminal justice system as much as possible.¹⁴⁵ The role of police, and the way in which young people are dealt with in the justice system, is explored further in Chapter Five.

However, it is important to note that the relatively small number of prosecutions of young people for sexting does not necessarily reflect the rate at which problematic or harmful sexting is occurring. Bearing in mind Victoria Police's preference to divert juveniles from prosecution where possible, the cases that are prosecuted would be only the worst sexting cases. In addition, there may be instances of harmful sexting that are dealt with internally by schools without alerting the police, and there may be other instances of concern that do not come to the attention of school authorities.

2.4 Why young people are peer-to-peer sexting

The desire for risk-taking and sexual exploration during the teenage years combined with a constant connection via mobile devices creates a 'perfect storm' for sexting ... Teenagers have always grappled with issues around sex and relationships, but their coming-of-age mistakes and transgressions have never been so easily transmitted and archived for others to see.¹⁴⁶

While the technologies that make sexting possible are new, the motivations behind sexting practices are not new or unique. For example, the Committee was told that if modern mobile technologies had been available 20 years ago, the behaviours we call sexting would have been happening 20 years ago.¹⁴⁷

In many cases, sexting is used by youth to facilitate, form, or maintain close or intimate relationships with one another. As with any close or intimate relationship, an element of trust is involved and required for both or all parties to be satisfied with that relationship. Some witnesses suggested to the Committee that, in the context of the key role communications technologies play in the lives of youth, sexting practices may not be regarded as particularly risky or threatening.¹⁴⁸

In evidence to the Inquiry, BoysTown suggested that young people use technology to replicate and extend their face-to-face behaviours, and similarly, that young people who are exploring their sexuality with each

¹⁴⁴ Children's Court of Victoria, *Submission no. 53*, 3 July 2012, p. 1.

¹⁴⁵ Neil Paterson, Acting Commander, Intelligence and Covert Support Department, Victoria Police, *Transcript of evidence*, Melbourne, 18 September 2012, p. 16.

¹⁴⁶ Amanda Lenhart, quoted in Pew Research Center, 'Teens and sexting' (Media Release, 15 December 2009).

¹⁴⁷ Captain Kirk Marlowe, Virginia State Police, *Meeting*, Washington, D.C., U.S.A., 6 November 2012.

¹⁴⁸ Katherine Albury, Kate Crawford, Paul Byron and Ben Mathews, *Young people and sexting in Australia: ethics, representation and the law*, The University of New South Wales, Sydney, 2013.

other may be using the internet and mobile phones to extend that behaviour to the virtual world.¹⁴⁹

The Pew Research Center survey, conducted with young people aged 12 to 17 in December 2009, suggests that peer-to-peer sexting occurs most commonly in one of three scenarios:

- exchanges of images solely between two romantic partners;
- exchanges between people who are not yet in a relationship, but where at least one of them hopes to be; and
- exchanges between partners that are then shared outside the relationship.¹⁵⁰

The Committee also heard that sexting was most commonly reported to have occurred either with a romantic partner or a friend well known to the 'sexter', although some young people did report sexting with a stranger known to them only via the internet.¹⁵¹

2.4.1 Motivations for sexting

Young people who contributed to Ms Shelley Walker's thesis on sexting discussed why they thought sexting occurred:

... there were lots of different reasons young people talked about why they thought sexting was happening. Some talked about it being fun or a joke. A few young people talked about the involvement of alcohol. Some young people — only a few young people — talked about sexual experimentation, and a few young people talked about the purpose being for those who are in a long-distance, long-term relationship.¹⁵²

BoysTown indicated that the most commonly reported reasons for youth engaging in sexting, as reported to Kids Helpline, were:

- Expression of affection to an existing partner;
- Pranks or game-playing;
- A flirtatious attempt to start a relationship (by getting the other person interested);
- Peer pressure from a partner/peers; and
- Misjudged behaviour under the influence of alcohol or drugs.¹⁵³

¹⁴⁹ John Dalgleish, Manager, Strategy and Research, BoysTown, *Transcript of evidence*, Melbourne, 18 September 2012, p. 3.

¹⁵⁰ Amanda Lenhart, *Teens and sexting: How and why minor teens are sending sexually suggestive nude or nearly nude images via text messaging*, Pew Research Center, 2009, pp. 6-7.

¹⁵¹ BoysTown, *Submission no. 9*, 12 June 2012, p. 9.

¹⁵² Shelley Walker, *Transcript of evidence*, Melbourne, 18 September 2012, p. 25.

¹⁵³ BoysTown, *Submission no. 9*, 12 June 2012, p. 9.

The sexting survey of American teens undertaken by the National Campaign to Prevent Teen and Unplanned Pregnancy and *Cosmogirl.com* questioned participants on their reasons for sending sexually suggestive content. Of those who had sent this kind of content:

- 66 per cent of teen girls and 60 per cent of teen boys said they did so to be “fun or flirtatious” – their most common reason for sending sexy content;
- 52 per cent of teen girls did so as a “sexy present” for their boyfriend;
- 44 per cent of both teen girls and teen boys said they sent sexually suggestive messages or images in response to similar content they received;
- 40 per cent of teen girls said they sent sexually suggestive messages or images as “a joke”;
- 34 per cent of teen girls said they sent/posted sexually suggestive content to “feel sexy”; and
- 12 per cent of teen girls said they felt “pressured” to send sexually suggestive messages or images.¹⁵⁴

BoysTown expressed concern about young people’s reports that their sexting behaviour was often in response to a request for an explicit image. BoysTown also reported that young people who had engaged in sexting often saw it as normal and common practice among their peers.¹⁵⁵

ACER noted that some images sent by youths are instigated by them with no prompting, rather than being sent in response to a request. ACER also noted that some teens feel that it is “no big deal” to send a sexting image, while others may feel obliged to acquiesce to a request from their boyfriend or girlfriend, if they consider the request to be normal or reasonable, and don’t want to discourage the relationship.¹⁵⁶

2.4.2 Adolescent development

Several submissions noted that sexting behaviour is not really new – rather, it “is a new manifestation of motivations and behaviours among young people that have been around forever.”¹⁵⁷ WHG noted that technology may be changing the way in which intimacy is expressed, suggesting that “[t]he sharing of a digital image between intimate or potential intimate partners can be seen as a demonstration of intimacy,

¹⁵⁴ The National Campaign to Prevent Teen and Unplanned Pregnancy and Cosmogirl.com, *Sex and tech: Results from a survey of teens and young adults*, 2008, p. 4.

¹⁵⁵ BoysTown, *Submission no. 9*, 12 June 2012, pp. 9-10.

¹⁵⁶ Australian Council of Educational Research, *Submission no. 35*, 15 June 2012, p. 2.

¹⁵⁷ See, for example, headspace, *Submission no. 22*, 15 June 2012, p. 2; Office of the Victorian Privacy Commissioner, *Submission no. 51*, 29 June 2012, pp. 3-4.

trust or love.”¹⁵⁸ WHW suggested that for young people, information and communication technologies “have become a forum for the exploration and expression of their sexuality and sexual identities.”¹⁵⁹

In the Committee’s view, when considering sexting it is important to bear in mind that adolescence is a period of development and is typically a time of experimenting and risk-taking, when young people explore their identity.¹⁶⁰ A number of submissions made the point that significant changes occur in the brain during teenage years, and adolescents are less able than adults to make informed decisions about personal safety and security:

The evidence now is strong that the brain does not cease to mature until the early 20s in those relevant parts that govern impulsivity, judgment, planning for the future, foresight of consequences, and other characteristics that make people morally culpable ... Indeed, age 21 or 22 would be closer to the ‘biological’ age of maturity.¹⁶¹

The Law Institute of Victoria also commented that the adolescent brain is unlike that of an adult in several significant ways:

First, teenagers are less competent decision makers than are adults. Secondly, teenagers are considerably more susceptible to peer-pressure than are adults. Thirdly, teenagers are much more likely to focus on immediate rather than long-term consequences, and are less skilled than adults in balancing risks and rewards, and are thereby likely to take more risks.¹⁶²

The Committee also heard evidence from a number of agencies engaged with issues surrounding sexting that youth do not always make choices that would be regarded by older people as ‘rational’ decisions – that it is not uncommon for young people to do things without appropriate regard for future ramifications. Detective Randy Norton of the Durham Region Police Service told the Committee that often children that participate in sexting do so in the heat of the moment – they are ‘good’ kids doing things out of character.¹⁶³

2.4.3 The gendered nature of sexting

The Committee heard our society is currently experiencing a “sexualisation of culture” that is heterosexual and gendered in nature.¹⁶⁴ The Committee was told that young people are being “exposed to a wide range of sexual imagery, in the words of songs, video clips, movies, the internet and in advertising”, which may lead them to form the opinion that this behaviour is

¹⁵⁸ Women’s Health Grampians, *Submission no. 14*, 14 June 2012, p. 3.

¹⁵⁹ Women’s Health West, *Submission no. 21*, 15 June 2012, p. 4.

¹⁶⁰ See headspace, *Submission no. 22*, 15 June 2012, p. 2.

¹⁶¹ Susan McLean, *Submission no. 12*, 13 June 2012, p. 4., quoting the American Bar Association.

¹⁶² Law Institute of Victoria, *Submission no. 46*, 22 June 2012, p. 6.

¹⁶³ Detective Randy Norton, Durham Region Police Service, *Meeting*, Toronto, Canada, 29 October 2012.

¹⁶⁴ Women’s Health Grampians, *Submission no. 14*, 14 June 2012, p. 5.

mainstream.¹⁶⁵ WHW noted that research shows a clear association between:

- exposure to imagery in film, advertising and communication technologies that objectify women and girls; and
- violence-supportive attitudes and a tolerance for physical and sexual violence.¹⁶⁶

Sexting is not a gender-neutral practice, with research suggesting that more young women than young men send explicit images or texts, and more young women report sending sexting messages as a result of pressure from the opposite sex.¹⁶⁷ WHG described the gendered nature of sexting, noting that when discussing the issue of sexting, we are predominantly discussing the distribution of sexually explicit images of young women:

This is of note and is indicative of the gendered nature of the problem and how it is reflective of broader social norms and stereotypes. Sexting is gendered in nature; it is the utilisation of a digital forum to reinforce already existing gender stereotypes and power relationships. This is the representation of women as sexual objects to be consumed by men and men as consumers who seek out sexually explicit images of women.¹⁶⁸

The gendered nature of sexting was confirmed by the MRLSC's practical experience dealing with sexting incidents. While MRLSC indicated that it is aware of sexting cases featuring both boys and girls as victims and 'offenders', it suggested that "gender stereotypes can have a significant influence on: who or why someone is an offender or victim, how offenders and victims are perceived or treated, or how the victim or offender may respond to the incident."¹⁶⁹

Research also suggests that gendered double-standards persist strongly around sexuality and sexual expression for teens, including when they engage in sexting. Teen girls are often pressured by teen boys to send or post sexual images of themselves, yet girls who do so are often perceived by teens of both sexes as promiscuous, as stupid, and as lacking the appropriate degree of self-respect or self-esteem.¹⁷⁰

The kind of sexist cultural dynamics we can see evident in some of the emerging research into sexting, both here and in the UK, are the same sexist cultural dynamics that have been part of our media landscape for a long time now. I am referring, in relation to the research into sexting, to the way in which it seems that, first, images of girls' bodies function as social currency, there is pressure on girls to display a certain kind of sexy body and pressure on boys to display a strong interest in heterosexual sex, and

¹⁶⁵ Susan McLean, *Submission no. 12*, 13 June 2012, p. 9.

¹⁶⁶ Women's Health West, *Submission no. 21*, 15 June 2012, p. 7.

¹⁶⁷ VicHealth, *Submission no. 26*, 15 June 2012, p. 4.

¹⁶⁸ Women's Health Grampians, *Submission no. 14*, 14 June 2012, p. 2.

¹⁶⁹ Macedon Ranges Local Safety Committee, *Submission no. 54*, 3 July 2012, p. 11.

¹⁷⁰ Amy Shields Dobson, Mary Lou Rasmussen and Danielle Tyson, *Submission no. 34*, 15 June 2012, pp. 2-3.

where girls must also then police themselves and their desires because they are still socially shamed for demonstrating any kind of sexual desire.¹⁷¹

Ms Walker recounted that many of the young people she spoke to when undertaking her study talked about the pressure to be involved in sexting. She heard lots of stories of girls feeling coerced, threatened or bribed by boys to produce and send intimate images:

It is a whole lot of different kinds of pressures, I would say — covert and overt kinds of pressures. ...

There was a young woman who talked about a more covert kind of pressure. She talked about a game that gets played out between girls and boys that ends with the boy asking for the sexually explicit image: "Just send me a pic". It starts as a game. It starts out like, when you're talking to guys about that kind of thing, it's like you're trying to dodge the subject, and they're trying to corner you. It's full on'. Some young women talked about the expectation for girls to produce and distribute images simply as a result of having viewed an image of a friend of theirs or someone they knew. A young woman said — she was 15 — 'Kind of like, I don't know. It makes you feel a bit uncomfortable because it makes you feel like, "Am I expected to do that too?"'.¹⁷²

There is also pressure on boys to obtain sexually explicit images of girls:

It is not just young women; young men also talked about pressure. There were a number of young men who talked about the pressure they experience from one another to request and have the images. Some young men talked about the silent treatment they would get if they were not into it.

There were a few young men that talked about how they were 'gay' if they did not want to look at the image or if they refused to look at it. There was a sense that their masculinity was in question if they did not ask their girlfriend for the images. There was a 16-year-old male who said, 'They just do it because they want to brag to their mates, "I got this girl to send me photos" and stuff like that' — feeling like they need to impress their mates in order to fit in.¹⁷³

2.5 Harmful consequences of peer-to-peer sexting

As discussed above, there is little unambiguous statistical evidence about the incidence of sexting behaviours in the community, and the extent to which sexting may, or may not, present a risk to youth or adults. What is certain is that sexting behaviours play a role in framing the experience of gender and sexuality by young people, and that in some cases, deleterious consequences may arise from sexting.

While some (or perhaps most) sexting practices may not cause significant harm to participants, each of the four 'stages' of sexting described in

¹⁷¹ Amy Shields Dobson, School of Political and Social Inquiry, Monash University, *Transcript of evidence*, Melbourne, 10 December 2012, p. 30.

¹⁷² Shelley Walker, *Transcript of evidence*, Melbourne, 18 September 2012, p. 26.

¹⁷³ *ibid.*

Figure 2 above (requesting an image, creating an image, sharing an image consensually and sharing an image without consent) present potential for harm to those who participate in sexting. Some of these potentially harmful consequences are discussed below.

2.5.1 Consequences for victims

2.5.1.1 Harm where an image is disseminated without consent

Non-consensual sexting – where an image that may have initially been shared willingly is distributed beyond the initial recipient without the consent of the person depicted in the image – is an issue of particular concern, in which the potential for a victim to suffer harm is greatest. Dr Greg Lyon, of the Criminal Bar Association, offered an anecdote illustrating how easy it is for an image to spread virally:

I gave Tony an example, when we were waiting, of one that happened at the school my girls go to where a young girl took self-images and passed them to a potential boyfriend. He thought it was a great lark and sent them to his mates. His mate sent it back to one of the girls at the school. She disseminated it through three schools at two levels — kids, parents and teachers. ... That is a case where the dissemination was where the harm was done.¹⁷⁴

BoysTown summarised the potential effects that sexting may have on victims whose images are disseminated beyond the intended recipient:

When sexting behaviour gets out of hand, or more specifically, 'sext' images get into undesirable hands, the impacts of sexting can be multi-faceted and extreme. Young people can find themselves the victims of humiliation, bullying, harassment, threat, punishment (from school and/or parents) and criminalisation. The flow on from these events can also be severe, impacting young people's wellbeing, health, school, employment, family and peer relationships.¹⁷⁵

There have been cases in the United States and in Canada with tragic outcomes for the young women whose images were disseminated. In 2008, a nude photograph of 18-year-old Jessica Hogan, which she intended for only her boyfriend, was sent to hundreds of teenagers in at least seven schools around Cincinnati, Ohio. Jessica was subsequently subjected to taunts and harassment, both in person, and in text and Facebook messages calling her a "slut" and a "whore". Jessica hanged herself in her bedroom.¹⁷⁶ Amanda Todd, a 15-year-old from Vancouver, had a similarly tragic story.¹⁷⁷

¹⁷⁴ Gregory Lyon, Chair, Criminal Bar Association, *Transcript of evidence*, Melbourne, 27 July 2012, p. 20.

¹⁷⁵ BoysTown, *Submission no. 9*, 12 June 2012, p. 11.

¹⁷⁶ Cincinnati.com, 'Nude photo led to suicide', *Cincinnati.com*, 22 March 2009, viewed 14 February 2013, <www.cincinnati.com>.

¹⁷⁷ CBC News, 'Amanda Todd tribute honours life of bullied teen', *CBC News*, 18 November 2012, viewed 14 February 2013, <www.cbc.ca>.

To the Committee's knowledge, there have not been any sexting cases that have led to suicide in Australia. However, the Salvation Army's Oasis Hunter, an organisation that provides assistance and support to children and teenagers dealing with the consequences of sexting, expressed concern that the consequences of sexting cases in Australia could escalate.¹⁷⁸ Oasis Hunter provided an example of a young girl who had sought assistance:

... a young girl approached us for help in regards to social ramifications from sexting. The teenager had changed schools three times, but could not escape the inappropriate photographs which were circling of her. As a result, she had developed a well-known reputation across a variety of schools in the area.¹⁷⁹

As discussed above, young women are more likely than young men to suffer negative social consequences from the non-consensual redistribution of sexting images,¹⁸⁰ even though, as in Dr Lyon's example, young women as well as young men may be involved in disseminating the images.

WHG and WHW consider that sexting can be a form of violence against women,¹⁸¹ with WHG suggesting that the distribution or posting of sexually explicit images without consent is a form of sexual harassment and abuse, regardless of the age of the persons involved:

Sexting, particularly when images are distributed widely can also be considered on the continuum of violence against women. The wide distribution of a sexually explicit image, with or without consent is likely to result in sexual and psychological harm or suffering to the young woman directly involved. It is also potentially sexually and psychologically harmful to a broader group of young women. The large distribution of images subsequently exposes all young women to prevalent gendered attitudes and beliefs where a woman's value and worth is judged by her sexuality and sexual attractiveness to men. Her sexuality is also then used to ridicule her and cause psychological harm.¹⁸²

The Committee heard a great deal of evidence during the course of the Inquiry on the harms that may arise from sexting for both children and adults, particularly where an image is distributed without the consent of all of the people depicted in it. The Committee also heard evidence noting the tendency for bullying and ridicule arising from sexting to be disproportionately directed toward women, and potentially vulnerable groups such as those who are same-sex attracted. There is substantial evidence to suggest that non-consensual distribution of sexting images is a form of abuse and violence, directed at the person or persons depicted in those images (or other media).

¹⁷⁸ Salvation Army Oasis Hunter, *Submission no. 7*, 30 May 2012, p. 5.

¹⁷⁹ *ibid.*, 5-6.

¹⁸⁰ Women's Health West, *Submission no. 21*, 15 June 2012, p. 4.

¹⁸¹ Women's Health Grampians, *Submission no. 14*, 14 June 2012, p. 3; Women's Health West, *Submission no. 21*, 15 June 2012, p. 4.

¹⁸² Women's Health Grampians, *Submission no. 14*, 14 June 2012, pp. 3-4.

Finding 1: The distribution of intimate images or media of a person without their consent has the potential to cause significant and ongoing harm to that person.

2.5.1.2 Possible harms where sexting is consensual

Some witnesses suggested that there are good reasons for discouraging children and young people from engaging in sexting, even when they consent to it, as harm can result even where sexting is done voluntarily and kept private.¹⁸³

The OCSC suggested that even if images are not disseminated by the person with whom they are shared, the young person who is depicted may later regret having participated in the making of the images, and may have no way of getting them back.¹⁸⁴ Further, if sexting is generally seen as 'ok' or 'something that everyone is doing', other young people may feel greater pressure to engage in this behaviour.¹⁸⁵ As discussed above, sexting also contributes to the highly sexualised culture in which children and young people live, which can have an adverse impact on their development and wellbeing.¹⁸⁶

WHW suggested, as did others who gave evidence to the Inquiry, that sexting in and of itself is not problematic. However, when sexting reinforces gender stereotypes, unequal gender power relations and coercion, the practice is harmful and a form of violence against women.¹⁸⁷ WHW commented that it is increasingly expected that young women will engage in sexting as a part of 'normal' sexual behaviour and relationships.¹⁸⁸

Free will and consent can also become blurred when gender stereotypes exist that support and encourage young women to measure their value and worth on their sexual attractiveness and availability:

It is only by advocating for and providing alternative examples of women's sexuality that we can ensure young women are able to make decisions in their best interests and not those overly influenced by negative gender stereotypes.¹⁸⁹

The Committee received evidence that practices surrounding sexting do tend to reinforce gender stereotypes, and in doing so may particularly disadvantage women and girls, and people from vulnerable groups. There appears to be a tendency within young people's use of social media to portray young women who participate in sexting as 'sluts', whereas young

¹⁸³ Office of the Child Safety Commissioner, *Submission no. 25*, 15 June 2012, p. 3; Office of the Victorian Privacy Commissioner, *Submission no. 51*, 29 June 2012, p. 9.

¹⁸⁴ Office of the Child Safety Commissioner, *Submission no. 25*, 15 June 2012, p. 3.

¹⁸⁵ *ibid.*

¹⁸⁶ *ibid.*; Office of the Victorian Privacy Commissioner, *Submission no. 51*, 29 June 2012, p. 9.

¹⁸⁷ Women's Health West, *Submission no. 21*, 15 June 2012, p. 4.

¹⁸⁸ *ibid.*

¹⁸⁹ Women's Health Grampians, *Submission no. 14*, 14 June 2012, p. 4.

men are portrayed as 'studs' or other terms that have more positive connotations in terms of peer perception.

Finding 2: Current practices and trends in sexting by youth appear to reinforce gender stereotypes for young men and women, where young women are portrayed as promiscuous or in a derogatory manner when they participate in sexting, while young men do not suffer negative connotations to the same extent. The social repercussions of these stereotypes are potentially more deleterious for young women than for young men.

2.5.1.3 Lasting nature of electronic material

Once digital material is created and shared, it is virtually impossible to retrieve or destroy it. Material posted to the internet can be downloaded and saved by others, and re-posted to other internet sites.

The long-lasting nature of digital material means that there can be significant long-term ramifications for young people whose images are distributed:

As adolescents start applying for jobs and/or meeting potential long-term partners their digital footprint (and any past sexting material) may well be searched and held to account, potentially impacting an individual's reputation and opportunities in life. Images shared on the internet can often become irretrievable from cyberspace.¹⁹⁰

2.5.1.4 Potential for material to be distributed as pornography

While sexting may be engaged in innocently by young people, there is potential for images to fall into the wrong hands – once images are posted online, it is virtually impossible to control how they circulate or where they end up.

The UK's *The Guardian* reported in October 2012 that thousands of sexually explicit images of children and young people, posted on the internet by themselves and their peers, are being stolen by porn websites.¹⁹¹ The article cited a study by the Internet Watch Foundation, a UK-based non-profit organisation, which found 88 per cent of self-made sexual or suggestive images and videos posted by young people, often on social networks, are taken from their original location and uploaded to other sites.¹⁹²

¹⁹⁰ BoysTown, *Submission no. 9*, 12 June 2012, p. 12; John Dalgleish, Manager, Strategy and Research, BoysTown, *Transcript of evidence*, Melbourne, 18 September 2012, p. 6.

¹⁹¹ Alexandra Topping, 'Parasite' porn websites stealing images and videos posted by young people', *The Guardian*, 22 October 2012, viewed 11 February 2013, <www.guardian.co.uk>.

¹⁹² *ibid.*

2.5.1.5 Criminal prosecution

While it is unlikely that a young person depicted in a sexted image would face a criminal prosecution, in theory such a consequence is possible. If the young person is a minor and took the photograph or footage themselves, they will have technically committed the offence of production of child pornography.¹⁹³ If they have sent the image on to another person, such as their partner, they could be open to a charge of publication or transmission of child pornography.¹⁹⁴ And if they still have the photograph on their mobile phone or in their email, they may be charged with possession of child pornography.

The Committee is not aware of any cases in Australia where a person who has been involved in consensual sexting has been prosecuted, unless they have subsequently acted in a non-consensual way. However, there have been cases in the United States where those involved in purely consensual sexting have been prosecuted, as demonstrated in the following case study.

*Case Study 5: A.H. v. State (Florida)*¹⁹⁵

A 16 year-old girl, A.H., and her 17-year-old boyfriend, J.G.W., engaged in consensual legal sex. They took digital pictures of themselves naked and engaged in sexual conduct, and afterwards A.H. emailed the pictures to J.G.W. The couple did not show the pictures to anyone, but somehow word of the photos' existence came out, and the police obtained a warrant to search J.G.W.'s computer. Both teens were prosecuted and convicted of child pornography offences because they had taken photographs of themselves engaged in private sexual conduct. Had they been two years older, the images they created would have been completely legal. However, because they were under 18 when the photographs were taken, their actions constituted a second degree felony.

A.H. appealed to the Florida District Court of Appeals, but the Court upheld her conviction.

While the Committee is confident that Victoria Police currently exercise discretion not to prosecute minors who have sexted consensually, the fact that the behaviour technically breaches the criminal law may deter victims of non-consensual sexting from reporting the conduct to authorities. For example, a minor who willingly sent a nude image of themselves to another person who then disseminated the image may be hesitant to report the circumstances to school authorities or the police for fear that he or she could personally face criminal charges. Legal advisers who work with young people would be expected to advise them of the possibility that they could be charged in this scenario, as the NCYLC does:

¹⁹³ *Crimes Act 1958* (Vic), section 68(1).

¹⁹⁴ *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* (Vic), section 57A.

¹⁹⁵ The facts in this case study are drawn from *AH v Florida*, 949 So. 2d 234 (Fla. Dist. Ct. App. 2007).

... I do believe that in the particular scenario of a problem that is just bubbling away in a school and a child who is thinking, 'Where do I go? I don't want to raise this with the principal. I do believe the principal is going to bring this to the attention of the police, and I am hearing that if it is brought to the attention of the police, I might get charged', we need much more clarity for the young person. The truth of the matter is that we are having to advise young people that while it would be preferable to engage the school and to talk to police in order to bring about a cessation to the dissemination of the image, we cannot guarantee that young person that the police — and bear in mind we are talking about a range of jurisdictions here — will not charge them.¹⁹⁶

The offences associated with sexting by young people are severe, and can have lasting consequences for people who are successfully charged with the offence. While the Committee is confident that police discretion is being exercised appropriately, it would prefer that measures be introduced so that an appropriate outcome for youth is not dependent on police discretion.

2.5.2 Consequences for disseminators and recipients

As noted in Chapter One, the serious potential consequences for a young person who receives a sexted image, whether they do or do not disseminate that image, gave rise to this Inquiry. A person who receives or disseminates a sexting image of a minor could be open to criminal prosecution, and if convicted they may be listed on the Sex Offenders Register for a significant period.

2.5.2.1 Criminal prosecution

The application of child pornography offences to circumstances of peer-to-peer sexting is discussed in more detail in Chapter Four. Briefly, a person who receives a sexting message from a minor could be prosecuted for the possession of child pornography,¹⁹⁷ and a person who disseminates that message, image or video could face prosecution for the publication or transmission of child pornography,¹⁹⁸ even if the accused person is also a minor. A person who requests that a minor send an image to him or her could also face charges for inviting or procuring a minor to make child pornography.¹⁹⁹

VLA noted that where young people are charged with child pornography offences for sexting, it is generally in the context of a consensual sexual relationship where images taken with consent are forwarded to a third party, with or without the consent of the person or persons in the images,

¹⁹⁶ Matthew Keeley, Director, National Children's and Youth Law Centre, *Transcript of evidence*, Melbourne, 10 December 2012, p. 39.

¹⁹⁷ *Crimes Act 1958 (Vic)*, section 70(1).

¹⁹⁸ *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995 (Vic)*, section 57A.

¹⁹⁹ *Crimes Act 1958 (Vic)*, section 69.

often after the breakup of a relationship.²⁰⁰ VLA provided a case study example:

Bob was 19 when he [was] sent an email from a friend which included a sexual photograph of his friend and his [friend's] girlfriend. Bob opened the photograph, thought little of it, but neglected to delete it from his email account. His computer was taken by the police for another criminal case (in which he was never a suspect) and the image was found. He was charged and pleaded guilty to possessing child pornography offences, sentenced, and mandatorily placed on the sex offenders register.²⁰¹

2.5.2.2 Sex offender registration

As already noted, a person who is convicted for a child pornography offence may be listed on the Sex Offenders Register. If the person is over 18 at the time they commit the offence, registration is mandatory, and if the person is a minor, the sentencing court has discretion as to whether the person is registered. The sex offender registration scheme, and the effects of being registered as a sex offender are explored further in Chapter Four.

2.6 Further research required

As mentioned previously, there has been limited research in Australia into sexting. It is a difficult area in which to undertake research, given the ethical issues around asking young people about their sexual behaviours. Many submissions to the Inquiry, and many witnesses, suggested that further Australian research into sexting is needed.

2.6.1 Prevalence data

The Committee heard from Ms Shelley Walker that Australian prevalence data is needed, “particularly to determine who is involved, how often and in what capacity, so that responses can be targeted at the right groups of young people”.²⁰² Ms Walker suggested that it is important to gather prevalence data from those who may be most at risk, such as young people in their early teens, young people from non-English speaking backgrounds, and young people with disabilities.²⁰³ Aboriginal and Torres Strait Islanders would also be likely to be an at-risk group, in light of the NCYLC’s survey results referred to in section 2.3.1.1.

Ms Walker noted that existing research is difficult to compare due to the differing definitions of sexting that have been employed, with some studies referring to sexually suggestive messaging, some studies including text-only messages, and some studies limiting the definition to sexually explicit images where genitals are depicted.²⁰⁴ The ages and demographics of

²⁰⁰ Victoria Legal Aid, *Submission no. 58*, 17 July 2012, p. 3.

²⁰¹ *ibid.*, 4.

²⁰² Shelley Walker, *Submission no. 55*, 6 July 2012, p. 3.

²⁰³ *ibid.*

²⁰⁴ Megan Price, Senior Researcher, BoysTown, *Transcript of evidence*, Melbourne, 18 September 2012, p. 4; Shelley Walker, *Transcript of evidence*, Melbourne, 18 September 2012, p. 23.

participants have also varied. The way in which sexting is defined is complex, as sexting is a complex and varied phenomenon, and the definition used will have a major impact on the prevalence rates reported.

In this regard, Ms Walker suggested that the focus should be placed on the *harms* arising from sexting, rather than sexting itself:

What I am saying about prevalence is that we do not have accurate prevalence data and we need that, but it is going to be a really difficult thing to gather because of the complexities of the phenomenon. Most of the prevalence investigations or studies have addressed motivations for involvement in the behaviour and the nature of this phenomenon called sexting, and I feel very strongly that if we are to address the harms, it is not necessarily sexting that is the issue, it is the harms resulting from the behaviour.²⁰⁵

Other submissions also took the view that further research is required not only on the extent of peer-to-peer sexting occurring, but also in relation to the impact on victims of sexting, where images are distributed without consent.²⁰⁶

Whilst it is clear from current research that sexting is a gendered practice, more research is required to understand both the prevalence and impact of sexting in Australia.²⁰⁷

WHG recommended that further research into the prevalence and nature of sexting – both by young people and in the broader community – should use a gendered framework to consider the differences in women’s and men’s experiences.²⁰⁸ This framework would involve consideration of the gender inequalities and differences present in our social and cultural institutions. Similarly, VicHealth recommended that future research efforts around sexting should focus on the gendered social context within which it occurs.²⁰⁹

The Committee endorses VicHealth’s recommendations regarding further research into sexting, which suggest that future research should focus on:

- Understanding the gendered social context within which sexting takes place and the positive impact primary prevention efforts which focus on changing this gendered culture can have on the prevalence of sexting
- Making clear the relationship between the determinants of violence against women and the practice of sexting
- The participation of children, young people and adults in this practice in Victoria

²⁰⁵ Shelley Walker, *Transcript of evidence*, Melbourne, 18 September 2012, pp. 23-24.

²⁰⁶ Royal Australian and New Zealand College of Psychiatrists, *Submission no. 13*, 14 June 2012, p. 4.

²⁰⁷ VicHealth, *Submission no. 26*, 15 June 2012, p. 5.

²⁰⁸ Women’s Health Grampians, *Submission no. 14*, 14 June 2012, p. 7.

²⁰⁹ VicHealth, *Submission no. 26*, 15 June 2012, pp. 5, Recommendation 1.

- Developing an evidence base that can guide the inclusion of sexting education into existing evidence based respectful relationships education programs in Victorian secondary schools.²¹⁰

2.6.2 Other considerations for future research

Submissions also emphasised the importance of seeking insights from young people around sexting practices. headspace recommended that further research into sexting should explore young people's experiences and views of sexting, and their recommendations for prevention and intervention,²¹¹ and the South Eastern Centre Against Sexual Assault suggested that young people should also be surveyed on their views as to what is acceptable and not acceptable in relation to sexting, and their perceptions of why they are engaging in sexting behaviour.²¹²

BoysTown made a similar point, suggesting that understanding the meaning that children and young people place on sexting behaviour will be key to developing prevention programs.²¹³

On a related note, it is also important to be aware that young people do not necessarily use the term 'sexting', or associate sexting behaviours with that term:

... no young person uses the word 'sexting'. ... 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.²¹⁴

As Ms Shelley Walker suggested, this has implications for the design of prevalence surveys, as well as for educational resources and information targeting young people, which should include language that is relevant for young people.²¹⁵

The Committee notes that education about sexting needs to be informed by research about current practices, changing use of technologies, and effective strategies for social awareness campaigns. It will also be important for the Victorian Government to progressively monitor and track changes brought about through introduction of sexting and cybersafety education and legislation in order to ensure programs and laws remain effective. Consequently, the Committee recommends that the Victorian

²¹⁰ *ibid.*, 5.

²¹¹ headspace, *Submission no. 22*, 15 June 2012, p. 2.

²¹² South Eastern Centre Against Sexual Assault, *Submission no. 16*, 14 June 2012, p. 1.

²¹³ John Dalgleish, Manager, Strategy and Research, BoysTown, *Transcript of evidence*, Melbourne, 18 September 2012, p. 4.

²¹⁴ Belinda Lo, Principal Lawyer, Eastern Community Legal Centre, *Transcript of evidence*, Melbourne, 18 September 2012, p. 35. See also The Alannah and Madeline Foundation, *Submission no. 42*, 18 June 2012, p. 15; Shelley Walker, *Submission no. 55*, 6 July 2012, p. 3.

²¹⁵ Shelley Walker, *Submission no. 55*, 6 July 2012, p. 3.

Government regularly conduct research to ensure that education and legislation sufficiently addresses sexting practices.

Recommendation 1: That the Victorian Government periodically commission research to examine qualitative and quantitative aspects of sexting practices by children and adults in Victoria.

Chapter Three: Education about sexting

[Sexting] could be portrayed as the collision of hormones and technology, where the creator or disseminator has little control over images that can be sent and forwarded almost instantaneously, with possible serious legal implications. It seems unjust that this generation of young people can be penalised for acts no more rash than many committed by their progenitors because the outcomes are amplified by digital technologies.²¹⁶

While effective legislation forms an important part of efforts to minimise the harms associated with sexting, most of the gains from effective government policy in this area will be achieved through effective education about the social and personal effects that sexting can have on children and adults, and the legal ramifications of engaging in sexting. Education about sexting should be part of a more general education on cybersafety, and how youth in particular may participate in developing positive practices for engagement with the online world.

Almost all of the submissions received by the Committee, and most of the evidence presented by witnesses, argued that effective education must be a key component of how society responds to sexting.²¹⁷ In this Chapter a range of issues surrounding education about sexting are considered.

3.1 Awareness of the potential consequences of sexting

Sexting can lead to a number of deleterious outcomes for both the producers, and recipients, of sexting materials. While in many cases people are not aware of the range of repercussions that may arise from

²¹⁶ The Alannah and Madeline Foundation, *Submission no. 42*, 18 June 2012, p. 5.

²¹⁷ Association of Heads of Independent Schools of Australia, *Submission no. 49*, 25 June 2012; Australian Council of Educational Research, *Submission no. 35*, 15 June 2012; Australian Privacy Foundation, *Submission no. 8*, 8 June 2012; BoysTown, *Submission no. 9*, 12 June 2012; Department of Education and Early Childhood Development, *Submission no. 60*, 19 July 2012; Lesley-Anne Ey, *Submission no. 5*, 30 May 2012; Susan McLean, *Submission no. 12*, 13 June 2012; National Children's and Youth Law Centre, *Submission no. 36*, 15 June 2012; Parents Victoria, *Submission no. 33*, 15 June 2012; Royal Australian and New Zealand College of Psychiatrists, *Submission no. 13*, 14 June 2012; Salvation Army Oasis Hunter, *Submission no. 7*, 30 May 2012; The Alannah and Madeline Foundation, *Submission no. 42*, 18 June 2012; Victorian Catholic Schools Parent Body, *Submission no. 15*, 14 June 2012; Shelley Walker, *Submission no. 55*, 6 July 2012; Women's Health Grampians, *Submission no. 14*, 14 June 2012.

sexting, the Committee also heard evidence that young people in particular may be aware of risks, but choose to participate in sexting anyway.²¹⁸

For example, the Committee heard that many young people who participate in sexting are aware that providing intimate images to their peers may result in further distribution of those images, and that they could suffer some social shame as a result.²¹⁹ However, the Committee was told that for some young people, sexting was part of their social experience, and that it was encouraged within their peer groups.²²⁰ For these young people, the wrong does not occur from sexting, instead, the wrong occurs when a sexting message is treated disrespectfully by someone within the peer group.²²¹ In its submission to the Committee, BoysTown noted that:

... young people who had engaged in the sexting behaviour often saw the behaviour as a normal and common practice among their peers. It was not the sexting behaviour itself that was typically seen to be a problem rather young people perceived the problem to be the negative outcome that could (and had in this case) occurred.²²²

The importance of sexting as a social phenomenon, rather than a legal problem, was recognised in most of the submissions and evidence received by the Committee. A number of people and organisations involved in educating young people about issues that may arise from sexting noted that they were able to make the greatest impression on youth by focussing on the social repercussions of sexting, rather than the legal risks:

²¹⁸ Association of Heads of Independent Schools of Australia, *Submission no. 49*, 25 June 2012; Emilia Kostovski, *Submission no. 39*, 15 June 2012; Stephanie Rich, Health Promotion Worker, Women's Health West, *Transcript of evidence*, Melbourne, 27 July 2012, p. 11; Amy Shields Dobson, Mary Lou Rasmussen and Danielle Tyson, *Submission no. 34*, 15 June 2012; The Alannah and Madeline Foundation, *Submission no. 42*, 18 June 2012; Shelley Walker, *Submission no. 55*, 6 July 2012; Women's Health Grampians, *Submission no. 14*, 14 June 2012, p. 6; Women's Health West, *Submission no. 21*, 15 June 2012.

²¹⁹ Association of Heads of Independent Schools of Australia, *Submission no. 49*, 25 June 2012; Stephanie Rich, Health Promotion Worker, Women's Health West, *Transcript of evidence*, Melbourne, 27 July 2012, p. 11; Amy Shields Dobson, Mary Lou Rasmussen and Danielle Tyson, *Submission no. 34*, 15 June 2012; The Alannah and Madeline Foundation, *Submission no. 42*, 18 June 2012; Victoria Legal Aid, *Submission no. 58*, 17 July 2012; Shelley Walker, *Submission no. 55*, 6 July 2012; Women's Health Grampians, *Submission no. 14*, 14 June 2012.

²²⁰ Association of Heads of Independent Schools of Australia, *Submission no. 49*, 25 June 2012; Australian Council of Educational Research, *Submission no. 35*, 15 June 2012; Electronic Frontiers Australia, *Submission no. 38*, 15 June 2012; June Kane, *Submission no. 10*, 12 June 2012; Emilia Kostovski, *Submission no. 39*, 15 June 2012; Amy Shields Dobson, Mary Lou Rasmussen and Danielle Tyson, *Submission no. 34*, 15 June 2012; Tasmania Police, *Submission no. 48*, 25 June 2012; The Alannah and Madeline Foundation, *Submission no. 42*, 18 June 2012; Shelley Walker, *Submission no. 55*, 6 July 2012; Women's Health West, *Submission no. 21*, 15 June 2012.

²²¹ Australian Council of Educational Research, *Submission no. 35*, 15 June 2012; BoysTown, *Submission no. 9*, 12 June 2012; Electronic Frontiers Australia, *Submission no. 38*, 15 June 2012; Macedon Ranges Local Safety Committee, *Submission no. 54*, 3 July 2012; The Alannah and Madeline Foundation, *Submission no. 42*, 18 June 2012; Victoria Legal Aid, *Submission no. 58*, 17 July 2012; Shelley Walker, *Submission no. 55*, 6 July 2012.

²²² BoysTown, *Submission no. 9*, 12 June 2012, pp. 9-10.

One of the things that we felt resonated with young people when they saw the film [*Tagged*] was as much the breakdown of the friendship circle of the kids in the film because of the results of their behaviour as much as that reference to the sex offenders register ...²²³

Victoria Legal Aid (VLA) observed that there is little awareness of the serious legal consequences that may flow from a finding of guilt for child pornography offences, such as a permanent criminal record, registration as a sex offender and potentially a sentence of imprisonment.²²⁴

Surf Coast Secondary College held an open community forum on sexting in June 2012 that included a number of student-led interviews. It informed the Committee that based on the responses of mid-aged adolescents (Years 9 and 10):

... there is negligible awareness of the legal ramifications of sexting in this age group at this College. Many students represented their responses regarding sanctions in terms of those guilty having their phones confiscated by their parents; thereby representing the behaviour as a family based matter rather than a matter for the justice system.²²⁵

However, the Committee also heard that in some cases young people may be unaware of the potential social consequences of sexting. The Salvation Army's Oasis Hunter noted in its submission that it regularly deals with issues related to sexting where clients are unaware of any potential social consequences, and suggested that there needs to be a dramatic increase in education on this issue. The submission by Oasis Hunter provided an example of the social consequences suffered by one of its clients:

... a young girl approached us for help in regards to social ramifications from sexting. The teenager had changed schools three times, but could not escape the inappropriate photographs which were circling of her. As a result, she had developed a well-known reputation across a variety of schools in the area. From our experience, it is apparent that young people are unaware of the damaging consequences associated with sexting and further education would assist in deterring or preventing these issues.²²⁶

The Gatehouse Centre also advised that the young people it sees rarely fully appreciate the legal effect and ramifications of sexting:

The children and young people, who come to counselling often express disdain at concerns about texting, laugh off explanations of the law and believe that Clinicians concerns expressed about this activity stem from the age gap between clinicians and themselves and their superior generational knowledge of phone, internet and other electronic devices usage.²²⁷

²²³ Andree Wright, Acting General Manager, Digital Economy Division, Australian Communications and Media Authority, *Transcript of evidence*, Melbourne, 10 December 2012, p. 14.

²²⁴ Victoria Legal Aid, *Submission no. 58*, 17 July 2012, p. 4.

²²⁵ Surf Coast Secondary College, *Submission no. 37*, 15 June 2012, p. 2.

²²⁶ Salvation Army Oasis Hunter, *Submission no. 7*, 30 May 2012, pp. 5-6.

²²⁷ Gatehouse Centre, Royal Children's Hospital, *Submission no. 40*, 18 June 2012, p. 2.

Family Planning Victoria also advised that it has found that secondary students are often unaware of the legal consequences of sexting:

When Family Planning Victoria's sexuality educators receive requests to conduct school-based sessions in secondary settings, we often get asked to include the topic of sexting. Anecdotally, during these sessions students often appear shocked to discover the severity of existing laws ...²²⁸

Victoria Police noted that anecdotal evidence from plea material presented to court indicates that there is a lack of awareness of the legal ramifications of sexting, particularly where it is consensual.²²⁹

The Just Leadership Program of the Monash Law Students Society ran an online 31-question survey on sexting, which was completed by 264 adult respondents, most of whom were recruited through Melbourne universities.²³⁰ The mean age of participants was 21 years old, with a range of 18 to 64 years.²³¹ About 38 per cent of the participants were male, and 62 per cent female.²³² While the survey was not scientific and has limitations, it provided some interesting results regarding young adults' participation in sexting behaviour, and their understanding of the law. Of the survey respondents, 28.4 per cent had sent at least one sexually explicit, sexually suggestive or nude image of themselves via electronic communication to another person.²³³ 40.5 per cent of respondents had received such an image of someone else via mobile phone.²³⁴ After receiving an image, 5.3 per cent had sent it on to a third person.²³⁵ Less than half of the survey respondents believed that retaining a sexually explicit, sexually suggestive or nude image of a person under 18 years old that is sent to them is illegal.²³⁶

3.2 Barriers to education about sexting

During the course of the Inquiry, the Committee heard about a number of factors that may affect the effectiveness of education about sexting. These range from developmental issues, to the social context of sexuality and online technologies, to structural and policy issues.

One of the key issues for education campaigns around sexting is to determine what the object of a particular campaign is. For example, is the aim to stop young people sexting altogether, to educate them about the possible legal repercussions of sexting, or to engage young people to consider when sexting may be acceptable, and when it is not? Clearly the context for education is determined in relation to the risks associated with a given practice – and as currently the legal penalties associated with

²²⁸ Family Planning Victoria, *Submission no. 18*, 14 June 2012, p. 1.

²²⁹ Victoria Police, *Submission no. 24*, 15 June 2012, p. 1.

²³⁰ Just Leadership Program, Monash University Law Students' Society, *Submission no. 59*, 17 July 2012, p. 28.

²³¹ *ibid.*

²³² *ibid.*

²³³ *ibid.*

²³⁴ *ibid.*

²³⁵ *ibid.*

²³⁶ *ibid.*

sexting for young people are very onerous, it may be appropriate for education campaigns to strongly discourage all forms and contexts of sexting.

3.2.1 Adolescent development

The Committee heard that one of the barriers to effecting behaviour change through education for young people is that adolescents may not always assess the risks and consequences of their actions appropriately. In her submission to the Inquiry, Ms Susan McLean noted:

There is strong research evidence to suggest that adolescents in general and male adolescents in particular, are developmentally less able to make informed decisions about personal safety and security than are adults.²³⁷

Ms McLean cited research by Dr Ruben C. Gur, Director of the Brain Behaviour Laboratory at the University of Pennsylvania, who suggested that:

The evidence now is strong that the brain does not cease to mature until the early 20s in those relevant parts that govern impulsivity, judgment, planning for the future, foresight of consequences, and other characteristics that make people morally culpable ... Indeed, age 21 or 22 would be closer to the 'biological' age of maturity.²³⁸

The submission by Ms Shelley Walker noted that her research on teens and sexting behaviours provided results that were “in line with what is known about developmental stages of adolescence and brain development; those in their early teens are more inclined to act on impulse, engage in risky behaviour and be less capable of thinking through potential consequences of their behaviour.”²³⁹

Witnesses and submissions suggested to the Committee that, due to these characteristics of adolescents, education campaigns that focus predominantly on risk, and the consequences of risky actions, may be less effective for young people. In their submission to the Inquiry, Drs Amy Shields Dobson, Mary Lou Rasmussen and Danielle Tyson noted that adolescent development, marketing to youth, and the tendency of youth to portray themselves as risk takers mean that “[c]ampaigns that highlight ‘risk’ may be ineffective, and even counter-productive, when it comes to minimising harm around the distribution of mediated sexual communication for this reason.”²⁴⁰

The Committee heard similar evidence overseas, where informants noted one of the key observations from sexting incidents was that children do not have good judgement, and tend to act impulsively. In a context where their peers are encouraging them to participate in sexting behaviours, the

²³⁷ Susan McLean, *Submission no. 12*, 13 June 2012, p. 3.

²³⁸ Cited in *ibid.*, 4.

²³⁹ Shelley Walker, *Submission no. 55*, 6 July 2012, p. 3.

²⁴⁰ Amy Shields Dobson, Mary Lou Rasmussen and Danielle Tyson, *Submission no. 34*, 15 June 2012, p. 4.

consequent risks of those behaviours may not feature prominently in young people's decisions whether or not to send a sexting message.

3.2.2 Peer social expectations

In Chapter Two the Committee noted that in some peer groups, and for many adolescents, there is considerable pressure for young people – and particularly girls – to participate in sexting. For some groups of adolescents providing a sexting message to a boyfriend or girlfriend, or a potential partner, is not regarded as an extraordinary practice – and may in fact be accepted practice in some peer groups.

The Committee received evidence throughout the course of the Inquiry suggesting that sexting by young people was typically associated with adolescents' ordinary interest and curiosity in sex and sexuality, expressed in a modern context where online and connected technologies mediate many young people's social relationships.²⁴¹ In many cases, provided that respect for one another is maintained in those relationships, sexting will not cause any overt harm to those youths. As noted by the Macedon Ranges Local Safety Committee in its submission to the Inquiry:

The act of 'sexting' (at the points of creation, sharing, sending, posting) between adolescents **can** be an act that is consensual, and at any point the action may have an intent that is not offensive, malicious, menacing, abusive, or exploitative.

The act of 'sexting' (at the points of creation, sharing, sending, posting) between adolescents **can** be an act that is **not** consensual, and can have an intent that could be construed as either/and/or: offensive, malicious, menacing, abusive, or exploitative.²⁴²

Evidence received by the Committee suggested that many, if not most, young people view the act of sexting in similar ways. As many youth do not see the act of sexting as inherently risky, or abusive, education campaigns that attempt to frame sexting in that way may not resonate with the target audience, and so will not contribute to behavioural change in that audience. A range of education campaigns, including ones that portray all sexting as risky, are described below.

3.2.3 Inappropriately framed laws

Another factor that may impede education about sexting is the difference between young people's understanding of sexting as an activity, and the legal repercussions of participating in that activity. As noted above in the study conducted by the Monash Law Students Society, less than half of

²⁴¹ Association of Heads of Independent Schools of Australia, *Submission no. 49*, 25 June 2012; Australian Council of Educational Research, *Submission no. 35*, 15 June 2012; Amy Shields Dobson, Mary Lou Rasmussen and Danielle Tyson, *Submission no. 34*, 15 June 2012; Tasmania Police, *Submission no. 48*, 25 June 2012; The Alannah and Madeline Foundation, *Submission no. 42*, 18 June 2012; Shelley Walker, *Submission no. 55*, 6 July 2012.

²⁴² Macedon Ranges Local Safety Committee, *Submission no. 54*, 3 July 2012, p. 9 (emphasis in original).

young people believed retaining a sexually explicit image of someone under 18 that was sent to them would be an offence.²⁴³ In its submission, Oasis Hunter told the Committee that “[i]n our experience, it is evident young people are not aware of the laws governing sexting and they do not understand the legal ramifications they may face in light of the act.”

As noted above, part of the dissonance between young people’s understanding of sexting and the legal repercussions of youth sexting is that current law defines sexting as a form of child pornography when it depicts minors, whereas this is not the view of the vast majority of adolescents. Under current legislation, the offence occurs with the creation (or copying) of an image, message or video, regardless (with some exceptions) of who created or copied it, when, or where. When distribution of a sexting image does occur without consent, it is typically an act of malice or negligence (in the latter case, where due consideration was not given to the subject of the sexting message), rather than a form of child sexual abuse.²⁴⁴ A key difference between young peers sharing explicit images and an older person sharing images is that for the older person, the focus is on the *youth* of the subject, rather than sex.²⁴⁵

As discussed in later in this Report, the Committee believes that current laws, which criminalise the *existence* of an intimate image of a young person, regardless of context or intent, are unlikely to resonate sufficiently with young people to influence their behaviours. The Committee argues that criminality in the distribution of intimate images between youth peers occurs when those images are distributed without consent, and the Committee believes that this definition of criminality would resonate with young people’s own understanding of what is acceptable for online practice.

3.2.4 Inconsistent approaches by authorities

The Committee heard that another potential barrier to education of young people about sexting was that the response of police, and schools, varied across the state. The police currently have no explicit policy on how to proceed with sexting incidents, so that on occasion there may be variations in responses by police and schools to incidents of sexting:

The 2009 Macedon Ranges case was the first of its kind brought to the attention of local police. There was no template for dealing with sexting. As a result local police initiated a forum with principals from all local schools and the education department, along with the local council and community health. This enabled conversations in relation to cyber and sexting incidents, duty of care, reporting protocols, police response and available

²⁴³ Just Leadership Program, Monash University Law Students' Society, *Submission no. 59*, 17 July 2012, p. 28.

²⁴⁴ Australian Council of Educational Research, *Submission no. 35*, 15 June 2012; Electronic Frontiers Australia, *Submission no. 38*, 15 June 2012; Macedon Ranges Local Safety Committee, *Submission no. 54*, 3 July 2012; Name withheld, *Submission no. 56*, 10 July 2012; The Alannah and Madeline Foundation, *Submission no. 42*, 18 June 2012.

²⁴⁵ A/Prof. Andrea Slane, Director, Legal Studies Program, University of Toronto, *Meeting*, Toronto, Canada, 29 October 2012.

networks for support, as well as a policy that enabled a consistent response to cyber and sexting incidents. This policy was implemented through local police at training sessions.²⁴⁶

The Committee heard that, in the case of the incidents referred to above in the Macedon Ranges, policies were adopted as issues arose through the course of sexting cases. The Committee also heard, however, that since those events progress has been made throughout Victoria to improve consistency in Victoria Police's approach to sexting events:

As a result of what happened at Macedon Ranges we have had a lot of communication; we came down and we were able to transfer a lot of the material that was successfully done. We were able to get it to the youth advisory unit police and then had it disseminated statewide, again acknowledging the fact that there are no boundaries for this stuff. That is where we have been doing that so that wherever you go in Victoria your response will be the same; that was the hope, and I guess that is what we are still looking at.²⁴⁷

The Committee considers further measures that could be examined to improve police approaches to sexting events in Chapter Five. It is clear that education about sexting, and the possible repercussions of it, would be facilitated if consistent processes and policies were implemented across the state.

3.2.5 Education not reflecting the experience of youth

As noted above, and in later chapters, the Committee heard that young people's understanding of interpersonal relationships and identity is increasingly mediated through online and connected technologies.²⁴⁸ This means that, for example, an increasing number of young people have a 'public' identity that is presented through social networking websites, image hosting services, and peer-to-peer communications and broadcasting. While the focus of the Inquiry is on sexting, young people may also broadcast a number of other potentially delicate matters via their online identities, such as public postings about parties, opinions about others, swear words, or images (which are not sexual in nature) of themselves or friends at parties.

A number of commentators suggest that this kind of activity may have a negative effect on the employment and education prospects of young people in the future, as educators and employers may be able to check

²⁴⁶ Darlene Cole, Youth Partnerships Officer, Macedon Ranges Shire Council, Macedon Ranges Local Safety Committee, *Transcript of evidence*, Melbourne, 7 August 2012, p. 23.

²⁴⁷ Joe Grbac, Leading Senior Constable, Macedon Ranges Youth Resource Officer, Victoria Police, Macedon Ranges Local Safety Committee, *Transcript of evidence*, Melbourne, 7 August 2012, p. 31.

²⁴⁸ Australian Council of Educational Research, *Submission no. 35*, 15 June 2012; Electronic Frontiers Australia, *Submission no. 38*, 15 June 2012; Amy Shields Dobson, Mary Lou Rasmussen and Danielle Tyson, *Submission no. 34*, 15 June 2012; The Alannah and Madeline Foundation, *Submission no. 42*, 18 June 2012; Shelley Walker, *Submission no. 55*, 6 July 2012.

online to determine what kinds of behaviours people have participated in.²⁴⁹ In this context, some educative approaches suggest that young people should take a very cautious approach to their online identities, and resist posting, or being associated with, activities that reflect negatively on their character.

Despite this advice, many young people persist in presenting colourful online personas through social networking, and other sites. As a large part of many young people's socialising takes place online, it is likely that many young people will continue to be more concerned about their peers' expectations of 'appropriate' online behaviour than their long-term online 'image'. It is important in this regard that approaches to education acknowledge that young people will likely continue to engage with one another through online media.

A number of witnesses also suggested that, due to the pervasiveness of online identities by young people, it was possible that over time educators and employers would take much less notice of (old) online materials. Some witnesses also suggested that notions of what is public and what is private are changing for young people, so that they are less concerned about some of the material about them that may be available to the public:

... young people might place a fundamentally different value on the notion of privacy. It is argued that the younger group (8-15 year olds) who are currently using social media have different notions of privacy regarding the sharing of information about oneself than are held by people in preceding generations. Those born before the war held personal information close as disclosure was thought to be 'airing one's dirty linen in public' and they never discussed their lives with people outside the family – sometimes even within it. ... Young people have grown up in an environment where sharing sometimes quite intimate thoughts – and images – is seen as the norm. Private and public selves are entwined in ways it's difficult for older generations to understand, "So they're not embarrassed about some of the things that we think they should be embarrassed about because it's an extension of the self that they're used to having viewed" (Steve Jones, Communications Professor at the University of Illinois-Chicago, in USA Today, 2007).²⁵⁰

Approaches to education that assume young people have a strong desire to remain out of the public eye may also fail to resonate, as young people may not be as concerned about these kinds of issues as previous generations.

²⁴⁹ Australian Federal Police, *Submission no. 57*, 11 July 2012; FamilyVoice Australia, *Submission no. 4*, 19 May 2012; Office of the Victorian Privacy Commissioner, *Submission no. 51*, 29 June 2012; Parents Victoria, *Submission no. 33*, 15 June 2012; Victoria Legal Aid, *Submission no. 58*, 17 July 2012; Caroline Whitehouse, Senior Clinician, Gatehouse Centre, Royal Children's Hospital, *Transcript of evidence*, Melbourne, 27 July 2012, p. 3.

²⁵⁰ The Alannah and Madeline Foundation, *Submission no. 42*, 18 June 2012, p. 8.

3.2.5.1 Education age groups

As noted in Chapter Two, the Committee received evidence from a number of witnesses and in submissions that education about sexting should be initiated relatively early for young people – Ms Shelley Walker noted her research suggested that “those in the middle years (aged 9-14), who are transitioning from childhood to adolescence, were more likely to be involved in sexting.”²⁵¹ In its submission, BoysTown noted that calls to its service suggested that education efforts should be directed toward children aged 10 to 15 years old and onwards.²⁵²

Most programs addressing sexting currently focus on young people aged in their early teens (see below). The Committee notes that providing education to children about issues surrounding sexting before they are ten years old may be preferable. The Committee is particularly cognisant of Ms Walker’s research in this regard, which suggests education about sexting should be introduced to children as early as Grade 3 level. This could take place in the context of more general education about cyberbullying. The Committee discusses these issues in further detail below.

3.2.6 Popular portrayals of sex and communication

The Committee received evidence from a number of witnesses and submissions noting that young people’s sexting practices are informed by, and respond to, popular media representations of men’s and women’s behaviours. In its submission to the Inquiry, BoysTown noted that “the ease with which children and young people can access sexy and even pornographic images is blurring the boundaries of what they consider to be acceptable behaviour. Increasingly, exposure is provided via the internet, music videos, advertising and reality television shows.”²⁵³

Witnesses noted that a number of celebrities had been involved in sexting events, and that these provided an example for young people to emulate:

Children, however, are much more likely to follow the example of their favourite music or movie celebrity or sports person than a parent or teacher. Consideration might therefore be given to involving celebrity spokespersons in influencing young people to recognize the high-risk nature of sexting and to discourage it. At the same time, when instances comes to light of violent sexting perpetrated by high profile celebrities (the Lara Bingle/Brendan Fevola episode comes to mind), then action should be taken and the perpetrator should be appropriately sanctioned.²⁵⁴

While the Committee has noted the Lara Bingle case in subsequent chapters of this Report, it is noteworthy that the example this provides for the distributors of non-consensual images (principally boys) is that distribution of titillating images may be done with comparatively little risk –

²⁵¹ Shelley Walker, *Submission no. 55*, 6 July 2012, p. 3.

²⁵² BoysTown, *Submission no. 9*, 12 June 2012, p. 8.

²⁵³ *ibid.*, 7.

²⁵⁴ June Kane, *Submission no. 10*, 12 June 2012, p. 3.

despite the fact that, currently, this is not the case for young people who distribute images of themselves.

Educative approaches that imply that all sexting is dangerous or detrimental are unlikely to resonate with young people, when popular culture provides a wealth of evidence that a sexualised presentation of oneself to the world enhances a person's profile, rather than detracts from it. It is important in this context that education about sexting directed at young people clearly defines the circumstances in which sexting is inappropriate – that is, where distribution of images is done without consent – rather than condemning all instances of sexting.

3.3 Current school policies

Government school policy with regard to sexting incidents, and a range of other incidents, is informed by the *Duty of care* statement issued by the Department of Education and Early Childhood Development (DEECD). This statement notes that the 'duty of care' of a school is an element of the tort of negligence, and describes the conditions that must be established for a claim of negligence to be brought against a school. With regard to the standard of care required by schools, the *Duty of care* statement provides the following advice:

Principals and teachers are held to a high standard of care in relation to students. The duty requires principals and teachers to take all reasonable steps to reduce risk, including:

- provision of suitable and safe premises
- provision of an adequate system of supervision
- implementation of strategies to prevent bullying
- ensuring that medical assistance is provided to a sick or injured student.

The duty is *non-delegable*, meaning that it cannot be assigned to another party.

Whenever a teacher-student relationship exists, teachers have a special duty of care. This has been expressed as: "a teacher is to take such measures as are reasonable in the circumstances to protect a student under the teacher's charge from risks of injury that the teacher should reasonably have foreseen." (*Richards v State of Victoria*).

The nature and extent of the duty will vary according to the circumstances. For example, the standard of care required will be higher when taking a group of preps for swimming lessons than when teaching a group of year 12s in the classroom.

The important issue in all cases will be what precautions the school could reasonably be expected to have taken to prevent the injury from occurring. This will involve consideration of the following factors:

- the probability that the harm would occur if care were not taken
- the likely seriousness of the harm
- the burden of taking precautions to avoid the risk of harm

- the social utility of the activity that creates the risk of harm.²⁵⁵

Under certain circumstances, the duty of care may extend outside of school grounds and/or outside of school hours.

The DEECD has also issued a number of documents describing processes that should be employed by government schools when responding to various kinds of online incidents. These processes are informed by each school's student engagement policy, which is developed by each school with reference to the *Student engagement policy guidelines*, issued by the DEECD.²⁵⁶ The guidelines require that each school develop a student engagement policy that includes the following components:

- school profile statement
- whole-school prevention statement
- rights and responsibilities
- shared expectations – staff, parents/carers and students; and
- school actions and consequences.²⁵⁷

Each government school's student engagement policy should also describe the processes and conditions that surround discipline of students for inappropriate behaviours, through a staged response that has a prevention and early intervention focus. The guidelines require that the school take steps toward:

- understanding the student
- ensuring a clear understanding of expectations by both students and teachers
- providing consistent school and classroom environments
- scaffolding the student's learning program.²⁵⁸

The student engagement policy of each school should also incorporate broader support strategies, including:

- involving and supporting the parents/carers
- involving the student wellbeing coordinator, managed individual pathways or careers coordinators
- tutoring/peer tutoring
- mentoring and/or counselling

²⁵⁵ Department of Education and Early Childhood Development, 'Duty of care', viewed 24 April 2013, <www.education.vic.gov.au>.

²⁵⁶ Department of Education and Early Childhood Development, 'Student Engagement Policy Guidelines', viewed 21 May 2013, <www.education.vic.gov.au>.

²⁵⁷ *ibid.*

²⁵⁸ *ibid.*

- convening student support group meetings – the student support group is an important component of the staged response for students facing difficulty with engagement, attendance or behaviour
- developing individualised flexible learning, behaviour or attendance plans
- providing broader educational programs, for example experiential learning, work education, camps/outdoor education/creative arts
- involving community support agencies.²⁵⁹

The DEECD has also issued *A step-by-step guide for responding to online incidents of inappropriate behaviour affecting students*.²⁶⁰ The guide states that “[s]chools have a duty of care to take reasonable steps to protect students from any harm that should have reasonably been foreseen.” The guide is activated when a school employee is:

concerned about a student because [he or she has]:

- received a disclosure from the student who has been subjected to inappropriate behaviour that is occurring or has occurred in the digital world.
- received a report from an adult or another student about inappropriate behaviour that is occurring or has occurred in the digital world.²⁶¹

Should this occur, the school employee is required to either approach the situation with regard to the school’s student engagement policy, refer the matter to the school’s leadership or student wellbeing team, or, if a criminal offence may have occurred, refer the matter to the DEECD Security Services Unit and to Victoria Police.²⁶² Consequently, in most circumstances where sexting has occurred, a school will refer the matter to the police.

The Committee notes that the DEECD *A step by step guide for responding to online incidents of inappropriate behaviour affecting students* does not exclude school employees from pursuing “digital world” matters that arise outside of school hours or outside school grounds.

The Catholic Education Commission of Victoria (CECV) advised that Catholic schools in Victoria are required to develop their own policy on cybersafety, and the CECV provides resources to assist them to do so.²⁶³ As part of a holistic approach to cybersafety, all Catholic schools are required to review and develop a cybersafety curriculum.²⁶⁴ CECV has also published a teaching resource to raise awareness and understanding on

²⁵⁹ *ibid.*

²⁶⁰ Department of Education and Early Childhood Development, ‘Step by step guide for responding to online incidents of inappropriate behaviour affecting students’, viewed 21 May 2013, <www.education.vic.gov.au>.

²⁶¹ *ibid.*

²⁶² *ibid.*

²⁶³ Catholic Education Commission of Victoria Ltd, *Submission no. 43*, 19 June 2012, p. 3.

²⁶⁴ *ibid.*, 4.

cybersafety among teachers and school leaders, and Catholic schools across Victoria provide parent education on cybersafety.²⁶⁵

In her submission to the Inquiry, Dr June Kane suggested that schools should be encouraged to review their policies in relation to mobile phone and tablet use at school – for example, schools could require that mobile devices be handed in at the start of the school day, and collected at the end.²⁶⁶ The Committee is aware that at least some schools already have in place digital technologies policies requiring that this occur.

3.4 Education and awareness campaigns and resources

Currently a number of resources are available, delivered principally through the schools system, to improve awareness and education about sexting issues. Most of these resources are delivered in the context of broader programs on internet safety, cyberbullying, and suicide prevention. While to date many programs have also been delivered as ‘one-off’ units in school curriculums, Victorian schools and teachers appear to be actively engaged in addressing issues surrounding online safety, so that over time these issues may become imbedded in school curriculums.

For example, the Australian Communications and Media Authority (ACMA) informed the Committee that as at December 2012 over 5288 Victorian teachers had participated in one-day training sessions for the Cybersmart program, and over 208 000 teachers, students and parents had attended 1-hour presentations under the program.²⁶⁷

The Committee also notes that a number of organisations also provide valuable services and information to the community that incorporate consideration of, and promotion of awareness and support for, sexting-related issues. The Committee considers some of the organisations providing this kind of service in Australia below.

3.4.1 DEECD and associated programs

The DEECD provides a range of information for teachers on education about online and related issues for students. In its submission to the Inquiry, the DEECD noted that it strongly encourages school communities to take a “whole school approach to ensuring and promoting cybersafety.”²⁶⁸ The DEECD also noted that while the whole school approach to cybersafety could not be mandated, the DEECD expects that by December 2013 every government school will have commenced the eSmart program, which strongly endorses whole-school approaches to the issue.²⁶⁹

²⁶⁵ *ibid.*, 3.

²⁶⁶ June Kane, *Submission no. 10*, 12 June 2012, p. 3.

²⁶⁷ Andree Wright, Acting General Manager, Digital Economy Division, Australian Communications and Media Authority, *Transcript of evidence*, Melbourne, 10 December 2012, pp. 9-10.

²⁶⁸ Department of Education and Early Childhood Development, *Submission no. 60*, 19 July 2012, p. 2.

²⁶⁹ *ibid.*

As well as the policy guides for responding to online incidents noted above, the DEECD hosts the *Learning OnLine* site on its website, which provides information about a range of issues relating to teaching the use of online technologies, such as acceptable use statements, elaboration of privacy and other issues, duty of care in online settings and student email use. The DEECD's *Cyber Teach Toolkit* also provides examples of teaching programs that engage various aspects of the Victorian Essential Learning Standards (VELS) from grade Prep to Year 12, including examples of programs for Special Needs Education.²⁷⁰ The *Cyber Teach Toolkit* covers a range of issues, including approaches for teaching students to identify 'real' people on the internet, and how to control privacy and online identity when using online technologies.

3.4.1.1 eSmart

As noted above, the eSmart program is endorsed by the DEECD, which encourages its implementation in Victorian schools. The Victorian Government has partnered with the Alannah and Madeline Foundation to provide the eSmart program to all government schools, and some independent and Catholic schools defined as disadvantaged by the DEECD.²⁷¹ eSmart was developed by the Alannah and Madeline Foundation in conjunction with RMIT University, and provides a system to guide schools to introduce policies and practices that encourage people to be smart, safe and responsible online, while developing digital literacy and citizenship. Key features of the eSmart program include that it:

- is a whole-school approach;
- embraces technology's benefits;
- reduces students' and teachers' exposure to risk; and
- improves wellbeing and enhances relationships.

Schools that participate in the eSmart program receive a range of resources and supports, including access to a secure website that provides teaching resources, research, and tracking tools, training on how to use those resources, and access to a help desk, among other things.

A key feature of the eSmart program is that it provides schools with resources and information to introduce whole-of-school approaches to education about online issues, and that it provides schools with access to current research and tools about those issues.

²⁷⁰ Department of Education and Early Childhood Development, 'Cyber Teach Toolkit - Safe and Responsible Use of Digital Technologies', viewed 21 May 2013, <www.education.vic.gov.au>.

²⁷¹ Department of Education and Early Childhood Development, *Submission no. 60*, 19 July 2012; The Alannah and Madeline Foundation, *Submission no. 42*, 18 June 2012.

3.4.1.2 Cybersmart

Cybersmart is a national cybersafety and cybersecurity education program that is managed by the ACMA. The program is designed to meet the needs of children, young people, parents, teachers and library staff to “encourage participation in the digital economy by providing information and education which empowers children to be safe online”.²⁷²

Most materials for the Cybersmart program are presented through its website, with sections dedicated to a range of age groups (“young kids”, “kids”, “teens” and “parents”) and specific sections for teachers and libraries. Information through the website is provided through activities, games, multimedia presentations, blogs, and other materials, developed for the specific age groups. Resources for teachers are comprehensive, and include information about national and state policies, links to useful websites, and lesson plans directed toward specific age groups.

The Cybersmart program also convenes outreach presentations, including one hour seminars which are presented to school communities and/or students; one-day professional development sessions for current teachers; and a pre-service final-year teachers program that is made available for free to all universities throughout Australia consisting of a 60 or 90 minute lecture, and an optional 60 minute tutorial. Cybersmart also offers an online training course, *Connect.ed*, for practising teachers.²⁷³

3.4.1.3 DEECD website resources links

The DEECD website provides a number of links to various learning resources for teachers and students. These include the eSmart and Cybersmart programs, noted above, and sites for the support of children experiencing difficulties online (and in other circumstances) such as Kids Helpline, which is a phone, web and email counselling service.

The DEECD website also provides links to a number of online resources that address issues about online safety, including sexting issues, from other countries. Most of these links are to online videos, including “think before you post”, “think before you post #2”, “growing up online”, “netsmartz” (US), “Claire thought”, and “think you know – again” (UK). Most of the stories in these media focus exclusively on the negative repercussions for the young person who consensually sends an intimate image of themselves to another person (in some cases the threat is compounded because the person they send the image to has misrepresented *himself*). The DEECD advises that teachers review the videos prior to showing them to students to ensure they are appropriate for the particular student’s educational needs.

²⁷² Australian Communications and Media Authority, 'About Cybersmart', viewed 24 April 2013, <www.cybersmart.gov.au>.

²⁷³ *ibid.*

The DEECD website also provides links to a number of resources that consider other aspects of online safety and awareness, such as information about copyright and piracy.²⁷⁴

3.5 Improving education about sexting

'Campaigns' based on community messaging via various media or short-term, limited-scope 'magic bullet' programs (Beer, Eisenstat & Spector, 1990) have little long-term effect on behavioural change. ... Policy responses need to address the issue in whole-of-community ways, that include educative, regulatory and, as a last resort, legal to address the needs of different members in ways that are appropriately targeted specifically to reduce online risks for young people and more generally to reduce risks for vulnerable young people.²⁷⁵

Throughout the course of this Inquiry the Committee became increasingly aware of the ubiquitous nature of online and communications technologies, particularly in the context of the development, and social lives, of young people. Communications and connected technologies mediate a large number of the environments young people are likely to encounter most of the time – during school, for entertainment, or during interactions with peers. The ubiquitous nature of these technologies means that suggestions for protecting children from abusing them, or being abused through them, by removing the technologies, or monitoring use, will become increasingly futile. The best means by which young people can be protected from the abuse of technology is to provide an education that allows them to discern appropriate use of those technologies, and to identify appropriate use by others.

Contemporary Australian research suggests that some children may begin to experiment with sexting-related behaviours from ages 9 to 14, and there are certainly multiple examples of teens experimenting with sexting from 15 years and older. In this context, it is important that education provides all young people with strategies and tools to deal with situations that may arise during and through online relationships. Because these technologies are always present, education about appropriate use should not be delivered as discrete units, but incorporated as a core component of school education curriculums. The Committee notes and supports the holistic approach to education about connected technologies currently encouraged by the DEECD.

Recommendation 2: That the Victorian Government, through the Department of Education and Early Childhood Development, ensure all Victorian schools adopt holistic, integrated programs for internet and communications technologies awareness and safety into the school curriculum.

²⁷⁴ Department of Education and Early Childhood Development, 'Learning Online', viewed 21 May 2013, <www.education.vic.gov.au>.

²⁷⁵ The Alannah and Madeline Foundation, *Submission no. 42*, 18 June 2012, p. 15.

The Committee was pleased to learn that Victorian teacher participation in cybersafety education initiatives, such as eSmart and Cybersmart, was high, and that Victoria compares favourably with other states for participation in these initiatives.²⁷⁶ The Committee was also pleased at high participation rates by pre-service teachers in cybersafety education. The Committee believes that this is a very positive development, and that the DEECD should continue to encourage all teachers and pre-service teachers to obtain appropriate qualifications in, and experience of, issues and teaching methods in cybersafety for children.

Recommendation 3: That the Victorian Government, through the Department of Education and Early Childhood Development, continue to encourage current and pre-service teachers to take part in professional development programs focusing on cybersafety education.

3.5.1 The focus of education campaigns about sexting

In Chapter Two, the Committee noted that that the range of reasons for young people, and girls in particular, to participate in sexting were complex and diverse: sexting could be an expression of sexuality, a response to peer pressure, or an impulsive act while intoxicated, among others.²⁷⁷ The Committee also noted youth sexting practices appear to reinforce gendered stereotypes about the behaviours of girls and boys, and in particular tend to both encourage and vilify young women who participate in sexting. A number of critical analyses of sexting note that campaigns to discourage youth from participating in sexting also tend to focus on girls as victims, and focus on girls as the authors of their own misfortune by participating in sexting. The 'solution' presented in many campaigns and media for the problems that arise from sexting is for girls to simply say 'no' to sexting.²⁷⁸

While this approach may prevent some episodes of sexting, the Committee notes that it does not provide a particularly pragmatic response to youth practices surrounding sexting, particularly given the broader social circumstances in which it occurs.²⁷⁹ Furthermore, the Committee notes and makes recommendations in later chapters reflecting the view that consensual sexting between peers may not cause significant harm, and that the more serious harms occur when sexting messages are distributed

²⁷⁶ Andree Wright, Acting General Manager, Digital Economy Division, Australian Communications and Media Authority, *Transcript of evidence*, Melbourne, 10 December 2012, pp. 9-10.

²⁷⁷ BoysTown, *Submission no. 9*, 12 June 2012; Electronic Frontiers Australia, *Submission no. 38*, 15 June 2012; June Kane, *Submission no. 10*, 12 June 2012; Macedon Ranges Local Safety Committee, *Submission no. 54*, 3 July 2012; Amy Shields Dobson, Mary Lou Rasmussen and Danielle Tyson, *Submission no. 34*, 15 June 2012; Shelley Walker, *Submission no. 55*, 6 July 2012; Women's Health Grampians, *Submission no. 14*, 14 June 2012; Women's Health West, *Submission no. 21*, 15 June 2012.

²⁷⁸ Katherine Albury, Kate Crawford and Paul Byron, *Submission no. 31*, 15 June 2012, p. 4; Amy Shields Dobson, Mary Lou Rasmussen and Danielle Tyson, *Submission no. 34*, 15 June 2012; Women's Health Grampians, *Submission no. 14*, 14 June 2012, p. 6.

²⁷⁹ Australian Council of Educational Research, *Submission no. 35*, 15 June 2012; June Kane, *Submission no. 10*, 12 June 2012; Amy Shields Dobson, Mary Lou Rasmussen and Danielle Tyson, *Submission no. 34*, 15 June 2012, p. 3; Shelley Walker, *Submission no. 55*, 6 July 2012.

without consent. However, very few educational media focus on the role and responsibilities of the disseminators of non-consensual sexting.

In the United States in the 1990s, “just say no” was a prominent media campaign directed at reducing drug use, and was later adopted for campaigns to reduce teen pregnancies. While the campaign has remained popular in the US, it has been widely critiqued as being ineffective. The reasons generally identified for its failure is that it fails to account for the social context in which teen pregnancies occur, that while the campaign appeals to adults it does not resonate with youth, and that it reinforces gendered notions that girls are responsible for preserving their virginity against the ‘natural’ desires of boys.

The Committee’s recommendation in Chapter Six to introduce an offence for non-consensual sexting recognises that sexting by young people is a practice that is unlikely to go away, and instead focuses on the act within the practice of sexting where the harm is commonly done through sexting – that is, where an intimate image is distributed without consent. The Committee believes that, among other things, this offence reflects community attitudes to the harms of sexting more accurately than current legislative arrangements, and so will likely work better to shape desirable behaviours in relation to sexting.

Likewise, the Committee believes that educational and media campaigns about sexting should also focus on the behaviour of people who disseminate sexting messages without consent, rather than the people who produced those images consensually. The act of distributing a message without consent is fundamentally a disrespectful act, and education and campaigns about sexting should focus on the need to maintain respectful relationships with others.

The Committee also notes that this approach to sexting education would correlate to education and campaigns focused on appropriate use of communications technologies generally, and will likely compliment the development of notions about online etiquette, rather than adhere to the notion that non-participation is a solution to the issue.

Recommendation 4: That the Victorian Government ensure that educational and media campaigns directed toward sexting focus on the appropriateness of the behaviour of people who distribute intimate images or media without consent, rather than on the person who initially creates the intimate images or media.

Chapter Four: Sexting and the criminal law

Young people who engage in peer-to-peer sexting may be prosecuted under child pornography laws, and may subsequently be listed on the Sex Offenders Register. One of the principal concerns for the Committee when approaching this Inquiry was to consider whether current legislation sufficiently deals with the circumstances surrounding sexting, and in particular, sexting by young people. In this Chapter, the Committee describes laws as they currently apply to the range of scenarios that may be captured by the term 'sexting'.

In conducting its review, the Committee was cognisant that child pornography laws were created for the purpose of protecting children from predatory sexual behaviour. As Chapter Two shows, while some sexting behaviour can be harmful – for example, where a person sends on an intimate image of someone else without the consent of the person depicted – most sexting behaviour does not involve the sexual exploitation of minors. Child pornography laws were not designed to capture this type of behaviour, but can nevertheless be applied to it.

In this Chapter, the Committee reviews the development of the child pornography laws, and discusses how these laws can apply to people who engage in sexting. The Committee also considers other criminal law provisions that may be applicable to various sexting behaviours.

4.1 A brief history of child pornography laws

The criminalisation of child pornography by means of specific child pornography offences is a fairly recent development in criminal law. Up until the 1970s, child pornography was not regulated separately from other forms of 'obscene material'.²⁸⁰ Academic Yaman Akdeniz described how specific child pornography laws developed in England and Wales:

Historically, the development of child pornography laws date back to the mid-1970s when the 'twin problems of child sexual abuse and child pornography' became a huge concern. The Williams Committee inquiry as well as the enactment of the Protection of Children Act 1978 in England and Wales responded to such concerns and provided the first 'specific' legal response to combat the problem of child pornography. Prior to this, sexually explicit content involving children (including photographs and

²⁸⁰ Jonathan Clough, *Barely (il)legal: the problematic definition of 'child pornography'*, Draft version, p. 5. citing Alisdair Gillespie, 'Legal definitions of child pornography', *Journal of Sexual Aggression*, vol. 16, no. 1, p. 19, 2010, p. 20.

videos) could be tackled under broader obscenity and indecency legislation such as the Obscene Publications Act 1959 and 1964 in England and Wales, and under the *Miller* obscenity standards in the United States. Since the late 1970s child pornography laws have been developed further and expanded continuously.²⁸¹

In Victoria, a specific offence for the “knowing possession” of child pornography was first introduced in 1992. Subsequently, child pornography offences were introduced to the *Crimes Act 1958* (Vic) in 1996, which made the production of child pornography illegal, as well as procurement of a minor for child pornography, and the knowing possession of child pornography. Each of these child pornography offences persist in current Victorian legislation, although the scope of the offences has broadened, and penalties have increased over time.

The rationale for making child pornography offences more comprehensive has always been to protect children, and the focus of legislators has always been on deterring and punishing the exploitation of children by adults. It is unlikely that legislators anticipated or intended that acts resembling peer-to-peer sexting by young people would be captured by these provisions.

4.1.1 Objectionable films and objectionable publications

Before 1992, there were no offences in Victorian legislation dealing specifically with child pornography. Rather, the *Classification of Films and Publications Act 1990* (Vic)²⁸² contained offences relating to objectionable films and objectionable publications. A film that depicted a child under the age of 16 engaged in sexual activity, or otherwise portrayed in an offensive manner, would fall within the definition of an “objectionable film”, as would films that, for example, depicted matters of sex, drugs, crime, cruelty or violence in a manner likely to cause offence to reasonable adults.²⁸³

This definition for “objectionable” material was consistent with legislation defining the age at which a person could legally consent to sexual intercourse, which was (and is) 16 years of age and older.

Offences under the *Classification of Films and Publications Act 1990* (Vic) included:

- public screening of an objectionable film;²⁸⁴
- screening of an “R”-rated or objectionable film before a child;²⁸⁵

²⁸¹ Yaman Akdeniz, *Internet child pornography and the law: National and international responses*, Ashgate Publishing Limited, England, 2008, p. 9. (citations omitted)

²⁸² The *Classification of Films and Publications Act 1990* (Vic). repealed the *Films Act 1971* (Vic); *Films (Classification) Act 1984* (Vic). and the *Police Offences Act 1958* (Vic). The repealed *Films (Classification) Act 1984* (Vic). contained similar provisions to the objectionable film and objectionable publications offences in the *Classification of Films and Publications Act 1990* (Vic).

²⁸³ *Classification of Films and Publications Act 1990* (Vic), section 3. Section 3 also defines “objectionable publication”, in essentially equivalent terms.

²⁸⁴ *ibid.*, 39.

- display for sale or sale of an objectionable film;²⁸⁶
- possession of an objectionable film for sale or public exhibition;²⁸⁷
- making or copying an objectionable film for the purpose of gain;²⁸⁸
- procurement of a child for an objectionable film;²⁸⁹
- advertisement, sale or distribution of an objectionable publication;²⁹⁰
- possession of an objectionable publication for the purpose of publishing it;²⁹¹
- keeping objectionable material for the purpose of publishing it;²⁹²
- exhibition or display of an objectionable publication;²⁹³
- producing an objectionable publication for the purpose of publishing it;²⁹⁴
- procurement of a child for an objectionable publication.²⁹⁵

The penalty for most of these offences was 240 penalty units,²⁹⁶ or 2 years' imprisonment.²⁹⁷ In the case of offences for procurement of a child for an objectionable film or an objectionable publication, a more severe penalty of up to 600 penalty units and/or imprisonment of up to 5 years applied.²⁹⁸

In contrast to current Victorian legislation, which criminalises the knowing possession of child pornography material,²⁹⁹ no offences existed for the mere *possession* of an objectionable film or publication under the *Classification of Films and Publications Act 1990 (Vic)*. Under that legislation, in order for an offence to occur, the person in possession of the material must have intended to sell or distribute the material (in the case of an objectionable film) or to publish it (in the case of an objectionable publication). In addition, making or producing an objectionable film was not

²⁸⁵ *ibid.*, 40.

²⁸⁶ *ibid.*, 41.

²⁸⁷ *ibid.*, 43.

²⁸⁸ *ibid.*, 44.

²⁸⁹ *ibid.*, 45.

²⁹⁰ *ibid.*, 48.

²⁹¹ *ibid.*, 49.

²⁹² *ibid.*, 50.

²⁹³ *ibid.*, 51.

²⁹⁴ *ibid.*, 53.

²⁹⁵ *ibid.*, 54.

²⁹⁶ Under section 110 of the *Sentencing Act 1991 (Vic)*, a penalty unit was \$100. From 1 July 2004, the value of a penalty unit is set by the Treasurer, under section 5(3) of the *Monetary Units Act 2004 (Vic)*. However, the value of a penalty unit for the financial year commencing on 1 July 2012 was set at \$140.84 by section 11(1) of the *ibid.*

²⁹⁷ For an offence of public screening of an objectionable film, or screening of an "R" or an objectionable film before a child, there was a lower penalty of 10 penalty units – *Classification of Films and Publications Act 1990 (Vic)*, sections 39, 40.

²⁹⁸ *ibid.*, 45, 54.

²⁹⁹ *Crimes Act 1958 (Vic)*, section 70(1).

an offence unless it was made or produced for the purpose of gain,³⁰⁰ or a child was procured, or an attempt was made to procure a child, for making the objectionable film.³⁰¹

As a result, if it were still in effect today, the *Classification of Films and Publications Act 1990* (Vic) would be unlikely to apply to the self-production of explicit photographs or films by minors (unless another minor under 16 was procured for making the film or photograph). Nor would it be possible for a person who received (and kept) an unsolicited sext message of a minor to be charged.

4.1.2 Offence for the possession of child pornography

In 1992, a new offence for the possession of child pornography was introduced to the *Classification of Films and Publications Act 1990* (Vic), and applied to films and photographs of children under the age of 16:

60A Possession of child pornography

- (1) A person must not knowingly possess a film or photograph of a child who is, or apparently is, under the age of 16 years and who is engaging in sexual activity or is depicted in an indecent sexual manner.

Penalty: 120 penalty units or 12 months imprisonment.³⁰²

The rationale for introducing this offence was explained in the second reading speech for the bill:

There are three main reasons for this prohibition. First, the Child Exploitation Unit of the Victoria Police advise that photographs or films of children engaged in sexual activity are often used to confuse the child and lower his or her inhibitions. Secondly, a record of that child's involvement in sexual activity may then be used to blackmail the child into silence. Thirdly, the production of child pornography involves child sexual abuse and exploitation.

Production for commercial purposes obviously requires a market. Currently, the law prohibits only the importation, production, sale, exhibition and hire of child pornography and the procuring of a child for objectionable films and publications.

This Bill attaches sanctions to the consumer, upon whom the instigators in this chain of child exploitation are dependent for their profit.³⁰³

The *Classification of Films and Publications Act 1990* (Vic) was repealed in 1996, with the enactment of the new *Classification (Publications, Films and Computer Games)(Enforcement) Act 1995* (Vic).³⁰⁴ At this time, an offence

³⁰⁰ *Classification of Films and Publications Act 1990* (Vic), section 44.

³⁰¹ *ibid.*, 45.

³⁰² *ibid.*, 60A.

³⁰³ The Hon. Thomas Roper MP, Member for Brunswick, *Parliamentary debates*, Legislative Assembly, 9 June 1992, pp. 2054-2055.

³⁰⁴ *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* (Vic), section 88.

for possession of child pornography (together with other child pornography offences) was introduced into the *Crimes Act 1958* (Vic).

4.1.3 Other child pornography offences

4.1.3.1 Child pornography offences in the *Crimes Act 1958*

With effect from the beginning of 1996, specific child pornography offences were introduced into the *Crimes Act 1958* (Vic).³⁰⁵ The offences covered the production of child pornography, the procurement of a minor for child pornography, and the knowing possession of child pornography.³⁰⁶ These three offences remain in the current *Crimes Act 1958* (Vic), although they have been amended since 1996.³⁰⁷

The definition of “child pornography” in the 1996 legislation was restricted to material in which the person depicted or described “is, or looks like, a minor under 16”.³⁰⁸ Further, the offence of knowingly possessing child pornography was a summary offence punishable on conviction by Level 10 imprisonment (i.e. 12 months’ imprisonment). This penalty increased to a maximum of two years’ imprisonment when the penalty scale for criminal offences was modified by the *Sentencing and Other Acts (Amendment) Act 1997* (Vic).³⁰⁹

4.1.3.2 Increased penalty for possession of child pornography

Possession of child pornography became a significantly more serious offence with the passing of the *Crimes (Amendment) Act 2000* (Vic). The offence was changed from a summary offence to an indictable offence, and the maximum penalty was increased from two years to five years imprisonment.³¹⁰

In the second reading speech for the bill, the Attorney-General, Mr Rob Hulls MP, explained the rationale for increasing the penalty, focusing on the increased need to protect children from predators:

In recent years there has been a dramatic change in the complexion of child pornography offences. Computers enable the storage of large quantities of images. The Internet has increased access to and distribution of pornographic images, resulting in a proliferation of child pornography.

It is now possible to possess thousands of images of child pornography by storing them in a personal computer. People who previously may not have

³⁰⁵ These provisions were inserted into the *Crimes Act 1958* (Vic) by section 88 of the *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* (Vic), which came into operation on 1 January 1996.

³⁰⁶ *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* (Vic), section 88.

³⁰⁷ The offences in the current *Crimes Act 1958* (Vic) are sections 68, 69 and 70.

³⁰⁸ *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* (Vic), section 88.

³⁰⁹ *Sentencing and Other Acts (Amendment) Act 1997* (Vic), sections Schedule 1, Item 47. The offence of knowing possession of child pornography was adjusted on the new scale to Level 7 imprisonment.

³¹⁰ *Crimes (Amendment) Act 2000* (Vic), section 6.

physically sought access to child pornography (although the proclivity was there), can now have anonymous access to it without having to leave their home.

The government is committed to the protection of children. The penalty for the possession of child pornography will be increased from two years imprisonment to five years imprisonment.

This increased penalty will send a clear message to those who prey on children that the government and the community will not tolerate this behaviour.³¹¹

Mr Bob Stensholt MP also commented that the increased penalty for possession of child pornography was intended to target voyeurs and paedophiles:

Largely because of almost universal access to the Internet, the sexual crime squad of the Victoria Police has recently seen a massive change in the complexity of child pornographic offences in investigations it has conducted. As honourable members have heard before in other debates, more than half the population has access to the Internet. Unfortunately, voyeurs and paedophiles can acquire and exchange thousands of images through the Internet by using various means, including chat rooms and email groups. Investigations by the sexual crime squad follow long and convoluted trails to find where the images are derived from. Those images are often used to lay trails for people to find victims for physical actions of paedophilia.³¹²

Both of these speakers referred to the growing importance and accessibility of the internet as an impetus for increasing the penalty for possession of child pornography. The focus was clearly on deterring predators from taking advantage of children. Sexting did not exist as such at this time, as cameras were not integrated into popular mobile phones until some years later, and few teenagers had mobile phones in any case, so sexting-type behaviour was not envisioned.

4.1.3.3 Publication or transmission of child pornography

In 2001, recognising increasing use of the internet to distribute child pornography,³¹³ a new criminal offence covering the publication and transmission of child pornography was inserted into the *Classification (Publications, Films and Computer Games)(Enforcement) Act 1995*.³¹⁴ Section 57A prohibited the publication or transmission of objectionable material describing or depicting a person who is, or who looks like, a minor under 16 engaging in sexual activity, or depicted in an indecent sexual

³¹¹ The Hon. Robert Hulls MP, Member for Niddrie, *Parliamentary debates*, Legislative Assembly, 5 October 2000, p. 945.

³¹² Mr Robert Stensholt, Member for Burwood, *Parliamentary debates*, Legislative Assembly, 31 October 2000, p. 1280.

³¹³ The Hon. Robert Hulls MP, Attorney-General, *Parliamentary debates*, Legislative Assembly, 19 September 2001, pp. 457-458.

³¹⁴ *Classification (Publications, Films and Computer Games) (Enforcement) (Amendment) Act 2001 (Vic)*, section 16.

manner or context. This was an indictable offence, punishable by up to 10 years imprisonment.

This offence remains in the *Classification (Publications, Films and Computer Games)(Enforcement) Act 1995* (Vic) today, although it was amended in 2005 to apply to objectionable material regarding minors under the age of 18, rather than being restricted to minors under 16.³¹⁵

4.1.3.4 Expansion to cover minors aged between 16 and 18

The definition of child pornography in the *Crimes Act 1958* (Vic) was amended in 2004 to include images of minors between the ages of 16 and 18.³¹⁶ Previously, images could only constitute child pornography where the minors concerned were or appeared to be younger than 16.

The impetus for this change was the International Labour Organisation's Convention 182, which calls for the elimination of the worst forms of child labour, including sex work. Among other things, the amendments made to the *Crimes Act 1958* (Vic) were intended to strengthen Victoria's laws against the commercial sexual exploitation of children, as explained by the Attorney-General, Mr Rob Hulls MP, in the second reading speech for the amending bill:

The International Labour Organisation convention 182 on the worst forms of child labour calls for the elimination of the worst forms of child labour, including the use, procuring or offering of a child under 18 for prostitution, production of pornography or pornographic performances.

The Victorian government strongly supports ratification of this convention. Promoting the physical, sexual, emotional and psychological safety of all young people is one of the government's priorities. Victorian laws already substantially comply with the convention, but there are some inconsistencies that will be addressed by this bill.

This bill will amend existing child pornography offences in the *Crimes Act 1958* to raise the age threshold from under 16 to under 18 years. This will meet the requirements of the convention to criminalise the production of child pornography in relation to children under 18.³¹⁷

This definition of child pornography remains in the *Crimes Act 1958* (Vic) today. As noted above, the provision regarding the transmission and publication of child pornography in the *Classification (Publications, Films and Computer Games)(Enforcement) Act 1995* (Vic) was amended similarly in 2005.

While the rationale of extending the definition of child pornography to include minors aged between 16 and 18 is commendable, an anomalous situation has been created where young people between the ages of 16

³¹⁵ *Classification (Publications, Films and Computer Games) (Enforcement) (Amendment) Act 2005* (Vic), section 10(3).

³¹⁶ *Justice Legislation (Sexual Offences and Bail) Act 2004* (Vic), sections 4, 6.

³¹⁷ The Hon. Robert Hulls MP, Member for Niddrie, *Parliamentary debates*, Legislative Assembly, 21 April 2004, p. 718.

and 18 can legally engage in sexual intercourse,³¹⁸ but commit a serious criminal offence if they film or photograph that sexual activity. This inconsistency is explored further in Chapter Five.

4.1.4 Commonwealth child pornography offences

In 2005, new child pornography offences were introduced to the *Criminal Code Act 1995* (Cth), prohibiting the use of a carriage service for child pornography material.³¹⁹ These offences were introduced in recognition of the growing use of the internet to facilitate the sexual abuse and exploitation of children.³²⁰ The maximum penalty for these offences was 10 years imprisonment.³²¹

In April 2010, changes to Commonwealth legislation increased the penalties for online child pornography offences to a maximum of 15 years imprisonment, and introduced an offence of transmitting indecent communications to persons under 16 years of age where the offender is over 18 years.³²² These provisions remain current, and are explored in detail below.

4.2 Current laws around sexting

Depending on the context in which it occurs, sexting can potentially constitute a crime falling under provisions of criminal law relating to:

- child pornography (or child abuse material in some Australian states);
- offensive, harassing, stalking or coercive behaviour; or
- unlawful surveillance.

The relevant provisions of Commonwealth and Victorian criminal laws that may apply in different types of sexting circumstances are explained below.

³¹⁸ The *Crimes Act 1958* (Vic) provides that it is an indictable offence to engage in an act of sexual penetration with a child under the age of 16: see section 45. It is not an offence to engage in an act of sexual penetration with a child between the ages of 16 and 18, unless the child is under the other person's care, supervision or authority: section 48.

³¹⁹ *Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Act (No. 2) 2004* (Cth), section Schedule 1. In enacting these offences, the Commonwealth Parliament relied on its constitutional power to legislate in relation to matters with respect to "postal, telegraphic, telephonic, and other like services": *Australian Constitution*, section 51(v).

³²⁰ Mr Peter Slipper MP, Member for Fisher, *Parliamentary debates*, House of Representatives, 4 August 2004, p. 32035.

³²¹ *Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Act (No. 2) 2004* (Cth), sections Schedule 1, sections 474.19(1) and 474.20(1).

³²² Australian Federal Police, *Submission no. 57*, 11 July 2012, p. 6.

4.2.1 The age of criminal responsibility

The law in Victoria provides that children under the age of 10 years bear no criminal responsibility.³²³ This means that a child who is younger than 10 cannot be charged with any criminal offence. Accordingly, any child under 10 who engages in sexting cannot be charged with a child pornography offence, or any other criminal offence. This is also the case for offences under federal law – the *Criminal Code Act 1995* (Cth) expressly states that a child under 10 years old is not criminally responsible for an offence.³²⁴

For children who are 10 or older, but younger than 14, there is a rebuttable presumption that the child does not know the difference between right and wrong, and is therefore not capable of committing a crime because of the lack of *mens rea*.³²⁵ The prosecution bears the onus of proving that when the child committed the act in question, he or she knew that what was being done was not merely wrong, but was seriously wrong.³²⁶

Children aged between 14 and 18 bear full criminal responsibility for their actions.³²⁷ Consequently, the criminal law relating to sexting is most relevant for young people aged 14 and older, although there is the potential for the law to also apply to children aged 10 to 14.

4.2.2 Child pornography offences

Criminal offences for child pornography are found in Victorian and Commonwealth legislation, with Commonwealth offences applying to activities related to child pornography that involves the use of a carriage service (that is, the internet or telecommunications services),³²⁸ and to the importation of child pornography.

³²³ *Children, Youth and Families Act 2005* (Vic), section 344. Also noted in The Alannah and Madeline Foundation, *Submission no. 42*, 18 June 2012, p. 19. This is consistent with the Commonwealth law, and with the law of every Australian state and territory.

³²⁴ *Criminal Code Act 1995* (Cth), section 7.1.

³²⁵ Children's Court of Victoria, *Research Materials: 10. Criminal Division - Procedure*, 2012., citing P J Richardson and John Frederick Archbold, *Archbold: Criminal pleading, evidence and practice*, Volume 1, Sweet and Maxwell, London, 1993, pp. para [1]-[96]. and Lord Lowry in *C v DPP* [1995] 2 All ER 43, 48. *Criminal Code Act 1995* (Cth), section 7.2.

³²⁶ Children's Court of Victoria, *Research Materials: 10. Criminal Division - Procedure*, 2012., citing Harper J in the Supreme Court of Victoria decision *R (a child) v Whitty* (1993) 66 A Crim R 462.

³²⁷ As noted by The Alannah and Madeline Foundation, *Submission no. 42*, 18 June 2012, p. 19.

³²⁸ According to the Dictionary forming part of the *Criminal Code Act 1995* (Cth)., the term "carriage service" in the Code has the same meaning as in the *Telecommunications Act 1997* (Cth)., where it is defined as "a service for carrying communications by means of guided and/or unguided electromagnetic energy", and thus includes mobile phones and the internet. See section 7 of the *ibid*.

4.2.2.1 Definition of child pornography

The Victorian legislation defines ‘child pornography’ as follows:

child pornography means a film, photograph, publication or computer game that describes or depicts a person who is, or appears to be, a minor engaging in sexual activity or depicted in an indecent sexual manner or context.³²⁹

The Commonwealth legislation provides a similar, but more detailed, definition of ‘child pornography material’:

child pornography material means:

- (a) material that depicts a person, or a representation of a person, who is, or appears to be, under 18 years of age and who:
 - (i) is engaged in, or appears to be engaged in, a sexual pose or sexual activity (whether or not in the presence of other persons); or
 - (ii) is in the presence of a person who is engaged in, or appears to be engaged in, a sexual pose or sexual activity;and does this in a way that reasonable persons would regard as being, in all the circumstances, offensive; or
- (b) material the dominant characteristic of which is the depiction, for a sexual purpose, of:
 - (i) a sexual organ or the anal region of a person who is, or appears to be, under 18 years of age; or
 - (ii) a representation of such a sexual organ or anal region; or
 - (iii) the breasts, or a representation of the breasts, of a female person who is, or appears to be, under 18 years of age;in a way that reasonable persons would regard as being, in all the circumstances, offensive; or
- (c) material that describes a person who is, or is implied to be, under 18 years of age and who:
 - (i) is engaged in, or is implied to be engaged in, a sexual pose or sexual activity (whether or not in the presence of other persons); or
 - (ii) is in the presence of a person who is engaged in, or is implied to be engaged in, a sexual pose or sexual activity;and does this in a way that reasonable persons would regard as being, in all the circumstances, offensive; or
- (d) material that describes:
 - (i) a sexual organ or the anal region of a person who is, or is implied to be, under 18 years of age; or

³²⁹ *Crimes Act 1958 (Vic)*, section 67A.

- (ii) the breasts of a female person who is, or is implied to be, under 18 years of age;
and does this in a way that reasonable persons would regard as being, in all the circumstances, offensive.³³⁰

Under both the Victorian and the Commonwealth legislation, the term 'child pornography' describes material depicting someone who is, or appears to be, a minor (i.e. under 18).³³¹ As noted above, this contrasts with the legal age of consent for sexual intercourse in Victoria, which is 16 years of age.³³²

Consequently, while an adult (or a minor) can legally engage in sexual activity with a person who is 16 or 17 years of age, if that adult (or minor) takes an explicit photograph of the young person, they will have produced and be in possession of child pornography. Likewise, if a minor takes an explicit photograph of himself or herself, he or she has committed at least one child pornography offence.

4.2.2.2 Child pornography offences

Two Victorian statutes include child pornography offences – the *Crimes Act 1958* (Vic) and the *Classification (Publications, Films and Computer Games)(Enforcement) Act 1995* (Vic).

The three child pornography offences set out in the *Crimes Act 1958* (Vic) are all indictable offences:

Section	Offence	Maximum penalty
68(1)	Production of child pornography	10 years imprisonment
69(1)	Inviting, procuring, causing or offering a minor to be in any way concerned in the making of child pornography	10 years imprisonment
70(1)	Knowingly possessing child pornography	5 years imprisonment

The *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* (Vic) also provides that the publication or transmission of child pornography is an indictable offence:

Section	Offence	Maximum penalty
57A(1)	Publication or transmission of child pornography	10 years imprisonment

This provision creates an offence for publishing or transmitting child pornography, as the *Crimes Act 1958* (Vic) does not specify an offence for this kind of activity.

³³⁰ *Criminal Code Act 1995* (Cth), section 473.1.

³³¹ *Crimes Act 1958* (Vic), section 67A; *Criminal Code Act 1995* (Cth).

³³² *Crimes Act 1958* (Vic), section 45., which provides that sexual penetration of a child under the age of 16 is an indictable offence.

The *Criminal Code Act 1995* (Cth)³³³ provides for similar child pornography offences to those under Victorian legislation, where the conduct involves the use of a carriage service:

Section	Offence	Maximum penalty
474.19	Accessing, transmitting, publishing or soliciting child pornography material using a carriage service	15 years imprisonment
474.20	Possessing, controlling, producing, supplying or obtaining child pornography material for use through a carriage service ³³⁴	15 years imprisonment

As discussed previously, child pornography offences were not created with sexting in mind; however, these offences may be applied to people who create, send, receive or possess sexts. While it does not appear that many young people have been convicted of child pornography offences for sexting, convictions have occurred in Victoria (and in other Australian jurisdictions under similar provisions).

*Case Study 6: Sexting behaviour resulting in a child pornography conviction*³³⁵

A female friend of an 18-year-old from country Victoria sent him via mobile phone six unsolicited images of girls aged 15 to 18, topless or in underwear. When the young man downloaded images and videos from his phone to his computer, the sexts were also transferred.

Police confiscated the young man's computer when investigating an unrelated matter. They found the sext images, and charged the young man with one count of possessing and one count of making child pornography.

*On legal advice, the young man pleaded guilty to the charges. He received a 12 month good behaviour bond with no conviction recorded.*³³⁶

The Magistrate refused a police application to list the young man on the Sex Offenders Register, saying this was not a suitable case for registration. However, police realised that the Magistrate did not have the power to override the mandatory listing, and the young man was registered for a period of eight years.

It was reported that the police did not question the girl who sent the images to the young man.

³³³ The Schedule to the *Criminal Code Act 1995* (Cth). constitutes the *Criminal Code* (Cth).

³³⁴ Section 474.20(2) provides that a person may be found guilty of an offence against this section even if committing the offence against section 474.19 (using a carriage service for child pornography) is impossible.

³³⁵ The facts in this case study are drawn from Nicole Brady, 'Sexting' youths placed on sex offenders register', *Sunday Age*, 24 July 2011.

³³⁶ Even though no conviction was recorded for the young man, the legal outcome of the matter was still a conviction. Accordingly, the provisions of the *Sex Offenders Registration Act 2004* (Vic). applied and mandated listing the young man on the register.

On the other hand, child pornography charges have also been applied in cases where young people have been involved in sexual exploitation of minors, and technology has been involved in that exploitation. For example, a case where a sexual assault was recorded was reported by Melbourne newspaper *The Age* in May 2012:

*Case Study 7: Sexual assault in Altona Meadows*³³⁷

“Four young people have been arrested after a teenage girl was allegedly sexually assaulted at a party in Melbourne’s west and footage of the incident was uploaded onto social networking sites, police say.

The alleged offenders are expected to be charged on summons with manufacturing and distributing child pornography and sexual penetration of a child under the age of 16 after the incident at a party in Altona Meadows in January. ...

[D]etectives ... executed a number of warrants last night and arrested a Werribee girl aged 16, a Bundoora boy aged 16, a 19-year-old Glenroy man and a 20-year-old Altona Meadows man.

They were all released and are expected to be charged on summons to appear in court at a later date.”

4.2.2.3 Defences to child pornography offences

Only one of the child pornography offences has defences available that could potentially apply in sexting circumstances. These defences may be exercised under section 70(2) of the *Crimes Act 1958* (Vic), where a person has a defence to a charge of possession of child pornography if they can prove that either:

- the accused person made the film or took the photograph, or was given the film or photograph by the minor, and at the time of making, taking or being given the photograph or film, the accused person was not more than 2 years older than the minor was or appeared to be; or
- the accused person is the minor or one of the minors depicted in the film or photograph.³³⁸

However, as these defences are only available for a charge of possession of child pornography, it is possible that a young person could have a valid defence to *possession* of child pornography, but still be charged with *producing* child pornography (which carries a higher maximum penalty). This inconsistency is discussed in detail in Chapter Five.

³³⁷ Megan Levy, 'Untold damage': alleged party sex attack ends up online', *The Age*, 2 May 2012, viewed 6 February 2013, <www.theage.com.au>.

³³⁸ *Crimes Act 1958* (Vic), section 70(2)(d)&(e).

4.2.2.4 Child pornography laws in other states and territories

One submission to the Inquiry noted that each Australian state and territory has separate criminal legislation that regulates sexting, and since 2005, no two jurisdictions in Australia have had the same child pornography laws.³³⁹ Significant differences exist in relation to the definitions, interpretations, elements of the offences and age of the relevant child contained in each jurisdiction's legislation.³⁴⁰

4.2.2.5 Role of the Commonwealth

As noted above, child pornography offences are found in both Victorian and Commonwealth legislation. The Australian Government Attorney-General's Department explained the respective roles of the states, territories and the Commonwealth in prosecuting child sex-related offences:

While States and Territories are primarily responsible for child sex-related offences occurring domestically within each jurisdiction, the Commonwealth has enacted offences in areas relating to child sex tourism, online child pornography and online child grooming laws. These offences fall within Commonwealth responsibility under the Constitution because they contain international or online elements.³⁴¹

The Committee received evidence from Victoria Police noting that its protocols require that "[i]n the event offences exist under both State and Commonwealth law, Victoria Police initially charge an offender with the most applicable state related offence. Commonwealth charges would only be used if they more accurately encapsulated circumstances of the alleged criminal activity, e.g. offences committed on Commonwealth land, or against a Commonwealth official."³⁴² Consequently, in Victoria the majority of child pornography offences, and offences related to sexting involving minors, are prosecuted under state law.

4.2.2.6 Consent of Federal Attorney-General

Under the Commonwealth legislation, the consent of the Attorney-General is required to commence proceedings for a child pornography offence under the *Criminal Code Act 1995* (Cth) where the defendant was under 18 at the time he or she allegedly engaged in the conduct constituting the offence.³⁴³ No such requirement exists in the Victorian legislation.

³³⁹ Just Leadership Program, Monash University Law Students' Society, *Submission no. 59*, 17 July 2012, p. 11.

³⁴⁰ *ibid.*

³⁴¹ Australian Government Attorney-General's Department, *Submission no. 6*, 30 May 2012, p. 2.

³⁴² Victoria Police, *Supplementary evidence*, 4 March 2013, p. 4.

³⁴³ *Criminal Code Act 1995* (Cth), section 474.24C.

4.2.3 Other criminal offences

There are a number of other criminal offences – found in both Victorian and Commonwealth legislation – that may apply to sexting conduct in particular circumstances. These offences are outlined below.

4.2.3.1 Using a carriage service to menace, harass or cause offence

Commonwealth criminal legislation includes a broad provision that prohibits using a carriage service in a manner that is menacing, harassing or offensive:

474.17 Using a carriage service to menace, harass or cause offence

- (1) A person is guilty of an offence if:
- (a) the person uses a carriage service; and
 - (b) the person does so in a way (whether by the method of use or the content of a communication, or both) that reasonable persons would regard as being, in all the circumstances, menacing, harassing or offensive.

Penalty: Imprisonment for 3 years.³⁴⁴

Tasmania Police advised the Committee that this provision is its preferred charge to apply in circumstances where adults are involved in the transmission of images of other adults without their consent.³⁴⁵ An example of the application of this offence to non-consensual transmission of sexting images is provided in the following case study.

*Case Study 8: ADFA webcam sex scandal*³⁴⁶

Two Australian Defence Force Academy cadets, Daniel McDonald and Dylan De Blaquiére, are expected to stand trial in the ACT Supreme Court in 2013. Both young men face charges of using a carriage service to menace, harass or cause offence, and McDonald faces an additional charge of committing an act of indecency.

The charges stem from a notorious incident in 2011 at ADFA. According to a police statement of facts, an 18-year-old female cadet, "Kate", agreed to a casual sexual relationship with McDonald, who was 19 at the time, on the proviso that McDonald would not tell anyone about the arrangement. On

³⁴⁴ *ibid.*, 474.17.

³⁴⁵ Tasmania Police, *Submission no. 48*, 25 June 2012, p. 1.

³⁴⁶ The facts in this case study are drawn from AAP, 'Australian Defence Force Academy rocked by webcam sex scandal', *News.com.au*, 5 April 2011, viewed 11 January 2013, <www.news.com.au>; Louis Andrews, 'ADFA Skype scandal trial set', *Canberra Times*, 28 February 2012, viewed 11 January 2013, <www.canberratimes.com.au>; Mark Dodd and Lauren Wilson, 'Sick idea' to film cadet sex so mates could watch', *The Australian*, 30 April 2011, viewed 11 January 2013, <www.theaustralian.com.au>; Ian McPhedran, 'ADFA sex scandal lands in ACT court', *Daily Telegraph*, 30 April 2011, viewed 11 January 2013, <www.dailytelegraph.com.au>.

the night of 29 March, they met in McDonald's room and engaged in consensual sex.

Unknown to "Kate", the sexual encounter was filmed and broadcast via Skype. It is alleged that this was De Blaquiere's idea, and he set up a Skype connection and two laptops to do so. According to documents filed in court, five other male cadets watched the 15-minute sexual encounter via the Skype connection. Still photos from the footage were also produced, and circulated at ADFA.

McDonald and De Blaquiere formally entered pleas of not guilty on 28 February 2012. The case is listed for an eight day trial, and is unlikely to be heard until August 2013.

Tasmania Police also considers that proceedings under this provision would be appropriate where prosecution of a young person for sexting is warranted.³⁴⁷ Tasmania Police noted its policy is that children should be diverted from court to cautioning or diversionary conferencing wherever possible, but if a prosecution is warranted for malicious sexting, it would make use of this Commonwealth offence.³⁴⁸ Tasmania Police's view is that children should only be charged with child exploitation offences where the conduct is deliberately exploitative of another child.³⁴⁹

In oral evidence to the Committee, Acting Commander Neil Paterson of Victoria Police acknowledged the existence of this Commonwealth provision, and commented:

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.³⁵⁰

Victoria Police has conducted 3688 investigations for offences under section 474.17 of the *Criminal Code Act 1995* (Cth), and stated that while "[i]t is difficult to determine the exact number of the offences that arose in circumstances of sexting. Preliminary analysis reveals that only two charges relate to juveniles in sexting circumstances and fourteen relate to adult offenders in sexting circumstances."³⁵¹

4.2.3.2 Using a carriage service for sexual activity with a child under 16 years

The Commonwealth criminal legislation also sets out a number of offences related to use of a carriage service for sexual activity with a child under 16 years of age. The offences include:

³⁴⁷ Tasmania Police, *Submission no. 48*, 25 June 2012, p. 2.

³⁴⁸ *ibid.*

³⁴⁹ *ibid.*

³⁵⁰ Neil Paterson, Acting Commander, Intelligence and Covert Support Department, Victoria Police, *Transcript of evidence*, Melbourne, 18 September 2012, p. 11.

³⁵¹ Victoria Police, *Supplementary evidence*, 4 March 2013, pp. 3-4.

- engaging in sexual activity with a person under 16 using a carriage service;³⁵²
- causing a person under 16 to engage in sexual activity with another person using a carriage service;³⁵³
- using a carriage service with the intention of procuring a person under 16 to engage in sexual activity with the sender or with another person;³⁵⁴
- using a carriage service to 'groom' a person under 16;³⁵⁵ and
- using a carriage service to transmit indecent communication to a person under 16 years of age.³⁵⁶

The penalty for each of these offences is imprisonment for 15 years,³⁵⁷ with the exception of the indecent communication offence, which carries a penalty of 7 years imprisonment.³⁵⁸

Case Study 9: Robert Darren Fry³⁵⁹

25-year-old Robert Darren Fry of Horsham, Victoria, pleaded guilty to, and was convicted of, two counts of using a carriage service for indecent communication with a child under 16. Mr Fry had communicated with a 13-year-old girl on Facebook, raised the topic of sex, and offered the girl \$400 to 'flash' him. In November 2012, the Magistrate sentenced Mr Fry to a 12-month community corrections order. The Magistrate rejected the prosecution's application to register Mr Fry as a sex offender.

4.2.3.3 Surveillance offences

Victoria has enacted legislation – the *Surveillance Devices Act 1999* (Vic) – which controls the use of surveillance devices for law enforcement purposes, and restricts their use for other purposes. The *Surveillance Devices Act 1999* (Vic) provides that it is an offence to use a surveillance device to record private activity without consent:

7 Regulation of installation, use and maintenance of optical surveillance devices

- (1) Subject to subsection (2), a person must not knowingly install, use or maintain an optical surveillance device to record visually or observe a

³⁵² *Criminal Code Act 1995* (Cth), section 474.25A(1).

³⁵³ *ibid.*, 474.25A(2).

³⁵⁴ *ibid.*, 474.26.

³⁵⁵ *ibid.*, 474.27.

³⁵⁶ *ibid.*, 474.27A.

³⁵⁷ Note that for the grooming offence, the penalty may be either 12 years or 15 years imprisonment, depending on the circumstances of the offence. See *ibid.*, 474.27.

³⁵⁸ *ibid.*, 474.27A.

³⁵⁹ The facts in this case study are drawn from 'Court order for Facebook sexter', *Wimmera Mail Times*, 30 November 2012.

private activity to which the person is not a party, without the express or implied consent of each party to the activity.³⁶⁰

A mobile phone with a camera function would constitute an “optical surveillance device”, which is defined as a device that is “capable of being used to record visually or observe an activity”.³⁶¹

It is noteworthy that the offence for recording without consent does not cover situations where a person is a party to the activity being recorded. This means that a person who records themselves engaging in sexual activity with another person without the other person’s consent (such as via a hidden camera) would not commit an offence under this provision.

It is also an offence to communicate or publish a record of a private activity made using an optical surveillance device.³⁶² This offence does not exclude recordings of activities to which a person was a party, so it could arguably apply where a person, for example, covertly recorded sexual activity with another person, then uploaded that recording to the internet, or distributed it to others. However, the offence does not apply where the recording was made with the express or implied consent of each party to the activity,³⁶³ and so would not apply where a recording was made consensually, but then distributed without the consent of all of the parties.

The penalty for each of the recording/observing and communicating offences is level 7 imprisonment (2 years maximum) or a level 7 fine (240 penalty units maximum), or both.³⁶⁴

*Case Study 10: Mark Robert Stratford*³⁶⁵

A former drama teacher at a Melbourne girls’ school pleaded guilty in the Victorian County Court to producing child pornography, possessing child pornography, and installing an optical surveillance device.

The former teacher, Mark Robert Stratford, had installed a hidden camera under the desk in his office to capture students undressing. He told students that he wanted them to audition for a play and used the hidden camera to record them changing into costumes.

Stratford filmed three girls, all aged under 16, between 2008 and early 2009. He was sentenced to 21 months in prison, with a non-parole period of 14 months.

³⁶⁰ Note that section 7(2) of the *Surveillance Devices Act 1999* (Vic). creates exceptions to this provision where the device is used for a lawful purpose, for example pursuant to a warrant.

³⁶¹ *ibid.*, 3.

³⁶² *ibid.*, 11(1).

³⁶³ *ibid.*, 11(2).

³⁶⁴ *ibid.*, 7(1),11(1).

³⁶⁵ The facts in this case study are drawn from AAP, 'Former drama teacher pleads guilty to porn charges', *The Age*, 1 March 2010, viewed 19 December 2012, <www.theage.com.au>; AAP and Norrie Ross, 'Mark Stratford jailed for filming Lauriston students in skimpy clothes', *Herald Sun*, 9 August 2010, viewed 11 January 2013, <www.heraldsun.com.au>.

Surveillance-related offences are also found in Division 4A of the *Summary Offences Act 1966* (Vic). These offences were introduced to address ‘upskirting’ following a series of incidents in Victoria where police arrested men who were caught secretly filming up the skirts of women on public transport and at public events, such as the Australian Open tennis tournament.³⁶⁶ The *Summary Offences Act 1996* (Vic) contains two offences particularly relevant to sexting:

- it is an offence for a person to visually capture another person’s genital or anal region in circumstances where it would be reasonable for the person to expect that this could not occur;³⁶⁷ and
- it is an offence for a person who has visually captured an image of another person’s genital or anal region to intentionally distribute that image.³⁶⁸

The capturing offence only applies where a person reasonably expects that his or her genital region could not be visually captured, including situations where ‘upskirting’ occurs in public locations, and covert filming in change rooms or bathrooms. This offence could also likely apply in a scenario where a hidden camera was used to capture images of private sexual activity. The distribution offence covers the distribution of images taken covertly, as well as the distribution of images that were taken with consent.³⁶⁹

The penalty for each of these two offences is 2 years imprisonment.³⁷⁰

A limitation on these offences is that they do not cover secondary dissemination of an image – it is only an offence for the person who took the image to send it on. Another limitation is that an offence is only committed when a person’s genital or anal region is photographed or filmed; the offences do not apply to other explicit images – for example, footage of a person engaging in sexual activity where their genital or anal region is not visible, or images of a woman’s breasts.

It appears that these offences have mostly been applied to the type of ‘upskirting’ cases which they were intended to address, as opposed to more general ‘sexting’ cases. *The Age* reported that police charged 22 people with upskirting in 2010-2011, and commented on some of the circumstances in which people have been charged:

Those charged with upskirting include a Geelong Grammar teacher who allegedly photographed under the skirts of students as they leant into tanks at the Queenscliff Marine Discovery Centre in 2007.

³⁶⁶ The Hon. Robert Hulls MP, Member for Niddrie, *Parliamentary debates*, Legislative Assembly, 21 June 2007, p. 2146.

³⁶⁷ *Summary Offences Act 1966* (Vic), section 41B.

³⁶⁸ *ibid.*, 41C.

³⁶⁹ Section 41C specifically notes that the offence applies whether or not the image was captured in contravention of section 41B.

³⁷⁰ *Summary Offences Act 1966* (Vic), sections 41B, 41C.

In 2010, a man was charged when a spy camera was discovered in a female toilet at the Royal Dental Hospital in Carlton and another man was charged for photographing under a woman's skirt with his mobile phone at Southland shopping centre.³⁷¹

4.2.3.4 Coercive offences

There are also offences that may be applied if a person attempts to use an intimate image or recording in a coercive or intimidatory manner.

Stalking is prohibited by the *Crimes Act 1958 (Vic)*, which defines stalking as engaging in a “course of conduct” which includes any of a number of specified behaviours, with the intention of causing physical or mental harm to the victim, or causing the victim to fear for their safety or another person's safety.³⁷²

Specified behaviours include:

- publishing on the Internet or by e-mail or other electronic communication a statement or material relating to the victim or another person, or purporting to relate to, or originate from, the victim or another person;
- making threats to the victim; and
- acting in any way that could reasonably be expected to cause physical or mental harm to the victim.³⁷³

The penalty for stalking is level 5 imprisonment, which is a maximum of 10 years.³⁷⁴

The stalking offence could potentially apply to a type of sexting circumstance that was raised as a particular concern by the Eastern Community Legal Centre (ECLC) and others – sexting in the context of an abusive relationship. In its submission to the Inquiry, the ECLC commented that it has noticed “a concerning trend whereby generally young adult women have felt coerced to stay in abusive relationships for fear of a sexual image (which may have originally been provided consensually, or non-consensually) being released to third parties.”³⁷⁵ Ms Belinda Lo, Principal Lawyer at the ECLC, explained in oral evidence:

... 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

³⁷¹ Nino Bucci, 'More charged with upskirting', *The Age*, 23 July 2012, viewed 4 December 2012, <www.theage.com.au>.

³⁷² *Crimes Act 1958 (Vic)*, section 21A.

³⁷³ *ibid.*, 21A(2).

³⁷⁴ *ibid.*, 21A(1).

³⁷⁵ Eastern Community Legal Centre, *Submission no. 23*, 15 June 2012, p. 2.

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 ... 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.³⁷⁶

The ECLC's view was that often in these kinds of circumstances, the stalking offence would be applicable to the person threatening to release the image, if the threat was not a one-off threat but was part of a broader course of conduct.³⁷⁷ Acting Commander Neil Paterson of Victoria Police confirmed that the stalking provision could only be applied in certain limited circumstances of sexting:

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.³⁷⁸

The ECLC also suggested that in addition to stalking offences, section 57 of the *Crimes Act 1958 (Vic)* – which prohibits the procurement of sexual penetration via threats or fraud – could apply in these circumstances.³⁷⁹ However, the ECLC told the Committee that these provisions are rarely utilised in family violence sexting cases in Victoria.³⁸⁰

The ECLC suggested that education should be provided to the police, legal community and general community about the possible consequences of threatening to release an image or recording.³⁸¹ Ms Lo commented in oral evidence:

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

³⁷⁶ Belinda Lo, Principal Lawyer, Eastern Community Legal Centre, *Transcript of evidence*, Melbourne, 18 September 2012, p. 32.

³⁷⁷ Eastern Community Legal Centre, *Submission no. 23*, 15 June 2012, p. 3.

³⁷⁸ Neil Paterson, Acting Commander, Intelligence and Covert Support Department, Victoria Police, *Transcript of evidence*, Melbourne, 18 September 2012, p. 12.

³⁷⁹ Eastern Community Legal Centre, *Submission no. 23*, 15 June 2012, p. 3.

³⁸⁰ *ibid.*, 4.

³⁸¹ *ibid.*, 3.

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.³⁸²

The Committee shares the ECLC's view that educating the community about the possible penalties for this type of behaviour is likely to encourage possible victims to come forward, and to discourage future threats of this nature.³⁸³ The ECLC suggested that more education about sexting in a family violence context could be provided:

Whilst the social ramifications of sexting is possibly known, it is submitted that the impact of sexting (particularly threats to use sexting) as a means to further control, intimidate and harass family violence victims is not as widely recognised. We therefore recommend that the impact of sexting in family violence contexts be included in any statewide education about sexting. We recommend also that the education refer particularly to threats of sexting being encompassed within section 21A and section 57 of the Crimes Act.

An additional recommendation is that the Police Family Violence Liaison Officers, Family Violence and general prosecutors be trained on the impacts of sexting in family violence contexts so that there is a consistent message that sexting within a family violence context is clearly against the law.

The rise of sexting cases also provides an opportunity to address family violence education for young people. The intent to intimidate, harass and control another person are key features in family violence sexting cases.³⁸⁴

Another general offence which may apply in some sexting circumstances is the criminal offence of blackmail:

87 Blackmail

- (1) A person is guilty of blackmail if, with a view to gain for himself or another or with intent to cause loss to another, he makes any unwarranted demand with menaces; and for this purpose a demand with menaces is unwarranted unless the person making it does so in the belief –
 - (a) that he has reasonable grounds for making the demand; and

³⁸² Belinda Lo, Principal Lawyer, Eastern Community Legal Centre, *Transcript of evidence*, Melbourne, 18 September 2012, p. 34.

³⁸³ Eastern Community Legal Centre, *Submission no. 23*, 15 June 2012, p. 3.

³⁸⁴ *ibid.*

- (b) that the use of the menaces is proper means of reinforcing the demand.
- (2) The nature of the act or omission demanded is immaterial, and it is also immaterial whether the menaces relate to action to be taken by the person making the demand.
- (3) A person guilty of blackmail is guilty of an indictable offence and liable to level 4 imprisonment (15 years maximum).³⁸⁵

A person could be found guilty of blackmail if they attempt to use an intimate image of someone else to compel that other person to act, or not act, in a certain way.

4.3 Consequences of conviction for child pornography offences

A conviction for a child pornography offence (as opposed to the other offences mentioned above) has grave consequences for both juveniles and adults. The conviction of an adult for a child pornography offence will result in mandatory sex offender registration, which imposes significant reporting obligations on a person for a minimum of eight years, and prohibits the person from engaging in any child-related employment. In the case of a juvenile, for whom sex offender registration is not mandatory, a child pornography conviction is still likely to restrict the types of employment that the convicted person can obtain, potentially for life.

4.3.1 Sex offender registration

4.3.1.1 Background and purpose of the scheme

Victoria has had a sex offenders registration scheme since 2004. The *Sex Offenders Registration Act 2004 (Vic)* established a registration and monitoring scheme that applies to all persons convicted of sexual offences involving children, and imposes the same mandatory reporting requirements on all registered sex offenders.³⁸⁶

The purpose of the *Sex Offenders Registration Act 2004 (Vic)* is explained in section 1:

1 Purpose and outline

- (1) The purpose of this Act is –
 - (a) to require certain offenders who commit sexual offences to keep police informed of their whereabouts and other personal details for a period of time –
 - (i) to reduce the likelihood that they will re-offend; and

³⁸⁵ *Crimes Act 1958 (Vic)*, section 87.

³⁸⁶ Victorian Law Reform Commission, *Sex offenders registration: Information paper*, 2011, p. 20.

- (ii) to facilitate the investigation and prosecution of any future offences that they may commit;
- (b) to prevent registered sex offenders working in child-related employment;
- (c) to empower the Police Ombudsman to monitor compliance with Part 4 of this Act.³⁸⁷

In the second reading speech for the legislation, the Minister for Police and Emergency Services, Mr Andre Haermeyer MP, stated that the intent of the legislation was to target paedophiles and serious sex offenders, to prevent recidivist behaviour:

The results of sexual assault are often devastating. No-one is immune. Not only does it impact on victims, their families and friends, but it also extends into the wider community.

Sex offenders come from every occupation and socioeconomic level, but unlike others who tend to 'settle down', these offenders may continue to offend throughout their lifetime.

This is why, in the prison statistics, sex offenders reoffend within all age groups.

Paedophiles, in particular, are notoriously compulsive and recidivist.

Premised, therefore, on the serious nature of the offences committed and the recidivist risks posed by sexual offenders, the bill recognises that certain offenders should continue to be monitored after their release into the community. It evinces Victoria's commitment to lead the fight against the insidious activities of paedophiles and other serious sex offenders. More particularly, it will put Victoria to the forefront of law enforcement by not only committing to the mandatory registration of child sex offenders but also empowering the courts with a discretion to order the registration of serious sexual offenders who commit sex offences against adult victims.

In requiring specified sex offenders to keep police informed of relevant personal information for a period of time after their release into the community, the bill will reduce the likelihood of their reoffending and assist in the investigation and prosecution of future offences.³⁸⁸

Victoria's sex offender registration scheme forms part of a broader national scheme to monitor people who have been convicted of sexual offences against children. Each of the Australian states and territories has enacted legislation similar to Victoria's, based on model legislation.³⁸⁹ A person who has been convicted of a child sexual offence and registered as a sex offender in another state will become subject to Victoria's registration scheme if they relocate to Victoria.³⁹⁰ Likewise, a Victorian registered sex

³⁸⁷ *Sex Offenders Registration Act 2004* (Vic), section 1.

³⁸⁸ The Hon. Andre Haermeyer MP, Member for Kororoit, *Parliamentary debates*, Legislative Assembly, 3 June 2004, pp. 1850-1851.

³⁸⁹ Victorian Law Reform Commission, *Sex offenders registration: Information paper*, 2011, p. 17.

³⁹⁰ *Sex Offenders Registration Act 2004* (Vic), section 15.

offender who moves to another state or territory will generally become subject to that state or territory's registration legislation.³⁹¹

A national database of information about registered sex offenders – the Australian National Child Offenders Register (ANCOR) – was established in September 2004.³⁹² This database contains information collected under the registration schemes of each of the states and territories, and it is accessible by the registrars of the sex offender registries in each jurisdiction.³⁹³

4.3.1.2 Application of the scheme

If a person aged 18 or over is convicted of a child pornography offence (under either state or Commonwealth legislation), it is mandatory that they be included in the Sex Offenders Register,³⁹⁴ and they must comply with reporting obligations for a minimum period of 8 years.³⁹⁵

If the convicted person is under the age of 18, the court has discretion whether to include the person on the register.³⁹⁶ The court may only order registration for a juvenile if:

- the court has imposed a sentence in relation to the offence;³⁹⁷
- an application for the order is made by the prosecution within 30 days of the sentence being imposed;³⁹⁸ and
- the court is satisfied beyond reasonable doubt that the person poses a risk to the sexual safety of one or more persons, or of the community.³⁹⁹

Sex offender registration for adults is compulsory not just for child pornography offences, but also for any sexual offence (state or Commonwealth) involving a minor.⁴⁰⁰ The court may also order registration

³⁹¹ *Child Protection (Offenders Registration) Act 2000* (NSW), section 3C; *Child Protection (Offender Reporting and Registration) Act 2004* (NT), section 8; *Child Protection (Offender Reporting) Act 2004* (Qld), section 7; *Community Protection (Offender Reporting) Act 2004* (WA), section 7; *Community Protection (Offender Reporting) Act 2005* (Tas), section 11; *Crimes (Child Sex Offenders) Act 2005* (ACT), section 11; *Child Sex Offenders Registration Act 2006* (SA), sections 7, 8.

³⁹² CrimTrac, *Annual report 2004-05*, Commonwealth of Australia, 2005, p. 31.

³⁹³ Victorian Law Reform Commission, *Sex offenders registration: Information paper*, 2011, p. 30.

³⁹⁴ *Sex Offenders Registration Act 2004* (Vic), sections 6, 7. Schedule 2 to the Act specifies that offences against sections 68(1), 69(1), and 70(1) of the *Crimes Act 1958* (Vic) and an offence against section 57A of the *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* (Vic) as well as offences against any of the Commonwealth child pornography offences, are all Class 2 (registrable) offences.

³⁹⁵ *Sex Offenders Registration Act 2004* (Vic), section 34. Shorter reporting periods apply for juveniles who are registered offenders: see section 35.

³⁹⁶ *ibid.*, 6(3)(a), 11.

³⁹⁷ *ibid.*, 11(5).

³⁹⁸ *ibid.*, 11(6).

³⁹⁹ *ibid.*, 11(3).

⁴⁰⁰ *ibid.*, 7, Schedules 1, 2. Convictions for certain other offences, such as bestiality and aggravated deceptive recruiting for commercial sexual services, also result in mandatory registration: see Schedule 2 of the Act.

for a sexual offence other than an offence involving a minor, where the court is satisfied beyond reasonable doubt that the offender poses a risk to the sexual safety of one or more persons in the community.⁴⁰¹

Inclusion in the Sex Offenders Register has serious implications. A person who is registered is required to provide to Victoria Police detailed personal information – such as full name, date of birth, address, telephone number, email address, internet service provider, living arrangements, employment, interstate and overseas travel, and contact with children.⁴⁰² This information must be provided when the person is initially registered, and on an annual basis thereafter.⁴⁰³ Any changes to any of these personal circumstances must be reported to police within 14 days of the change occurring, unless the change is that a child is now residing in the same household as the registered person, or the registered person has had unsupervised regular contact with a child, in which case details must be reported within one day of that occurring.⁴⁰⁴

A registered offender commits an offence if they fail to comply with any of their reporting obligations without a reasonable excuse, or if they provide false or misleading information when making a report.⁴⁰⁵ A simple accidental omission can constitute a breach of reporting obligations. For example, the Committee heard that one young man who has been registered as a result of a conviction for a child pornography offence appeared before the Magistrates' Court for breaching his reporting obligations in April 2012. This person had omitted to disclose to police that he had purchased a motorcycle, registered in his own name, for his girlfriend.⁴⁰⁶ The Magistrate fined the young man \$400, but did not record a conviction for the offence.⁴⁰⁷

Registered sex offenders are also prohibited from working in any "child-related employment", which includes a broad range of occupations and volunteer undertakings such as working in schools and assisting at school crossings.⁴⁰⁸

According to Victoria Police, as at March 2013 there were no juveniles listed on the Sex Offenders Register for the offences of production of child pornography,⁴⁰⁹ possession of child pornography,⁴¹⁰ or publication or

⁴⁰¹ *ibid.*, 11.

⁴⁰² *ibid.*, 14.

⁴⁰³ *ibid.*, 12, 14, 16, 17.

⁴⁰⁴ *ibid.*, 17.

⁴⁰⁵ *ibid.*, 46, 47. Failing to comply with reporting obligations is punishable by Level 6 imprisonment (5 years maximum); the penalty for providing false or misleading information is 240 penalty units or imprisonment for 2 years.

⁴⁰⁶ Name withheld, *Submission no. 3*, 15 May 2012, p. 2.

⁴⁰⁷ *ibid.*

⁴⁰⁸ *Sex Offenders Registration Act 2004* (Vic), sections 67, 68.

⁴⁰⁹ *Crimes Act 1958* (Vic), section 68(1).

⁴¹⁰ *ibid.*, 70(1).

transmission of child pornography,⁴¹¹ where sexting constituted the offending behaviour.⁴¹²

As at 1 December 2011, a total of 4165 people had been included in the Sex Offenders Register.⁴¹³ By the end of 2014, this figure is projected to reach approximately 6200, if there are no changes to the legislation.⁴¹⁴

The Victorian Law Reform Commission recently undertook a review of the sex offenders registration scheme, issuing a report with recommendations for change in December 2011.⁴¹⁵ Further information about the review is provided in Chapter Six.

4.3.2 Working with children checks

While children under the age of 18 are unlikely to be listed on the Sex Offenders Register if they are convicted of a child pornography offence for engaging in sexting, as registration for people in this age group is at a judge's discretion, rather than being mandatory, they may still be barred from working with children. The National Children's and Youth Law Centre (NCYLC) noted this in their submission to the Committee, explaining:

Under the *Working with Children Act 2005*, a person must be 'assessed' before he or she can secure employment involving contact with young people. Anyone who has been convicted of a child pornography offence while under the age of 18 and later applies for a working with children check is considered a 'category 2' applicant. Category 2 applicants are automatically refused assessment – and thereby precluded from ever working with children – unless the Secretary is satisfied that the applicant does not pose an unjustifiable risk to the safety of children. Thus, while the standard for these checks is ostensibly the same as for sex offender registration, the default position is reversed – whereas a young person *cannot* be placed on the register absent a finding that he or she *does* pose a risk, a young person must be *refused* assessment to work with children absent a finding that he or she *does not* pose a risk. This places an undue burden on the young applicant who is pursuing work as an educator or youth worker.⁴¹⁶

Under the *Working with Children Act 2005* (Vic), an application is a Category 2 application if the person making the application has *at any time* been convicted or found guilty of a child pornography offence.⁴¹⁷ This means that if a person was convicted as a juvenile for a child pornography offence, the Secretary of the Department of Justice must refuse to give an

⁴¹¹ *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* (Vic), section 57A.

⁴¹² Victoria Police, *Submission no. 24A*, 18 September 2012, p. 1.

⁴¹³ Victorian Law Reform Commission, *Sex offenders registration: Final report*, Melbourne, 2011, p. 64., citing information provided by Victoria Police, 6 December 2011.

⁴¹⁴ *ibid.*, citing information provided by Victoria Police, 6 December 2011.

⁴¹⁵ *ibid.*

⁴¹⁶ National Children's and Youth Law Centre, *Submission no. 36*, 15 June 2012, p. 9. (citations omitted, and emphasis in original)

⁴¹⁷ *Working With Children Act 2005* (Vic), section 13(1)(a).

assessment notice unless he or she is satisfied that doing so would not pose an unjustifiable risk to the safety of children.⁴¹⁸

Furthermore, any adult convicted or found guilty of a child pornography offence will be barred from working with children even after their period of reporting obligations under the *Sex Offenders Registration Act 2004* (Vic) has expired. Under the *Working with Children Act 2005* (Vic), the Secretary of the Department of Justice *must* refuse to give an assessment notice to a person who has been convicted as an adult at any time for a child pornography offence.⁴¹⁹

It is an offence to engage in child-related work without a current assessment notice, punishable by level 7 imprisonment (2 years maximum) or a level 7 fine (240 penalty units), or both.⁴²⁰ It is also an offence for an employer to engage a person in child-related work if that person does not have a current assessment notice.⁴²¹

‘Child-related work’ is defined as work, practical training, or volunteer work that usually involves, or is likely to usually involve, regular direct unsupervised contact with a child in connection with any of a broad range of services, bodies, places or activities, such as:

- child care services;
- educational institutions;
- clubs, associations or movements;
- religious organisations;
- coaching or tuition services of any kind for children; and
- counselling or other support services for children.⁴²²

4.3.3 Police checks

The NCYLC also noted that even for positions that do not involve contact with children many employers will require a police check before employing a person, and past convictions and findings of guilt will be included on a police certificate issued by Victoria Police.⁴²³ Consequently, young people who are charged and found guilty of child pornography offences for sexting could experience difficulty securing employment in a range of fields.

On receiving an application for a police check Victoria Police will issue a National Police Certificate, which details the person’s criminal history, if any. Victoria Police releases criminal history information on the basis of

⁴¹⁸ *ibid.*, 13(2).

⁴¹⁹ *ibid.*, 12.

⁴²⁰ *ibid.*, 33.

⁴²¹ *ibid.*, 35.

⁴²² *ibid.*, 9.

⁴²³ National Children's and Youth Law Centre, *Submission no. 36*, 15 June 2012, p. 9.

findings of guilt, which includes court outcomes where there is a finding of guilt but no conviction is recorded, or where a good behaviour bond is ordered.⁴²⁴

Generally, if the individual was an adult when last found guilty of an offence and ten years have since elapsed, no details of previous offences will be listed on the police certificate.⁴²⁵ If the individual was a child when last found guilty and five years have elapsed, details of previous offences will generally not be released.⁴²⁶ However, details of offences for which a person was convicted as a juvenile will be released if the person has since been convicted of an offence as an adult, and less than ten years have elapsed since that conviction.⁴²⁷

There are some other circumstances in which a record that is over ten years old (or five years old, for a minor) will be released, including if the record check is for any of the following purposes:

- registration with a child-screening unit and/or the Victorian Institute of Teaching;
- an application for assisted reproductive treatment;
- registration and accreditation of health professionals;
- employment in prisons or state or territory police forces;
- an application for a Casino or Gaming Licence;
- an application for a Prostitution Service Provider's Licence;
- an application for Bus Operator Accreditation;
- an application for a Private Security Licence;
- an application for Victorian Taxi Accreditation; or
- an application for a Firearms Licence.⁴²⁸

Records older than ten years will also be released if the record includes a serious offence of violence or a sex offence (such as a child pornography offence) and the records check is for the purposes of employment or voluntary work with children (as discussed above), or vulnerable people.⁴²⁹

⁴²⁴ Victoria Police, 'National police certificates: Information release policy', viewed 28 November 2012, <www.police.vic.gov.au>.

⁴²⁵ *ibid.*

⁴²⁶ *ibid.*

⁴²⁷ *ibid.*, 2.

⁴²⁸ *ibid.*

⁴²⁹ *ibid.*

Chapter Five: Young people and the criminal justice system

The focus of this Inquiry is on sexting conduct engaged in by young people. In this Chapter, the Committee examines the way in which Victoria's criminal justice system deals with children and young adult offenders, and considers factors that warrant the differential treatment of children and young adults, compared with mature adult offenders, under the law.

5.1 Special considerations for children and young adults

As noted in Chapter Two, in this report, the term 'young people' is used to refer to minors under the age of 18, and also young adults approximately up to the age of 21. In the *Sentencing Act 1991* (Vic), "young offenders" are defined as those who are under the age of 21 at the time they are sentenced.⁴³⁰

5.1.1 Development of children and young adults

Several submissions to the Inquiry suggested that specific factors should be considered when determining appropriate legal responses to behaviour engaged in by children or young adults.⁴³¹

As noted by the Criminal Bar Association (CBA), criminal law has long recognised that young adults vary in their maturity, and may on occasion act impulsively and spontaneously, to their own detriment.⁴³² In most sexting cases involving young adults, the CBA submitted, the primary purpose of the criminal law should be to rehabilitate the offender, as the community as a whole, as well as the offender, will benefit from rehabilitation.⁴³³ This view was also expressed by Victoria Legal Aid (VLA):

There is also a wealth of authority confirming that the paramount sentencing consideration for children and young offenders is rehabilitation. This reflects the reality that most young offenders 'grow out' of crime. It is widely accepted that it is in the interests of the community to prioritise

⁴³⁰ *Sentencing Act 1991* (Vic), section 3.

⁴³¹ Criminal Bar Association, *Submission no. 11*, 13 June 2012; Victoria Legal Aid, *Submission no. 58*, 17 July 2012.

⁴³² Criminal Bar Association, *Submission no. 11*, 13 June 2012, p. 3.

⁴³³ *ibid.*

rehabilitation of children and young people over sentencing considerations in most circumstances.⁴³⁴

In a report on the sentencing of children and young people in Victoria, the Sentencing Advisory Council (SAC) explained the risk factors for offending by young people:

In the last decade or so, a body of research has emerged that suggests that adolescent brains are not fully mature until well into the early twenties. Such neurological immaturity (combined with various aspects of psychosocial immaturity), may undermine adolescents' ability to refrain from criminal behaviour. The frontal lobe, which governs reasoning, planning and organisation, is the last part of the brain to develop. This is likely to contribute to adolescents' lack of impulse control, although their attraction to risk and the high value they place on the immediate rewards flowing from risky behaviour, as well as their heavy 'discounting' of the future costs of this behaviour, also contribute. Adolescents are very vulnerable to peer pressure (which in turn can strongly affect their risk-taking behaviour), in part due to the importance they place on peers and in part due to neurological and hormonal changes. Scott and Steinberg conclude that although adolescents have roughly the same ability as adults to employ logical reasoning in making decisions by early to mid adolescence, adolescents have far less experience using these skills. The authors state that:

youthful criminal choices may share much in common with those of adults whose decision-making capacities are impaired by emotional disturbance, mental illness or retardation, vulnerability to influence or domination by others, or failure to understand fully the consequences of their acts.

The American Bar Association agrees, arguing that the research on adolescent brain development, although not serving to excuse adolescents from violent crime, 'clearly lessens their culpability', as adolescents are 'less than adult'.

New South Wales Magistrate Paul Mulrone has acknowledged the neuroscience research and commented on the potential effects of adolescents' different functioning:

It is typical of the offences committed by young offenders that they are opportunistic, there is little if any forethought of consequences and there is peer pressure or groupthink i.e. everyone thinks that it was someone else's idea and 'goes with the flow'.⁴³⁵

5.1.2 Recognition of special needs of children and young adults

Victoria's court system recognises that children have special needs and should not be treated in the same way as adults in the criminal justice

⁴³⁴ Victoria Legal Aid, *Submission no. 58*, 17 July 2012, p. 8.

⁴³⁵ Sentencing Advisory Council, *Sentencing children and young people in Victoria*, Sentencing Advisory Council, Melbourne, 2012, p. 11 (citations omitted).

system.⁴³⁶ The Children’s Court of Victoria was established as a specialist court to deal with matters related to children, and its Criminal Division hears and determines charges against young people aged between 10 and 17 years at the time of committing the alleged offence.⁴³⁷

Sentencing in the Children’s Court differs significantly from sentencing in adult courts, as the focus of the Children’s Court is on the needs of the offender:

The *Sentencing Act 1991* (Vic) instructs courts of adult jurisdiction that the purposes for which a sentence may be imposed are punishment, deterrence, rehabilitation, denunciation and protection of the community. The principles set out in the *Children, Youth and Families Act 2005* (Vic), on the other hand, are all directed at an assessment of the particular offending behaviour and the needs of the offender. For example, in determining which sentence to impose on a child, the court must consider factors including the need to strengthen and preserve the relationship between the child and the child’s family, the desirability of allowing the child to live at home and continue with education, training or employment, the need to minimise stigma to the child and the suitability of the sentence to the child.

Unlike in courts of adult jurisdiction, where rehabilitation is but one of five purposes for which a sentence may be imposed, in the Children’s Court rehabilitation is the overarching or core principle. However, in appropriate cases, the emphasis on rehabilitating the offender is qualified by the need to protect the community, to specifically deter offenders and to ensure that offenders are held accountable for their actions.⁴³⁸

Victoria’s criminal justice system also provides for some recognition of the particular vulnerability of young adults. Victoria has a unique “dual track” system, under which it is possible in some circumstances for adult courts to sentence young offenders – those who are under the age of 21 at the time of sentencing – to serve a custodial sentence in a youth detention facility rather than an adult facility.⁴³⁹ This is intended to prevent vulnerable young offenders from entering the adult prison system at a young age.⁴⁴⁰

The special needs and circumstances of children are also highlighted in several instruments of international law, and international legal principles relating to the rights of children are reflected in the Victorian *Charter of Human Rights and Responsibilities*.⁴⁴¹

⁴³⁶ For example, consider the comments of Judge Grant in *R v P and ors* [2007] VChC 3, para 20.: “We have a Children’s Court because we accept, as a community, that young people should be dealt with differently to adults”.

⁴³⁷ Apart from charges for fatal offences: *Children, Youth and Families Act 2005* (Vic), section 516(1).

⁴³⁸ Sentencing Advisory Council, *Sentencing children and young people in Victoria*, Sentencing Advisory Council, Melbourne, 2012, p. vii.

⁴³⁹ *Sentencing and Other Acts (Amendment) Act 1997* (Vic), section 83AR(4).

⁴⁴⁰ Sentencing Advisory Council, *Sentencing children and young people in Victoria*, Sentencing Advisory Council, Melbourne, 2012, p. xi.

⁴⁴¹ *ibid.*

5.1.2.1 International law

The United Nations *Convention on the Rights of the Child* (UNCROC) provides an important foundation for considering the complex and competing issues in sexting – in particular, the right of children to be protected from sexual exploitation, as well as their rights to be heard, to have their privacy respected, and to be able to access and share information, and education to enhance their wellbeing.⁴⁴²

The Office of the Child Safety Commissioner suggested that when determining criminal offences that might apply to children, particular regard should be given to Article 40 of UNCROC which includes the right of a child offender to be treated in a manner consistent with the child's sense of dignity and worth.⁴⁴³

The most relevant articles of UNCROC in this regard are:

- **Article 3 (Best interests of the child):** The best interests of children must be the primary concern in making decisions that may affect them. All adults should do what is best for children. When adults make decisions, they should think about how their decisions will affect children. This particularly applies to budget, policy and law makers.
- **Article 13 (Freedom of expression):** Children have the right to get and share information, as long as the information is not damaging to them or others. In exercising the right to freedom of expression, children have the responsibility to also respect the rights, freedoms and reputations of others. The freedom of expression includes the right to share information in any way they choose, including by talking, drawing or writing.
- **Article 16 (Right to privacy):** Children have a right to privacy. The law should protect them from attacks against their way of life, their good name, their families and their homes.
- **Article 34 (Sexual exploitation):** Governments should protect children from all forms of sexual exploitation and abuse. This provision in the Convention is augmented by the Optional Protocol on the sale of children, child prostitution and child pornography.
- **Article 37 (Detention and punishment):** No one is allowed to punish children in a cruel or harmful way. Children who break the law should not be treated cruelly. They should not be put in prison with adults, should be able to keep in contact with their families, and should not be sentenced to death or life imprisonment without possibility of release.
- **Article 40 (Juvenile justice):** Children who are accused of breaking the law have the right to legal help and fair treatment in a justice system that respects their rights. Governments are required to set a minimum age below which children cannot be held criminally

⁴⁴² Noted by the Office of the Child Safety Commissioner, *Submission no. 25*, 15 June 2012, pp. 1-2.

⁴⁴³ *ibid.*

responsible and to provide minimum guarantees for the fairness and quick resolution of judicial or alternative proceedings.⁴⁴⁴

The international law does not recognise 'consent' as a factor where the person concerned is under 18 years of age. For example, the International Labour Organisation's Convention no. 182 on the Worst Forms of Child Labour considers the involvement of children in pornographic performances as one of the worst forms of labour, to which a child – that is, a person under 18 years of age – cannot consent. Dr June Kane noted that this provision may be used to consider the creation, possession and distribution of all sexually explicit images of minors as *de facto* child pornography, and therefore illegal.⁴⁴⁵

5.1.2.2 Charter of Human Rights and Responsibilities

The UNCROC principles are reflected in Victoria's *Charter of Human Rights and Responsibilities* (the Charter),⁴⁴⁶ particularly sections 17(2) and 23(3).⁴⁴⁷ Section 17(2) of the Charter requires that laws affecting children must support the best interests of the child. Section 23(3) provides that a child who has been convicted of an offence must be treated in a way that is appropriate for his or her age.

Regarding section 17(2), the Victorian Equal Opportunity and Human Rights Commission argued that current laws employed for sexting do not support the best interests of the child:

Section 17(2) of the Charter provides that "every child has the right, without discrimination, to such protection as is in his or her best interests and is needed by him or her by reason of being a child". Current laws involving sexting do not afford young people the protection from the stigma of being labelled a sex offender in circumstances where the nature of, and intention behind, their conduct does not necessarily warrant the label.⁴⁴⁸

Further, regarding section 23(3), it may be argued that the flow-on effects for a child of a conviction for a child pornography offence – such as being labelled a child pornographer and sex offender, and the potential effect on the young person's ability to obtain work – are not appropriate, particularly where the conduct in question is non-exploitative sexting.

5.2 Police and prosecution approaches

As explored in Chapters Two and Four, many young Victorians engage in peer-to-peer sexting behaviour, and much of this behaviour breaches child pornography laws. However, most peer-to-peer sexting does not come to

⁴⁴⁴ These summaries are taken from UNICEF, 'Fact sheet: A summary of the rights under the Convention on the Rights of the Child', viewed 16 January 2013, <www.unicef.org>.

⁴⁴⁵ June Kane, *Submission no. 10*, 12 June 2012, p. 1.

⁴⁴⁶ *Charter of Human Rights and Responsibilities Act 2006 (Vic)*.

⁴⁴⁷ As noted by the Office of the Child Safety Commissioner, *Submission no. 25*, 15 June 2012, p. 2.

⁴⁴⁸ Victorian Equal Opportunity and Human Rights Commission, *Submission no. 41*, 18 June 2012, p. 3.

the attention of police or other authorities.⁴⁴⁹ Usually, police only become involved when sexting 'goes wrong', resulting in harm to the person depicted – for example, if a person publishes an intimate photograph of their ex-partner as revenge, or if sexted footage 'goes viral' within a school or across school communities.⁴⁵⁰

Victoria Police told the Committee that even when it does investigate sexting behaviour, charging and prosecuting a young person with child pornography offences is not the usual outcome. For example, Victoria Police advised that it investigated six juveniles for the transmission of child pornography in relation to an incident in 2010, and only one of these matters proceeded to the Children's Court, and that case was complicated by the fact that the young person had downloaded child pornography from the internet.⁴⁵¹ Of the five other juveniles, one was cautioned, and four were not subject to any further police action after the initial investigation.⁴⁵²

5.2.1 Criminal procedure for child pornography offences

In Victoria, criminal offences generally fall into two broad categories – summary offences, and indictable offences. Summary offences are considered less serious, and are heard in the Magistrates' Court. Summary offences include traffic offences, property damage and minor assaults. In the Magistrates' Court, both the verdict in a contested plea (that is, a finding of guilty or not guilty) and the sentence upon a conviction or a guilty plea are determined by a magistrate alone.⁴⁵³ The maximum sentence that can be imposed for a summary offence is two years imprisonment.⁴⁵⁴

Indictable offences are considered more serious, and are heard in the County Court or the Supreme Court, by a judge and jury. However, some indictable offences may be heard and tried summarily in the Magistrates' Court. If an offence is punishable by a term of imprisonment not greater than 10 years, or a fine not exceeding 1200 penalty units, or both, it may be heard and determined summarily in the Magistrates' Court.⁴⁵⁵ In order for this to happen, the Magistrates' Court must consider that the charge is appropriate to be determined summarily, and the accused must consent to a summary hearing.⁴⁵⁶ If an indictable offence is heard summarily, as for

⁴⁴⁹ Neil Paterson, Acting Commander, Intelligence and Covert Support Department, Victoria Police, *Transcript of evidence*, Melbourne, 18 September 2012, pp. 12-13.

⁴⁵⁰ Macedon Ranges Local Safety Committee, *Submission no. 54*, 3 July 2012, p. 13.

⁴⁵¹ Neil Paterson, Acting Commander, Intelligence and Covert Support Department, Victoria Police, *Transcript of evidence*, Melbourne, 18 September 2012, pp. 12-13.

⁴⁵² *ibid.*, 13.

⁴⁵³ Magistrates' Court of Victoria, 'Criminal proceedings', viewed 29 January 2013, <www.magistratescourt.vic.gov.au>.

⁴⁵⁴ *Sentencing Act 1991* (Vic), section 113A.

⁴⁵⁵ *Criminal Procedure Act 2009* (Vic), section 28(1). This section also provides that offences listed in Schedule 2 to this Act are able to be tried summarily, as are offences described in legislation as a level 5 offence or a level 6 offence, and offences that are punishable by level 5 or level 6 imprisonment or fine or both. A level 5 offence is punishable by 10 years imprisonment maximum and a level 6 offence is punishable by 5 years imprisonment maximum: *Sentencing Act 1991* (Vic), section 109.

⁴⁵⁶ *Criminal Procedure Act 2009* (Vic), section 29(1). The factors which the Court must have regard to in determining whether it is appropriate to hear a charge summarily are listed in section 29(2).

summary offences, the maximum penalty that can be imposed is two years imprisonment, regardless of the statutory maximum penalty for the offence.⁴⁵⁷

Child pornography offences found in Victorian legislation are indictable offences, but they are able to be heard and determined summarily, as they are each punishable by a term of imprisonment not exceeding 10 years.⁴⁵⁸

Prosecutions of offences committed by children are generally heard in the Criminal Division of the Children's Court, which can hear and determine summarily all criminal charges against children, other than charges for fatal offences.⁴⁵⁹

The Office of Public Prosecutions (OPP) is responsible for prosecuting indictable offences in Victoria.⁴⁶⁰ Victoria Police is generally responsible for conducting prosecutions of summary offences, or indictable offences that are heard summarily.⁴⁶¹ Consequently, child pornography offences are often prosecuted by Victoria Police in the Magistrates' Court (or the Children's Court), and decisions around the prosecution of these offences are made by Victoria Police. In more serious child pornography cases, where a determination is made that the charge should not be heard and dealt with summarily, the OPP will have responsibility for conducting the prosecution.

There are a number of stages in the criminal process prior to a court finding an accused person guilty of an offence:

- the police investigate possible criminal activity, and decide whether to charge a person, and what the charges will be;
- the prosecutor decides whether to prosecute the person; and
- the prosecutor and court decides whether to allow a person to take part in a diversion program.

Each of these stages, and the opportunities they present for a young person to have an outcome other than a finding of guilt for a child pornography offence, are explained below.

⁴⁵⁷ *Sentencing Act 1991* (Vic), sections 113, 113A.

⁴⁵⁸ The *Crimes Act 1958* (Vic). specifies that each of the offences of production of child pornography, procurement of a minor for child pornography, and possession of child pornography are indictable offences: see sections 68(1), 69(1) and 70(1) respectively. The publication or transmission of child pornography is also specified to be an indictable offence: see *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* (Vic), section 57A.

⁴⁵⁹ *Children, Youth and Families Act 2005* (Vic), section 516(1).

⁴⁶⁰ *Public Prosecutions Act 1994* (Vic), section 22(1)(a).

⁴⁶¹ Office of Public Prosecutions, 'Our role in the justice system', viewed 30 January 2013, <www.opp.vic.gov.au>.

5.2.2 Police discretion

Police have significant discretion in how they choose to deal with suspected breaches of the criminal law. Police members determine what type of enforcement action to pursue, if any, against a person suspected of committing a crime – such as giving the person an unofficial warning, issuing a caution (only available for juveniles, and for some adults for specific offences), issuing an official warning (only available for some minor offences), or pursuing a prosecution.⁴⁶²

Discretion exercised by police officers involves balancing the need to enforce the law to its fullest extent, and the need to take appropriate action (or no action if that is the most appropriate option), and in doing so recognising the individual circumstances of the person who has broken the law, and the circumstances of the offence.⁴⁶³

The Victoria Police Manual provides guidance as to how police discretion should be exercised. The Police Manual provides that when deciding what action is to be taken against a person, the appropriate action must be chosen that achieves the purpose of taking that action against the offender. The Police Manual lists several factors that must be considered when making this assessment:

- the nature, severity and gravity of the offence;
- characteristics and circumstances of the offender and victim;
- any injury, loss or damage resulting directly from the offence;
- the appropriateness of the action in light of community expectations, effect of deterrence on the individual and of the community in general; and
- requirements that apply to the specific enforcement action (for example, cautions generally cannot be issued to adults).⁴⁶⁴

Although police have discretion in determining whether to take enforcement action against an alleged offender, the Australian Council of Educational Research noted that there is a lack of flexibility in the options available to police dealing with a sexting incident, which are currently at two ends of the spectrum:

While the police have discretion, the options are either to warn those involved or to press [child pornography] charges. A warning may not be an adequate consequence, but under current legislation, pressing charges could have serious consequences. The issue lies at least in part in the inability of the law to consider the age and intent of the perpetrators.⁴⁶⁵

⁴⁶² Victoria Police, *Victoria Police Manual: Disposition of offenders*, 2012, p. 1.

⁴⁶³ *ibid.*

⁴⁶⁴ *ibid.*, 2.

⁴⁶⁵ Australian Council of Educational Research, *Submission no. 35*, 15 June 2012, p. 4.

This lack of flexibility is illustrated by the following case study of a positive outcome for a sexting offence, provided by VLA:

*Case Study 11: Aaron*⁴⁶⁶

“Aaron was 17 years of age and in an intimate relationship with his 17 year old girlfriend. During their relationship his girlfriend sent him a photo of her breasts and Aaron kept it on his phone.

Aaron went through a difficult break up with his girlfriend and both of them ended up spreading rumours at school about each other that were hurtful and untrue. Out of revenge Aaron sent the photo to one of his friends and she found out. Her father then reported him to police.

The police contacted Aaron and asked [him] to come to the police station for an interview. During his interview Aaron admitted to police that he sent the photo to his friend but that he was not sorry because she had deserved it, because she told her friends lies about how bad at sex he was. The police did not like Aaron’s attitude and decided he should learn a lesson and hear from the Court about the seriousness of his behaviour. The police charged him with transmitting child pornography.

Aaron’s lawyer realised just how negative a finding of guilt would be for Aaron, particularly in finding work. ... Aaron’s lawyer contacted [the police officer] and referred him to the Victoria Police Criminal Record disclosure policy, which states that children will have a disclosable criminal record for a finding of guilt for up to 5 years after their court appearance. The informant agreed to withdraw the charges, with Aaron attending a sexual education program about the negative impacts of sexting.”

While the outcome of Case Study 11 appears to have been positive, this example illustrates the extent to which options for police prosecuting these kinds of actions are polarised – police may either warn an offender, or prosecute with an offence that may substantially affect that person’s social and employment prospects for at least the next five years. There is no ‘middle ground’ for the police to demonstrate the seriousness of the act and its effects on victims without undue repercussions for the offender.

5.2.3 Cautions

In evidence to the Committee, Acting Commander Neil Paterson noted the Victoria Police’s preference to keep juveniles out of the criminal justice system:

... what I do know is that as soon as juveniles enter the justice stream – [and] 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.

...

⁴⁶⁶ Victoria Legal Aid, *Submission no. 58*, 17 July 2012, pp. 8-9.

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 [non-consensual sexting] 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.⁴⁶⁷

As Acting Commander Paterson explained, police officers often exercise their discretion to caution juveniles, and Victoria Police considers this the best method by which to divert juveniles from the criminal justice system.

5.2.3.1 When cautions can be issued

Victoria Police officers can choose to issue a formal caution to a child who is reasonably suspected of having committed a criminal offence. The process involved in cautioning a child is that the details of the offence are recorded, and the offender, and the offender's parents or another responsible adult, are required to attend the police station at a later date, when an official warning is given by the police. After the warning is given, the child does not need to take any further action.⁴⁶⁸

The Victoria Police Manual governs the ability of police in Victoria to issue cautions.⁴⁶⁹ The Manual provides that in order for a juvenile offender to be eligible to receive a caution, they must admit to committing the offence.⁴⁷⁰ Cautions can only be given to children aged 10 or above (as children younger than 10 cannot be held criminally responsible for their conduct), and the child's parent or guardian must consent to the caution, and must be present at the time the caution is given.⁴⁷¹

Generally, a caution will only be offered to an offender with no prior criminal history.⁴⁷² Cautions will only be considered for sexual or related offences in exceptional circumstances.⁴⁷³ When issuing the caution, the police officer giving the caution will have an informal discussion with the child and his or her parent or guardian, to seek the underlying reasons for committing the offence, and to discuss inappropriate behaviour and its

⁴⁶⁷ Neil Paterson, Acting Commander, Intelligence and Covert Support Department, Victoria Police, *Transcript of evidence*, Melbourne, 18 September 2012, p. 16.

⁴⁶⁸ Kenneth Polk, Christine Adler, Damon A Muller and Katherine Rechtman, *Early intervention: diversion and youth conferencing - a national profile and review of current approaches to diverting juveniles from the criminal justice system*, Australian Government Attorney-General's Department, 2003, p. 12.

⁴⁶⁹ In other Australian jurisdictions, the process for giving cautions is set out in legislation.

⁴⁷⁰ Victoria Police, *Victoria Police Manual: Disposition of offenders*, 2012, p. 4.

⁴⁷¹ *ibid.*

⁴⁷² Victoria Police, *Victoria Police Manual: Cautions*, 2012, p. 2.

⁴⁷³ *ibid.*

consequences.⁴⁷⁴ The child and the parent or guardian will also be advised that further cautions are unlikely for any future offences.⁴⁷⁵

Cautions are not available for adults,⁴⁷⁶ so any person who was 18 or older at the time they engaged in sexting behaviour is not eligible to receive a caution.⁴⁷⁷ A minor who is 10 or older who admits the offence can receive a caution.⁴⁷⁸

As mentioned above, Victoria Police has cautioned one juvenile in relation to a possible offence of transmission of child pornography in sexting circumstances.⁴⁷⁹ The ability of Victoria Police to issue cautions for child pornography offences is limited, however, because the Victoria Police Manual advises that police must “[o]nly consider a caution for sexual or related offences in exceptional circumstances.”⁴⁸⁰ The requirement for “exceptional circumstances” sets a high threshold which limits the ability of police to issue cautions, and in the majority of cases, sexting by minors (which is offending under child pornography provisions) will not meet this threshold.

5.2.3.2 Limits on the use of cautions

As adults generally cannot receive cautions, it is not open to Victoria Police to issue a caution to a young person who has turned 18 and who has been involved in peer-to-peer sexting that legally constitutes a child pornography offence. In this situation, the only options available to the police are to take no further action, or to proceed with charging the person with an offence.

Another limitation on the use of cautions is that, as noted above, they can only be issued in relation to sexual or related offences in exceptional circumstances. There may therefore be some reluctance on the part of police officers to issue cautions in relation to peer-to-peer sexting behaviour, given that child pornography offences are considered to be sexual or related offences.

Finally, police will not ordinarily issue a second caution to a child who has already received a caution. This means that a child who has received a caution in relation to sexting behaviour (or any other offence) is unlikely to receive a second caution if they engage in such behaviour again – instead, they would likely be prosecuted for child pornography offences.

The following case study illustrates how Victoria Police employed the use of cautions in responding to two separate sexting incidents involving footage of the same teenage girl:

⁴⁷⁴ *ibid.*, 3.

⁴⁷⁵ *ibid.*

⁴⁷⁶ With the exception of cannabis cautions and drug diversions.

⁴⁷⁷ Victoria Police, *Victoria Police Manual: Disposition of offenders*, 2012, p. 4.

⁴⁷⁸ *ibid.*

⁴⁷⁹ Neil Paterson, Acting Commander, Intelligence and Covert Support Department, Victoria Police, *Transcript of evidence*, Melbourne, 18 September 2012, p. 13.

⁴⁸⁰ Victoria Police, *Victoria Police Manual: Cautions*, 2012, p. 2.

Case Study 12: Cautioning juveniles involved in sexting⁴⁸¹

In the Macedon Ranges case a teenage boy and girl consensually exchanged a sexually explicit image and video via mobile telephone following discussions of a sexual nature. Some time later the girl attended a party and informed another teenage boy about the video of herself. The girl declined to show the boy the video, but while she was distracted the boy stole her phone, located the video and bluetoothed it to his own mobile. This boy then sent the video to a number of other boys and so forth.

The matter came to the attention of the secondary school that the girl and boy attended. The school elected to deal with the incident by speaking to the students involved. On becoming aware of the incident and school response, a concerned parent of a friend of the girl in the video reported the incident to police. Police commenced an investigation and approached the school to ascertain details of the incident. The school was reluctant to provide the statements it had obtained, resulting in police executing a search warrant to obtain any evidence that was in the school's possession. The girl and her parents were then approached with regard to formalising a police response. The girl disclosed issues of self-harming, and the police response was elevated to attempt to minimise the effect on the victim.

Through the police investigation eight boys were identified as being involved in the transmission and possession of the video. This resulted in these students being interviewed by police in the presence of their parents for offences relating to possession of child pornography. Seven of the boys were cautioned by way of the police child caution program. The other boy was charged with possession of child pornography, owing to a previous caution for similar behaviour. This young person subsequently pleaded guilty at the Children's Court and was placed on a ROPES program without conviction. The victim was referred to counselling.

Approximately four months after the initial incident had been resolved the same girl produced a second sexually explicit video of herself on her mobile telephone and forwarded it to a different boy at his request. The boy forwarded the video to other students at a different school. Information about the incident was brought to the attention of police by a parent of one of the boys who had been involved in the first incident. A police investigation was commenced as a matter of urgency to prevent the video from going viral. The girl was interviewed in relation to producing child pornography. The boy who received the video was interviewed in relation to possessing child pornography. Both the girl and boy in this case received a caution for their behaviour.

In relation to the first incident in Case Study 12, one of the eight boys who had been identified as being involved in the transmission and possession of the video was charged with possession of child pornography. Even

⁴⁸¹ The facts for this case study are drawn from Darlene Cole, Youth Partnerships Officer, Macedon Ranges Shire Council, Macedon Ranges Local Safety Committee, *Transcript of evidence*, Melbourne, 7 August 2012, pp. 20-21; Macedon Ranges Local Safety Committee, *Submission no. 54*, 3 July 2012, pp. 6-7.

though this teenager *had* already received a caution for similar conduct, it is strongly arguable that it was not appropriate for him to be charged with a child pornography offence (as will be considered further in Chapter Six). It is also rather questionable whether the girl who was involved in both incidents should have received a caution for producing child pornography.

Smart Justice for Young People also suggested that police decisions in relation to cautioning young offenders have at times been uneven and inconsistent between individual officers, stations and regions, raising questions about whether police discretion in this regard has been consistently and properly exercised.⁴⁸²

These limitations suggest that the current system for issuing cautions in Victoria is imperfectly suited to ensure that juveniles and young adults who engage in peer-to-peer sexting are not charged with child pornography offences and prosecuted as a result of their conduct.

5.2.4 Lesser charges

As the CBA noted, child pornography offences carry significant social stigma that has a real and lasting capacity to prejudice employment, travel and social opportunities.⁴⁸³ This social stigma remains even if the sentencing court does not order a term of imprisonment – the label of ‘child pornographer’ attracts extreme societal disapproval and abhorrence.

The CBA suggested that in cases involving young adults sexting, if it is considered appropriate to charge the young person with a criminal offence, they should face a lesser charge than a child pornography offence.⁴⁸⁴ The most suitable existing charge in many circumstances would be the Commonwealth offence of using a carriage service to menace, harass or cause offence.⁴⁸⁵ Conviction for this offence would not carry the same social stigma as a child pornography conviction, although penalties for it are significant and serious. Nor would it result in automatic sex offender registration (which is mandatory for anyone aged 18 or older who is convicted of a child pornography offence).

Victoria Police determines whether to charge a suspected offender, and what charges to apply.⁴⁸⁶ Currently, however, the Victoria Police Manual requires police to charge an offender with the most applicable state-based offence, if one is available. This means that, in practice, Victoria Police

⁴⁸² Smart Justice for Young People, *Entrenching diversion in the youth justice system*, Response to diversion discussion paper: ‘Practical Lessons, Fair Consequences: Improving Diversion for Young People in Victoria’, 2012, p. 8.

⁴⁸³ Criminal Bar Association, *Submission no. 11*, 13 June 2012, p. 2.

⁴⁸⁴ *ibid.*; Tony Trood, Member, Criminal Bar Association, *Transcript of evidence*, Melbourne, 27 July 2012, p. 18.

⁴⁸⁵ *Criminal Code Act 1995* (Cth), section 474.17.

⁴⁸⁶ The Office of Public Prosecutions may provide advice at the request of Victoria Police on issues such as whether there is sufficient evidence to charge a suspect, what the correct charges are, and what are the likely prospects of obtaining a conviction; however, the decision to charge a person is solely within the discretion of Victoria Police: Office of Public Prosecutions, letter to the Law Reform Committee, 18 February 2013.

must charge an offender with a state-based child pornography offence in preference to the Commonwealth offence, if circumstances suggest that a child pornography offence could be applied.

Finding 3: In the absence of an appropriate Victorian offence, the Commonwealth charge of using a carriage service to menace, harass or cause offence is more appropriate than child pornography charges in cases of non-consensual sexting between people who could engage in lawful sexual activity, where the sexting is not exploitative.

5.2.5 The decision to prosecute

5.2.5.1 The decision whether to prosecute for serious offences

After charges have been laid against a person, the next stage of the criminal justice process is a decision whether to proceed to a prosecution of the alleged offender. In the case of indictable offences, this role is performed by the OPP. The OPP will assess the brief of evidence for the matter in accordance with the Director's Policy on the exercise of prosecutorial discretion,⁴⁸⁷ which requires an assessment of whether the public interest requires a prosecution to be pursued.⁴⁸⁸ Several factors are considered when making this assessment.⁴⁸⁹

The Director's Policy on the exercise of prosecutorial discretion also provides that careful consideration must be given to the public interest test in 'boyfriend/girlfriend' cases. Clause 2.9.2 provides that the OPP must consider whether the public interest is served when prosecuting a case where a sexual offence has technically been committed:

One circumstance in which careful attention must be given to the 'public interest' test is in 'boyfriend/girlfriend' cases involving sexual offences, in which, typically, it is clear upon the admissible evidence that an offence has technically been committed, but that the objective circumstances of the offending itself in combination with the personal circumstances of the complainant and offender, do not satisfy the 'public interest' test. When assessing the 'public interest' test in such cases, close attention should be given to the following factors:

- the relative ages, maturity and intellectual capacity of the complainant and the offender;
- whether the complainant and offender were in a relationship at the time of the offending and if so, the length of the relationship;
- whether the offending was 'consensual', in the sense that (despite consent being irrelevant to the primary issue) the complainant was capable of consenting and did in fact consent;
- whether the offending to any extent involved grooming, duress, coercion or deception;

⁴⁸⁷ *ibid.*

⁴⁸⁸ Director of Public Prosecutions, *Director's Policy: The prosecutorial discretion*, 2012, p. clause 2.1.6.

⁴⁸⁹ *ibid.*, clauses 2.1.9, 2.1.10.

- whether, at the time of considering whether the matter should proceed, the complainant and the offender are in a relationship;
- the attitude of the complainant and her family or guardians toward the prosecution of the offender;
- whether the offending resulted in pregnancy and if so, the sequelae of the pregnancy; and
- any other circumstance which might be relevant to assessing the 'public interest' in these circumstances.⁴⁹⁰

It appears that the application of this policy would reduce the possibility of a prosecution in circumstances involving peer-to-peer sexting occurring between two young people in a relationship. However, the wording of the policy as applying to "boyfriend/girlfriend" cases makes it unlikely that these considerations would come into play in cases where a young person engages in non-consensual sexting by disseminating an intimate image to others.

Further, the OPP is generally only involved in decisions to prosecute in regards to more serious offences, which are prosecuted in the County Court or the Supreme Court of Victoria. The OPP is thus unlikely to prosecute an offence for sexting unless it is connected with contact sexual offences (for example, rape or sexual penetration of a child under 16) or has other serious aggravating factors associated with it.⁴⁹¹

In the case of summary offences, or indictable offences that are heard summarily (which would include the vast majority, if not all, of prosecutions for peer-to-peer sexting), the prosecuting agency is Victoria Police.

5.2.5.2 The decision whether to prosecute for lesser offences

Where sexting is engaged in by children, the decision whether to prosecute is made by Victoria Police, which conducts prosecutions in the Children's Court. Where young adults are charged with offences for sexting, again, the decision to prosecute will generally be made by Victoria Police, which undertakes all prosecutions in the Magistrates' Court.

When determining the exercise of prosecutorial discretion, Victoria Police prosecutors are bound by the OPP Prosecutorial Guidelines, including policy 2.9.2 above, which determines parameters for a public interest test in boyfriend/girlfriend cases of consensual sexting. Consequently, it is unlikely that consensual sexting between peers would be prosecuted by Victoria Police.

5.2.6 Diversion for adults

After a young person has been charged with a child pornography (or other) offence and the decision has been made to proceed to prosecution, a young person may avoid receiving a conviction by successfully completing

⁴⁹⁰ *ibid.*, para 2.9.2.

⁴⁹¹ Office of Public Prosecutions, *personal communication*, 18 February 2013.

a court diversion program. A diversion program for adults is run by the Magistrates' Court of Victoria, and a more limited diversion program exists for children. In addition, the Children's Court of Victoria has available to it more sentencing options than the adult courts, including sentencing orders that do not involve a formal finding of guilt.

5.2.6.1 Operation of the Magistrates' Court Criminal Justice Diversion Program

For adults, the Magistrates' Court runs a Criminal Justice Diversion Program, which allows a person who has committed an offence – particularly a first-time offender – to avoid receiving a conviction for that offence, in certain circumstances. As explained by the CBA:

In Victoria, to its credit, the Magistrates' Court runs a very innovative and sensible program. It is called diversion. The whole idea behind it is that particularly first-time offenders have the opportunity in certain circumstances to avoid getting a court order against their name. ... in terms of sentencing, the lowest is what used to be called a good behaviour bond, where something is adjourned without conviction and there is a whole range of conviction orders. This program [diversion] takes it back one step prior to that. Basically how it works is this – where someone is charged with a criminal offence and an informant [police officer] recommends it, the matter can be dealt with in the diversion program. It requires the imprimatur of the magistrate, who says yea or nay, and there is obviously some discretion there. In a typical example what will happen is that an informant will recommend diversion, it will be considered by the magistrate and the magistrate can make a number of conditions that [the offender has] to comply with ...⁴⁹²

The CBA noted that when a person for whom diversion is recommended goes to court, if diversion is endorsed by the magistrate the case will be adjourned for a period of time – for example, a few months. Conditions will be attached to the order, and the offender will have to complete those conditions, and provide proof of their completion. For example, if the offender is required to attend a program, a certificate of completion will need to be provided to the court, and if an apology is a condition of diversion, a copy of the apology may need to be produced. If the offender complies with the requirements of diversion, the charge against him or her will be withdrawn.⁴⁹³ This has the significant benefit that there is no formal finding of guilt made against the offender, and formal court orders will not be issued against him or her:

One of the basic premises of the program is the recognition that court orders, even without a conviction order, can still hamstring a person when it comes to work opportunities, discrimination between employers, for example, travel opportunities and the like, so in my view it is a very good program because of that.⁴⁹⁴

⁴⁹² Tony Trood, Member, Criminal Bar Association, *Transcript of evidence*, Melbourne, 27 July 2012, p. 17.

⁴⁹³ *ibid.*

⁴⁹⁴ *ibid.*

As noted in Chapter Four, a formal finding of guilt, even where no conviction is recorded, will show up on a police check and on a working with children check. Successfully completing diversion avoids this outcome – while the police will maintain a record of the diversion, the diversion result would not show up on a police check or a working with children check conducted by a potential employer.⁴⁹⁵ It is unlikely that a person will be offered diversion more than once, and toward this end, police internal records allow the police to track who has previously received diversion.⁴⁹⁶

5.2.6.2 Requirements for granting diversion

In order for the Magistrates' Court to be able to grant diversion, the criminal proceedings must be for a summary offence, or for an indictable offence that can be dealt with summarily,⁴⁹⁷ which each of the child pornography offences are. The Magistrates' Court may adjourn the proceedings for up to 12 months to enable the accused person to participate in and complete the diversion program if, before taking a formal plea from the accused:

- the accused acknowledges their responsibility for the offence;
- it appears appropriate to the Magistrates' Court that the accused should participate in a diversion program; and
- the prosecution (i.e. the police informant/prosecutor) and the accused both consent to proceedings being adjourned to allow the accused to undertake the diversion program.⁴⁹⁸

If the accused person completes the diversion program to the Court's satisfaction, no plea to the charge is taken, and the Court must discharge the accused without any finding of guilt.⁴⁹⁹

The Magistrates' Court diversion program is not age-based – it is open to the Court to grant diversion to any person, if the criteria for allowing diversion are met.⁵⁰⁰ However, a person's youth may be a factor that works in favour of the magistrate determining that it is appropriate that the accused participate in a diversion program.

5.2.6.3 Applying diversion to sexting offences

Victoria Police told the Committee that where an adult engaged in low-level sexting behaviour and was subject to child pornography charges for that conduct, Victoria Police could agree to diversion for that person, and as a result they would not be convicted and would not be registered on the Sex Offenders Register.⁵⁰¹ However, there are no examples of this approach

⁴⁹⁵ *ibid.*, 18.

⁴⁹⁶ *ibid.*

⁴⁹⁷ *Criminal Procedure Act 2009 (Vic)*, section 59(2).

⁴⁹⁸ *ibid.*

⁴⁹⁹ *ibid.*, 59(4).

⁵⁰⁰ Tony Trood, Member, Criminal Bar Association, *Transcript of evidence*, Melbourne, 27 July 2012, p. 19.

⁵⁰¹ Neil Paterson, Acting Commander, Intelligence and Covert Support Department, Victoria Police, *Transcript of evidence*, Melbourne, 18 September 2012, pp. 16-17.

having been taken, and according to Victoria Police there are no examples of adult, low-level sexting behaviour that have been prosecuted. Acting Commander Neil Paterson told the Committee that “people have only offended in a way that is greater than just a sexting example by the nature of their actions.”⁵⁰²

Although sexting conduct can in theory be included in the existing diversion program, the CBA suggested that in reality police informants are reluctant to recommend the inclusion of young adults who are being prosecuted for sexting in the diversion program, because the prosecution concerns child pornography offences. The CBA suggests that there is a need to specifically authorise police officers to be able to recommend diversion in such cases.⁵⁰³

The CBA also suggested that magistrates should have an overriding discretion to allow diversion.⁵⁰⁴ At present, if the police informant does not consent to diversion, that is the end of the matter – diversion cannot be granted. The CBA suggests this is a flaw in the system, and argues that magistrates are very capable of determining whether diversion is suitable in particular circumstances:

... a magistrate who, for example, was considering a diversionary application by a police officer in a sexting example where there was commercial gain by the person, you would think it was probably unlikely a diversion would be granted, but that is an aggravated form of it. If somebody were selling stuff to their mates, they would take it beyond perhaps what the norm is. You could easily foresee that you would have difficulty in convincing a magistrate to give diversion if you have got that aggravating feature there. Magistrates commonly make those sorts of decisions, whether it be a theft offence they are looking at for diversion, a burglary or whatever it is.⁵⁰⁵

The Committee recognises that entry into a diversion program will be a desirable outcome for many young adults who are brought before the court for offences solely related to sexting activities. The Committee also notes that, because the applicable offence in most sexting cases is a child pornography offence, some police informants may be reluctant to offer diversion. Consequently, the Committee recommends that Victoria Police review its policies for offering diversion to ensure that opportunities are provided for young adults charged with child pornography offences in association with sexting-type behaviour to be offered diversion by police prosecutors where there is no evidence of exploitative behaviour. If necessary, Victoria Police may need to consult with the Office of Public Prosecutions during development of these policies.

⁵⁰² *ibid.*

⁵⁰³ Criminal Bar Association, *Submission no. 11*, 13 June 2012, p. 3.

⁵⁰⁴ Tony Trood, Member, Criminal Bar Association, *Transcript of evidence*, Melbourne, 27 July 2012, p. 19.

⁵⁰⁵ *ibid.*

Recommendation 5: That Victoria Police review its policies to ensure that opportunities are provided for adults charged with offences in relation to sexting-type behaviour, where there is no evidence of exploitative behaviour, to be offered diversion by Police prosecutors.

5.2.7 Diversion for children

The enactment of the *Children and Young Persons Act 1989* (Vic) formally recognised that young people have different developmental needs to adults, and since that time, the approach in Victoria has been to divert young people from coming into contact with the criminal justice system if possible.⁵⁰⁶

The only widely-available diversion program for children in Victoria is the ROPES program, which was developed in 2002 by the Children's Court and Victoria Police.⁵⁰⁷ This program is targeted at young people who have little or no criminal history.

5.2.7.1 Eligibility for ROPES program diversion

In order to be eligible for the ROPES program, a young person must be referred to the program by either the police (if the young person has not been charged), or by one of a number of Children's Courts in Victoria,⁵⁰⁸ and:

- the young person must be aged between 12 and 17 at the time they committed the offence;
- the offence must be one that can be heard and dealt with summarily;
- the informant (i.e. investigating police officer) must deem the young person to be a suitable candidate for the program;
- the young person must admit the offence;
- the young person must have received no more than two previous cautions, or be appearing before the Children's Court for the first time;
- the young person must not have participated in the program previously;

⁵⁰⁶ Sentencing Advisory Council, *Sentencing children and young people in Victoria*, Sentencing Advisory Council, Melbourne, 2012, p. 12.

⁵⁰⁷ *ibid.*, 33.

⁵⁰⁸ The Children's Courts that can refer children to the ROPES program are: Melbourne, Collingwood Neighbourhood Justice Centre, Ringwood, Sunshine, Wonthaggi, Geelong, Frankston, Broadmeadows, Heidelberg, Dandenong, Sale, Bairnsdale and Bendigo. Young people who have received police cautions, or who have been displaying anti-social behaviour patterns without yet coming into contact with the criminal justice system, may also be accepted into the program.

- the young person must agree to participate, and his or her parent or guardian must also agree;
- if the young person has been charged, the presiding judicial officer must have deemed the ROPES program as suitable, and adjourned the case to enable the young person to participate in the program.⁵⁰⁹

5.2.7.2 How the ROPES program works

The ROPES program brings together the young offender and the police informant in a series of physical challenges requiring trust and cooperation, which are designed to break down the barriers between them and to help them to see things from the other's perspective. According to the ROPES Program Co-ordinator, the aim of the ROPES program is:

... to demonstrate to young people that although they have offended and have been apprehended by police, they do not have to go down the path of continual anti-social behaviour or criminal activity. The program is designed to share trust, respect and co-operation between police and young persons. Its objective is to create a new level of understanding between police, the Children's Court and the young people involved that is not based on a negative punitive experience but rather is based on positive behaviour change.⁵¹⁰

If a young person performs satisfactorily in the ROPES program, a completion certificate will be given to him or her and sent to the court. If the Children's Court is satisfied with the young person's performance in ROPES, the defendant will be discharged without having to re-attend at court, without making a formal plea, and without the court making any finding as to the young person's guilt. This means that the young person will have neither a criminal conviction nor a finding of guilt recorded against him or her in respect of the offence. In this regard, the philosophy of the program is similar to the adult diversion program.⁵¹¹

5.2.7.3 Limits to diversion for children

There are some limitations to the ROPES program, as the SAC has noted. One weakness is that one of the main eligibility criteria for the program is assessment of suitability by the police informant; however, there do not appear to be clear guidelines as to how such a determination is made, with the result that referral may be quite discretionary.⁵¹² Anecdotal evidence

⁵⁰⁹ Children's Court of Victoria, *Research Materials: 11. Criminal Division - Sentencing*, 2012, p. 176.

⁵¹⁰ *ibid.*, 176-177.

⁵¹¹ *ibid.*, 177.

⁵¹² Sentencing Advisory Council, *Sentencing children and young people in Victoria*, Sentencing Advisory Council, Melbourne, 2012, p. 34.

indicates that police informants have refused to refer some young people to this program, even when the young people appear to be eligible.⁵¹³

Another significant limitation is that the program is only suitable for young people who are physically capable. Some young people may not be able to participate in the program due to restrictions on their physical abilities.

As with the adult Magistrates' Court Diversion Program, ROPES is not available to those who have a prior criminal history, and those who have already participated in the ROPES program are precluded from future participation.

There are some other unfunded, locally established programs for young offenders operating in specific geographic areas of Victoria,⁵¹⁴ but the ROPES program is the only diversionary program that is accessible to a large number of young Victorians across the state. However, even the ROPES program is limited geographically – ROPES does not have statewide coverage, so not all young Victorians are able to access the program.⁵¹⁵

The South Eastern Centre Against Sexual Assault suggested that a new diversion program be introduced for youth under the age of 18 who commit a sexting-type offence:

A diversion program needs to be created for the under 18 year olds who forward on a message or image without knowledge or consent of the person who originally sent it and this transmission has come to the notice of the authorities. This program should be linked in with the statewide Sexually Abusive Behaviour Treatment Services (SABTS) program created under the Therapeutic Treatment Order legislative provisions of the *Children, Youth and Families Act 2005*. There needs to be early intervention in such instances and referral into a program that will conduct an assessment of risk. If it is assessed that this was a one off offence, and there is no risk, the young person can be dealt with by attending an information session about sexting and the law, etc. If it is assessed that this young person is high or medium risk they would attend a program about respectful relationships, offending and issues around technologically facilitated offences for 6-12 months, depending on the assessment.⁵¹⁶

⁵¹³ Smart Justice for Young People, *Entrenching diversion in the youth justice system*, Response to diversion discussion paper: 'Practical Lessons, Fair Consequences: Improving Diversion for Young People in Victoria', 2012, p. 9.

⁵¹⁴ For example, the 'Right Step' program and the 'GRIPP' program: see Sentencing Advisory Council, *Sentencing children and young people in Victoria*, Sentencing Advisory Council, Melbourne, 2012, p. 35.

⁵¹⁵ Smart Justice for Young People, *Entrenching diversion in the youth justice system*, Response to diversion discussion paper: 'Practical Lessons, Fair Consequences: Improving Diversion for Young People in Victoria', 2012, p. 9.

⁵¹⁶ South Eastern Centre Against Sexual Assault, *Submission no. 16*, 14 June 2012, pp. 2-3.

5.2.7.4 Sentencing for children

The *Children, Youth and Families Act 2005* (Vic) lists matters to be taken into account when determining a sentence to be imposed on a child.⁵¹⁷ One matter under the Act that is highly relevant to child pornography offences is “the need to minimise the stigma to the child resulting from a court determination”.⁵¹⁸ This principle accords with section 23(3) of the Charter, which requires that a child who has been convicted of an offence must be treated in a way that is appropriate for his or her age.⁵¹⁹

Where it makes a finding of guilt, the Children’s Court has open to it some sentencing options that are not available to adult courts – such as dismissal, non-accountable and accountable undertakings, and good behaviour bonds. For these sentencing orders, no conviction is recorded.⁵²⁰ The Children’s Court may also make other orders – such as ordering a fine, probation, or making a youth supervision order – without recording a conviction.⁵²¹

However, as noted above in reference to the adult Magistrates’ Court diversion program, even if no conviction is recorded, the Children’s Court must still make a finding of guilt to be able to make any of these sentencing orders. As discussed in Chapter Four, for people aged under 18 when found guilty of an offence, details may be released for up to five years from the date of the court’s finding. This means that a finding of guilt for a child pornography offence will show up on a police check or a working with children check undertaken within five years of the court’s finding.

The Committee agrees with the comments of the SAC, which note that Victoria Police’s policy on releasing information about findings of guilt undermines the intent that convictions (and their negative consequences) should only be applied to deserving cases:

The intent behind Victoria Police’s Information Release Policy would appear to be the consolidation and release of information that is in any event accessible to the public. However, the Information Release Policy may have the effect of undermining the intent behind section 8 of the *Sentencing Act 1991* (Vic), which is that a conviction, or rather all the negative and ongoing consequences of a conviction (which can be particularly severe for a young person just starting out in employment), should be applied to deserving cases only. It may also undermine some of the Children’s Court sentencing principles, in particular, ‘the need to minimise the stigma to the child resulting from a court determination’. If a magistrate chooses to utilise the discretion not to record a conviction against a child, there are generally compelling reasons for this.⁵²²

⁵¹⁷ *Children, Youth and Families Act 2005* (Vic), section 362.

⁵¹⁸ *ibid.*, 362(1)(d).

⁵¹⁹ *Charter of Human Rights and Responsibilities Act 2006* (Vic), section 23(3).

⁵²⁰ *Children, Youth and Families Act 2005* (Vic), sections 360(1)(a), 363, 365, 367.

⁵²¹ *ibid.*, 360(1)(e), (f), (g).

⁵²² Sentencing Advisory Council, *Sentencing children and young people in Victoria*, Sentencing Advisory Council, Melbourne, 2012, p. 89 (citations omitted).

As a result of Victoria Police's Information Release Policy, the negative and ongoing consequences of a conviction are also suffered by those for whom no conviction is recorded, but a finding of guilt is made. The Committee believes that this consequence undermines the sentencing principle that the need to minimise stigma to a child should be considered when determining a sentence.

As described later in this Report, the Committee's view is that a specific offence should be created in Victoria for sexting offences, and if this recommendation is implemented, there should be few cases where a young person has a finding of guilt for a child pornography offence that does not suit the circumstances of their offending.

Chapter Six: Appropriateness and adequacy of criminal laws

As explored in Chapters Two and Four, a wide range of behaviours fall within the concept of sexting, and a number of criminal offences can apply in different circumstances. Key concerns that arise from existing criminal law and its application to sexting are:

- that the child pornography provisions apply not only to genuinely predatory and paedophilic behaviour, but equally to both consensual and non-consensual peer-to-peer sexting behaviour involving minors;
- that there is no criminal offence specific to non-consensual sexting, and as a result:
 - adults who engage in non-consensual sexting are not generally subject to criminal charges for that behaviour; and
 - child pornography offences are being applied inappropriately to young people;
- that a person 18 years or older who is convicted of a child pornography offence where they have engaged in peer-to-peer sexting behaviour involving someone under 18 will be subject to mandatory sex offender registration; and
- that a young person found guilty of a child pornography offence will suffer some of the negative consequences of a conviction even if the court chooses not to record a conviction.

A major theme to emerge from the majority of submissions and evidence received by the Committee is that the criminal law needs to be flexible, as a 'one size fits all' approach is not appropriate for the diverse range of behaviours that constitute sexting.⁵²³ Several submissions suggested that the law should treat different sexting behaviours differently. For example, academics from Monash University suggested that:

⁵²³ See, for example, Association of Heads of Independent Schools of Australia, *Submission no. 49*, 25 June 2012, p. 4; Australian Privacy Foundation, *Submission no. 8*, 8 June 2012; Gippsland Community Legal Service, *Submission no. 17*, 14 June 2012, p. 3; Name withheld, *Submission no. 56*, 10 July 2012, p. 1.

... the law needs to distinguish between sexting scenarios [where a minor] takes a sexually explicit image of her or himself and sends it to someone else, where it is clear that no minor was harmed or assaulted in the actual taking of the photograph or in its initial transmission to a willing recipient, and scenarios where coercion or blackmail may have been involved in the original taking of the picture, and significant harms result from its further unauthorised dissemination ... legal responses to sexting scenarios require a detailed understanding of the context in which the original image-taking, and its further distribution, took place.⁵²⁴

The Children's Legal Service, of Legal Aid New South Wales, emphasised the importance of the criminal response reflecting the criminality of the behaviour in question:

... the current legal stance conflates a whole range of sexting behaviour under a single umbrella. ... [The Committee] should take account of the intentions behind further dissemination of an image. A further distinction must be drawn between genuine and predatory sexting offences by 'young' child pornographers, and between the further dissemination of photos by an ex-girlfriend / boyfriend that is exploitative and malicious, but not motivated by predatory behaviour. We believe that these nuanced distinctions are necessary, and that the law is inadequate until they are taken into account and treated separately.⁵²⁵

The Committee agrees with these comments, and in this Chapter explores changes needed to allow the criminal law to appropriately differentiate between different types of sexting conduct.

6.1 Anomalies in the criminal law

In addition to key concerns noted above, two particular anomalies in the criminal law with regard to sexting were identified during the course of this Inquiry.

First, while it is currently lawful for a 15-year-old and a 17-year-old, or a 16-year-old and an adult, to engage in sexual activity with each other, photographing that activity is illegal. If people participating in legal sexual activity in these circumstances photograph their sexual activity, their behaviour will likely constitute one or more serious child pornography offences.

Second, there are currently sexting-related defences available for the offence of possession of child pornography, but not for the offences of production of child pornography, procuring child pornography, or publishing or transmitting child pornography. This means that, for example, a minor who took a photo of him or herself participating in sexual activity may have a legal defence to possessing child pornography, but at the same time not have a defence to producing child pornography.

⁵²⁴ Amy Shields Dobson, Mary Lou Rasmussen and Danielle Tyson, *Submission no. 34*, 15 June 2012, p. 7.

⁵²⁵ Children's Legal Service, Legal Aid New South Wales, *Submission no. 50*, 27 June 2012, p. 4.

These anomalies are explained in further detail below.

6.1.1 Age of consent

The ‘age of consent’ is generally understood to be the age at which a person is legally able to consent to engage in sexual activity. If an adult engages in sexual activity with a person who is not legally able to provide consent, the adult commits a criminal offence.

For the purpose of Commonwealth offences, the age of consent is 16.⁵²⁶ The age of consent is also 16 in Victoria,⁵²⁷ and in each of Australia’s states and territories except for South Australia and Tasmania, where it is 17.⁵²⁸

The Australian Government Attorney-General’s Department has stated it “believes that setting the age of consent at 16 years of age strikes the appropriate balance between the need to protect vulnerable persons from sexual exploitation, and the need to allow for sexual autonomy”.⁵²⁹ It is also worth noting that 16 years of age as the age of consent is generally consistent with international trends – while the age of consent varies from country to country, most define the age of consent between 15 and 17 years of age.⁵³⁰

6.1.1.1 Discord between the age of consent and child pornography offences

There is inconsistency between the age of consent in Victoria, and the child pornography offences under Victorian and Commonwealth legislation. As discussed in Chapter Four, child pornography offences apply where the person depicted in an image is under 18 years of age. This means that an adult can legally engage in sexual activity with a 16- or 17-year-old partner, but if he or she films or photographs that activity, he or she will commit a child pornography offence.

As noted in Chapter Four, it has not always been the case in Victoria that child pornography offences have applied where the person depicted is 16 or 17 years old. Prior to 2004, images could only constitute child pornography if the minors depicted were (or appeared to be) under 16. The definition of ‘child pornography’ was broadened in 2004⁵³¹ in response to the International Labour Organisation’s Convention No. 182 on the Worst Forms of Child Labour.

⁵²⁶ See, for example, *Criminal Code Act 1995* (Cth), sections 272.8, 272.9.

⁵²⁷ *Crimes Act 1958* (Vic), section 45.

⁵²⁸ Australian Government Attorney-General’s Department, *Proposed reforms to Commonwealth child sex-related offences*, 2009, p. 6.

⁵²⁹ *ibid.*

⁵³⁰ *ibid.*, 7.

⁵³¹ *Justice Legislation (Sexual Offences and Bail) Act 2004* (Vic), sections 4, 6.

6.1.1.2 International law and the definition of 'child'

Convention 182 calls for the elimination of the worst forms of child labour, including “the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances”.⁵³² For the purposes of the Convention, the term ‘child’ applies to all persons under the age of 18.⁵³³ Accordingly, extending the definition of ‘child pornography’ in Victorian legislation to cover all children under 18 was intended to protect children, and to ensure that Victoria’s legislation was consistent with Convention 182.

The definition of a ‘child’ as a person under the age of 18 is also consistent with the United Nations Convention on the Rights of the Child (UNCROC), to which Australia is a signatory. Under Article 34 of UNCROC, countries undertake to protect children from all forms of sexual exploitation and sexual abuse. Specifically, they agree to “take all appropriate national, bilateral and multilateral measures to prevent ... the exploitative use of children in pornographic performances and materials”.⁵³⁴ By Article 1 of the UNCROC, a child is defined as a “human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier”.⁵³⁵

While the age threshold for child pornography offences also varies internationally, the general trend appears to be setting the threshold at 18 years of age.⁵³⁶ According to the Australian Government Attorney-General’s Department, it is common for the age of persons covered by child pornography offences to be higher than the age of consent, because child pornography involves the exploitation (often for commercial purposes) of children.⁵³⁷ The type of conduct involved is closely aligned to child prostitution – and child prostitution offences are generally directed at protecting persons under 18 years of age.⁵³⁸

6.1.1.3 The Committee’s position

The Committee did not receive any evidence suggesting that the age of consent in Victorian legislation should be altered. The Committee believes that in the interests of protecting children as far as possible, and to meet Victoria’s obligations under international law, the definition of ‘child’ for the purpose of child pornography offences should remain as a person under the age of 18. The Committee believes that the current conflict between the age of consent and the threshold age for child pornography offences

⁵³² *Worst Forms of Child Labour Convention*, opened for signature 17 June 1999, 2133 UNTS 161 (entered into force 19 November 2000), article 3.

⁵³³ *ibid.*, article 2.

⁵³⁴ UNICEF, ‘Fact sheet: A summary of the rights under the Convention on the Rights of the Child’, viewed 16 January 2013, <www.unicef.org>.

⁵³⁵ Gareth Griffith and Kathryn Simon, *Child pornography law*, NSW Parliamentary Library Research Service, Briefing Paper No. 9/08, 2008, p. 10.

⁵³⁶ Australian Government Attorney-General’s Department, *Proposed reforms to Commonwealth child sex-related offences*, 2009, p. 6.

⁵³⁷ *ibid.*

⁵³⁸ *ibid.*

can be resolved by introducing appropriate defences to the child pornography offences, discussed in detail below.

Finding 4: The definition of child pornography in section 67A of the *Crimes Act 1958* (Vic), and section 57A of the *Classification (Publications, Films and Computer Games)(Enforcement) Act 1995* (Vic), should continue to define a minor as a person under 18 years of age.

6.1.2 Available defences for child pornography offences

As several submissions pointed out,⁵³⁹ the child pornography provisions in the Victorian legislation are inconsistent with regard to defences available for young people who engage in peer-to-peer sexting. The four child pornography offences are:

- production of child pornography,⁵⁴⁰
- inviting, procuring, causing or offering a minor to be in any way concerned in the making of child pornography;⁵⁴¹
- knowingly possessing child pornography,⁵⁴² and
- publication or transmission of child pornography.⁵⁴³

6.1.2.1 Defences for possession of child pornography

Possession of child pornography is the only one of the four Victorian child pornography offences that has available defences that are relevant to sexting. Further, there are no sexting-related defences available for the Commonwealth offences involving using a carriage service for child pornography material.⁵⁴⁴

Under section 70(2) of the *Crimes Act 1958* (Vic), a person accused of possessing child pornography currently has a defence if they can prove that either:

- they made the film or took the photograph, or were given the film or photograph by the minor, and at the time of making, taking or being given the photograph or film, they were not more than two years older than the minor was or appeared to be;⁵⁴⁵ or

⁵³⁹ See, for example, Liberty Victoria, *Submission no. 28*, 15 June 2012, p. 3; National Children's and Youth Law Centre, *Submission no. 36*, 15 June 2012, p. 8.

⁵⁴⁰ *Crimes Act 1958* (Vic), section 68(1).

⁵⁴¹ *ibid.*, 69(1).

⁵⁴² *ibid.*, 70(1).

⁵⁴³ *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* (Vic), section 57A(1).

⁵⁴⁴ *Criminal Code Act 1995* (Cth), sections 474.19, 474.20.

⁵⁴⁵ *Crimes Act 1958* (Vic), section 70(2)(d).

- they are the minor or one of the minors depicted in the film or photograph.⁵⁴⁶

The first defence covers two types of situations:

- where the accused person makes (and possesses) a film or photograph depicting a minor who is not more than two years younger than the accused person. This could include an image solely of the minor, or of the accused person (who may be a minor themselves) together with the minor; and
- where the accused person is given a film or photograph by the minor depicted – that is, the minor sends a nude image of herself or himself to the accused person – and the accused person is not more than two years older than the minor.

In both of these scenarios, the accused person could be up to 19 years of age (i.e. two years older than a minor aged 17).

The second defence covers the situation where the accused person is under 18, and is the only person in the photograph, or is depicted with another minor.

6.1.2.2 Deficiencies with the current defences

Defences do not cover images received by third parties

The first defence operates appropriately to exempt sexting where young people who are not more than two years apart in age exchange images of themselves, or take photographs of each other. However, it does not provide a defence where a young person is sent an image by someone other than the person depicted in the image. For example, if a person was to send an intimate image of their 17-year-old girlfriend to a friend of theirs, the young person who received the image could be convicted for possession of child pornography, even if he or she did not request the image.

Defences could exempt exploitative conduct

The second defence – where the accused is the minor or one of the minors depicted in the film or photograph – may apply appropriately to exempt some peer-to-peer sexting behaviour from the criminal offence of possession of child pornography. However, because this defence does not incorporate an age difference criterion, the defence could also operate to exclude exploitative behaviour. For example, a 17-year-old who took a photograph of themselves in a sexual context with a young child could have a defence to possession of child pornography.

⁵⁴⁶ *ibid.*, 70(2)(e). These are not the only defences available for this offence, but they are the two defences relevant to sexting.

Defences do not apply to producing, procuring, or publishing/transmitting

Further, as the two sexting-related defences are only available for the offence of possession, a young person could have a valid defence to a charge of possession of child pornography, but could still be open to a charge of producing, procuring, or publishing or transmitting child pornography. For example, if a 17-year-old boy takes a photograph of himself and his 16-year-old girlfriend having sex, sends a copy of the photograph to his girlfriend, and keeps a copy of the photograph on his phone:

- the boy will have a defence to possession of child pornography, but may be open to charges of producing child pornography, procuring child pornography, and transmitting child pornography; and
- the boy's girlfriend will have a defence to possession of child pornography, but may be open to a charge of producing child pornography.

Several witnesses who gave evidence to the Committee noted these inconsistencies, where sexting-related defences are available for the offence of possession of child pornography, but not for the other child pornography offences, and recommended that sexting-related defences should be made available for all child pornography offences.⁵⁴⁷

Defences are inconsistent with defences for sexual assault offences

In the context of considering defences to child pornography offences, the Committee notes defences available to some people charged with sexual assault. For the offence of sexual penetration of a child under the age of 16 years,⁵⁴⁸ for example, consent is a defence if the child was aged 12 or older, and the accused:

- was not more than two years older than the child;⁵⁴⁹ or
- believed on reasonable grounds that the child was aged 16 years or older.⁵⁵⁰

These defences are similar in content to the first defence available for possession of child pornography. It is incongruent that these defences are available for the offence of sexual penetration of a child under 16, but not for offences of producing child pornography, procuring a minor to make child pornography, and publishing or transmitting child pornography.

⁵⁴⁷ See, for example, Liberty Victoria, *Submission no. 28*, 15 June 2012, p. 3; National Children's and Youth Law Centre, *Submission no. 36*, 15 June 2012, pp. 8, 10; Neil Paterson, Acting Commander, Intelligence and Covert Support Department, Victoria Police, *Transcript of evidence*, Melbourne, 18 September 2012, pp. 14-15, 17.

⁵⁴⁸ *Crimes Act 1958* (Vic), section 45(1).

⁵⁴⁹ *ibid.*, 45(4)(b).

⁵⁵⁰ *ibid.*, 45(4)(a).

6.1.2.3 The Committee's view

The Committee believes that the current defences for possession of child pornography leave young people who engage in peer-to-peer sexting vulnerable to child pornography charges in circumstances where their sexting conduct is not exploitative. Current defences also provide a potential loophole where a minor engages in sexually exploitative behaviour with a younger child that should be considered child pornography. The defences should also be modified to ensure that no defence is available to a minor that sexually exploits a younger child.

Finding 5: Defences for the offence of possession of child pornography, expressed in section 70(2)(d) and (e) of the *Crimes Act 1958* (Vic), are inadequate.

The Committee also believes that defences to exempt non-exploitative sexting behaviour should be available for each of the four child pornography defences. The current defences, available only for possession of child pornography, should be modified to ensure that adequate defences are available for sexual conduct associated with sexting that is not exploitative.

Finding 6: The absence of appropriate defences for the child pornography offences found in sections 68(1) and 69(1) of the *Crimes Act 1958* (Vic), and in section 57A(1) of the *Classification (Publications, Films and Computer Games)(Enforcement) Act 1995* (Vic), exposes young people who engage in non-exploitative sexting to being charged with child pornography offences.

6.2 Changes to the criminal law

Many of the submissions and much of the oral evidence received by the Committee suggested that amendments to the criminal law are necessary to ensure that young people are not being inappropriately punished for consensual (or non-consensual) sexting behaviour, and to ensure that the criminal law deals adequately and appropriately with non-consensual sexting.

However, the Committee was also cautioned to ensure that the law does not provide opportunities for adults who engage in the sexual exploitation of minors to avoid prosecution. As well as peer-to-peer sexting, sexting can occur where an adult paedophile sends pornographic images to a child, or solicits such images from a child, and the law should not exempt these kinds of acts from child pornography offences.⁵⁵¹ Some submissions recommended that harsh penalties be imposed on perpetrators who intimidate children and young people into sexting behaviour, noting the recent high-profile John Zimmerman case.⁵⁵² Zimmermann, whose

⁵⁵¹ See, for example, Australian Privacy Foundation, *Submission no. 8*, 8 June 2012, p. 2.

⁵⁵² BoysTown, *Submission no. 9*, 12 June 2012, p. 17; The Alannah and Madeline Foundation, *Submission no. 42*, 18 June 2012, p. 9.

circumstances were described in Case Study 4 in Chapter Two, promised various favours to entice young girls to send provocative pictures to him and then, through threats of exposure, forced girls, most aged between 12 and 15, to engage in sexual acts with him.⁵⁵³

Young people can also engage in sexually exploitative behaviour. The Children's Legal Service, of Legal Aid New South Wales, noted that genuine instances of child pornography by predatory children should also be considered criminal behaviour.⁵⁵⁴

The Committee notes and agrees with these comments, and is cognisant of the need to ensure that genuinely exploitative sexting behaviour is not exempted from the full force of the child pornography laws.

6.2.1 Decriminalisation of consensual sexting

Almost all of the submissions to the Inquiry that addressed the law around sexting considered that consensual, age-appropriate sexting should not be treated as criminal behaviour. Many suggested that the child pornography offences should be amended accordingly.

6.2.1.1 Arguments for decriminalisation of peer-to-peer sexting

Most submissions received by the Committee expressed the view that it is entirely inappropriate, disproportionate and extremely damaging for young people who engage in consensual sexting to be subject to child pornography charges, and to possible registration as a sex offender.⁵⁵⁵

Significance of child pornography charges

Child pornography offences are indictable offences,⁵⁵⁶ with significant maximum penalties. The Criminal Bar Association (CBA) noted that these offences "carry a significant social stigma that has a real and lasting capacity to prejudice employment, travel, and social opportunities".⁵⁵⁷ The CBA noted that even if sentencing orders imposed do not include a term of imprisonment, the social stigma of being found guilty of a child pornography offence remains.⁵⁵⁸ Victoria Legal Aid (VLA) suggested that the long-term consequences of a conviction for a child pornography offence are exacerbated by the fact that Victoria does not have a spent convictions scheme; so that a person who is convicted will always be noted

⁵⁵³ Mark Dunn, 'John Raymond Zimmerman jailed for multiple rapes and grooming online', *Herald Sun*, 16 December 2011, viewed 16 January 2013, <www.heraldsun.com.au>.

⁵⁵⁴ Children's Legal Service, Legal Aid New South Wales, *Submission no. 50*, 27 June 2012, p. 7.

⁵⁵⁵ *ibid.*, 3-4, 7; Electronic Frontiers Australia, *Submission no. 38*, 15 June 2012, p. 2; Law Institute of Victoria, *Submission no. 46*, 22 June 2012, p. 4; Susan McLean, *Submission no. 12*, 13 June 2012; The Alannah and Madeline Foundation, *Submission no. 42*, 18 June 2012, p. 20; Victoria Legal Aid, *Submission no. 58*, 17 July 2012, p. 2; Women's Health West, *Submission no. 21*, 15 June 2012, p. 9.

⁵⁵⁶ Although they can be, and are often, heard summarily – as explained in Chapter Four.

⁵⁵⁷ Criminal Bar Association, *Submission no. 11*, 13 June 2012, p. 2.

⁵⁵⁸ *ibid.*

as a paedophile and a serious sex offender (as explored in Chapter Four).⁵⁵⁹

According to the Children's Court of Victoria, charging young people with child pornography offences for sexting is like "using a sledge hammer to crack a nut".⁵⁶⁰ Four Year 9 students from University High School commented that:

We are well aware that the law on sexting was originally created in the interest of children and teens to ensure their emotional and physical welfare and to protect them from predatory people. However, as the law stands at the moment, it is not serving its intended purpose well, to protect teenagers, but rather is leaving them wide open for prosecution and trouble with the law.⁵⁶¹

Potential to discourage victim reporting

Current legal sanctions may discourage children and young people, as well as their parents and carers, from seeking help or advice in how to deal with a non-consensual sexting incident.⁵⁶² Even if the police are not inclined to charge a young person who is the victim of non-consensual sexting (as Victoria Police indicated to the Committee⁵⁶³), the possibility that they *could* be charged with a criminal offence may act as a significant deterrent to young people, and their families, seeking further assistance. Indeed, the National Children's and Youth Law Centre (NCYLC) told the Committee that when a young person who has been the victim of non-consensual sexting is seeking advice about what they can do to stop their image from being further disseminated, the NCYLC must advise the young person that if they go to the police, there is no guarantee that they will not themselves be charged with a child pornography offence.⁵⁶⁴

Inappropriateness of child pornography charges

Several submissions noted that sexting among minors is a modern-day extension of adolescent sexual experimentation and exploration of relationships.⁵⁶⁵ VLA noted that sexting ordinarily occurs in the context of a relationship between people of similar ages, and does not usually involve violent, predatory or abusive behaviour.⁵⁶⁶

Even where sexting conduct involving minors is non-consensual – that is, where an image is sent to third party peers without the consent of the person depicted – in most cases, child pornography charges are not appropriate. While the Committee believes that non-consensual sexting is

⁵⁵⁹ Victoria Legal Aid, *Submission no. 58*, 17 July 2012, p. 8.

⁵⁶⁰ Children's Court of Victoria, *Submission no. 53*, 3 July 2012, p. 1.

⁵⁶¹ Ella Keogh, et al, *Submission no. 29*, 15 June 2012.

⁵⁶² Office of the Child Safety Commissioner, *Submission no. 25*, 15 June 2012, p. 3.

⁵⁶³ Neil Paterson, Acting Commander, Intelligence and Covert Support Department, Victoria Police, *Transcript of evidence*, Melbourne, 18 September 2012, p. 13.

⁵⁶⁴ Matthew Keeley, Director, National Children's and Youth Law Centre, *Transcript of evidence*, Melbourne, 10 December 2012, p. 39.

⁵⁶⁵ BoysTown, *Submission no. 9*, 12 June 2012, p. 16.

⁵⁶⁶ Victoria Legal Aid, *Submission no. 58*, 17 July 2012, p. 7.

highly inappropriate, and that significant measures should be taken to discourage the practice, the Committee also notes that non-consensual sexting does not involve the type of predatory or paedophilic intentions to which the child pornography offences are directed.

6.2.1.2 Arguments against decriminalisation of peer-to-peer sexting

The Australian Christian Lobby (ACL) indicated to the Committee that it is strongly opposed to the decriminalisation of sexting.⁵⁶⁷ According to Mr Daniel Flynn, the Victorian Director of the ACL, the rationale for the ACL's opposition is a fear that decriminalising sexting will normalise it, and will encourage more young people to engage in sexting behaviour:

The decriminalisation of sexting has this problem: once it is seen to be okay then it is likely to increase. People will be more attracted to the idea of doing it, and the message will be that this is now okay. It may lead to greater pressure on young people to send and onsend images.⁵⁶⁸

However, the ACL did recognise that child pornography charges are not necessarily appropriate, suggesting that a lesser criminal offence could apply:

This is a little bit like seatbelt legislation for young people who send these images. The vice, done to themselves in an ongoing way, is so significant that it ought not to be taken off the statute books. We do not submit that it needs to be a child pornography offence — it can be an offence worded in a different way that does not carry that level of stigma — but it ought to be an offence nevertheless. One wonders whether it could be something that could even be dealt with by way of an infringement notice for somebody who sends, consensually, an image that is likely to later cause them damage. The beauty of an infringement notice is that once it is paid the matter is expiated and there is no record of ever being charged with an offence. That would be a great outcome for those at the lowest end of the scale. The police are generally the best placed to assess the criminality and the intent of those who send these images.⁵⁶⁹

The Committee also heard that the existence of offences was a critical tool for discouraging youth from engaging in sexting. For example, the Committee heard that if young people were made aware that they could be breaking the law by sexting, they would be more likely to take care when contemplating creating or sending a sexting message.⁵⁷⁰ The Committee also heard that the existence of an offence could facilitate the 'clean up' of non-consensual sexting – for example, the Committee heard that the best way to encourage youths to delete sexting images from their phones and

⁵⁶⁷ Australian Christian Lobby, *Submission no. 47*, 22 June 2012, p. 3.

⁵⁶⁸ Daniel Flynn, Victorian Director, Australian Christian Lobby, *Transcript of evidence*, Melbourne, 27 August 2012, p. 13.

⁵⁶⁹ *ibid.*, 14.

⁵⁷⁰ Andree Wright, Acting General Manager, Digital Economy Division, Australian Communications and Media Authority, *Transcript of evidence*, Melbourne, 10 December 2012, p. 14.

other devices was to point out that they were breaking the law by possessing them.⁵⁷¹

6.2.2 Should peer-to-peer sexting be considered a child pornography offence?

There are two key considerations for this Inquiry when examining whether it is appropriate for some or all sexting behaviours to be (or to remain) offences. The first is to determine whether some or all sexting behaviours should be offences, and the second is to determine the magnitude of the offence or offences.

As discussed above, the Committee believes child pornography offences are appropriate for circumstances involving the sexual exploitation of children by adults. The Committee also notes that these offences may also be used in circumstances where sexting activities are incidental to other forms of violence or sexual offending – illustrated, for example, in the account provided to the Committee by Acting Commander Neil Paterson:

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.⁵⁷²

⁵⁷¹ Detective Randy Norton, Durham Region Police Service, *Meeting*, Toronto, Canada, 29 October 2012.

⁵⁷² Neil Paterson, Acting Commander, Intelligence and Covert Support Department, Victoria Police, *Transcript of evidence*, Melbourne, 18 September 2012, p. 15.

However, the Committee also received substantial evidence that it was not appropriate to treat peer-to-peer sexting by minors as child pornography. There are a number of arguments to support this position, which the Committee describes in turn below.

6.2.2.1 Absence of intent to produce or procure child pornography

During its international investigations the Committee heard that a key consideration for law enforcement agencies when deciding to prosecute a person for possession of child pornography was to establish that an intent to possess or procure child pornography existed. For example, the Committee was told that if, for example, a person had one or two child pornography images in a collection of many thousands of adult pornographic images, and if that person exhibited no interest in those images (if, for example, the person had deleted them or not viewed them), it would be difficult to prove that the person's intent was to obtain child pornography – and indeed, in such circumstances, it would be likely that the person was not interested in child pornographic materials.⁵⁷³

The Committee also heard that it is important to consider the context in which children or minors obtain sexually explicit images of each other. In many (and perhaps most) cases, the intent of children who possess or produce these images (often of themselves) is not motivated by a desire to exploit children as adult paedophiles do – rather, their motivation is to obtain explicit images of people in their age group, at a similar stage of physiological and psychological development, and with similar interests. In the vast majority of cases, as these children grow older, their sexual interest will remain with their peers – that is, children who produce sexual images of themselves, or obtain sexual images of their peers, are not paedophiles in the making, but instead are experiencing a phase of normal human development.⁵⁷⁴

6.2.2.2 That the offence appropriately describes the harm

As noted above, for the majority of sexting-related child pornography offences by children or minors, the intent is not to obtain child pornography *per se*, but to obtain sexually explicit images of their peers. Generally, and as noted in Chapter Two, the harm to children and minors does not occur at the time they consent to either produce or share the explicit image or film. The harm occurs when that image or film is distributed without their consent, especially when distribution of the image is done in order to humiliate, intimidate, or ridicule that person.⁵⁷⁵

⁵⁷³ Various law enforcement agencies, *Meeting*, Los Angeles, U.S.A., 8 November 2012.

⁵⁷⁴ *ibid.*

⁵⁷⁵ Centres Against Sexual Assault Forum, *Submission no. 32*, 15 June 2012; Civil Liberties Australia, *Submission no. 27*, 15 June 2012; FamilyVoice Australia, *Submission no. 4*, 19 May 2012; Amy Shields Dobson, Mary Lou Rasmussen and Danielle Tyson, *Submission no. 34*, 15 June 2012; Women's Health Grampians, *Submission no. 14*, 14 June 2012; Women's Health West, *Submission no. 21*, 15 June 2012.

Harms of this kind that are perpetrated through sexting are not restricted to children and minors, however – as noted in Chapter Two, harm is also inflicted when sexually explicit images and films of adults are distributed without their consent.⁵⁷⁶ Thus, in cases where harm is done through sexting, the harm is not restricted to or focused upon a particular age group, in contrast to child pornography offences.

6.2.2.3 That the punishment is proportional to the offence

In Chapter Four, the Committee noted that findings of guilt for child pornography offences, even where no conviction is recorded, can substantially adversely affect the ability of a young person to participate in a range of community, employment, and educational activities. In the Committee's view it is inappropriate to place conditions developed to constrain the activities of child sex offenders on a minor when that person's intent was not to procure or possess child pornography.

6.2.2.4 Implications for current criminal law

In accordance with the views expressed above, the Committee believes that a number of changes should be made to Victorian law in order to accommodate the range of harms that occur from sexting, and in order to prevent children and minors being inappropriately charged with child pornography offences. These changes are described in the following pages, but include changes to defences for child pornography offences, the creation of a new sexting offence, and changes to allow discretion, in specific circumstances, for orders to place a person on the Victorian Sex Offenders Register.

Finding 7: Current Victorian law does not sufficiently accommodate the intent, magnitude, and range of harms committed through inappropriate sexting practices.

6.2.3 Defences to child pornography offences

The Committee received evidence from witnesses and in submissions that some of the problems in the way Victorian law currently deals with child pornography offences could be ameliorated through the introduction of new defences to those offences. In its submission to the Inquiry, Victoria Police suggested that defences currently available under section 70 of the *Crimes Act 1958* (Vic) (possession of child pornography) should be extended to the other child pornography offences (producing, procuring and transmitting child pornography).⁵⁷⁷ Defences available under section 70 of the Act that are relevant to sexting in this regard are:

⁵⁷⁶ Centres Against Sexual Assault Forum, *Submission no. 32*, 15 June 2012; Civil Liberties Australia, *Submission no. 27*, 15 June 2012; FamilyVoice Australia, *Submission no. 4*, 19 May 2012; Amy Shields Dobson, Mary Lou Rasmussen and Danielle Tyson, *Submission no. 34*, 15 June 2012; Women's Health Grampians, *Submission no. 14*, 14 June 2012; Women's Health West, *Submission no. 21*, 15 June 2012.

⁵⁷⁷ Victoria Police, *Submission no. 24*, 15 June 2012, p. 2.

- (d) 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 2 years older than the minor was or appeared to be; or
- (e) that the minor or one of the minors depicted in the film or photograph is the accused.⁵⁷⁸

In regard to sexting by children or minors, these defences would provide defences to some common scenarios, such as when a child produces a sexually explicit image of his or her girlfriend or boyfriend. However, in the Committee's view there are two key deficiencies in this approach. First, by limiting the defences available to the two defences listed above, some sexting behaviour will still be captured by child pornography provisions, particularly where images are disseminated to third parties. For example, if a young person was to send an intimate image of their girlfriend to a friend, the young person sending the image may have a defence (if his girlfriend sent it to him, or if he took the photograph), but the person to whom he sends the image would not have a defence and could be convicted of possession of child pornography, even if he did not ask for the image.

Secondly, and crucially, because the second defence does not include reference to a particular age difference, or to lawful sexual conduct, it is possible that this defence could exclude genuinely predatory behaviour from the child pornography offences. For example, if a 17-year-old boy takes a photograph of himself in a sexual context with a young child, that boy will have a valid defence to child pornography charges.

6.2.3.1 Determining appropriate age-based defences to child pornography

A common caveat expressed by people who advocated decriminalising consensual sexting was that the age gap between people engaged in sexting should be appropriate. The Committee heard that a significant age gap between participants in sexting would strongly suggest that the sexting in question is likely to be exploitative, and that sexting of this nature should be regarded as criminal behaviour committed by the older participant.

In considering this issue, the Committee noted provisions in Tasmanian law for defences to child pornography. In Tasmania, it is a defence to prove that the material depicts sexual activity between the accused person and a person under the age of 18 that is not an unlawful sexual act.⁵⁷⁹ While age of consent laws in Tasmania differ to those in Victoria, the principle behind this defence is sound, as it would correlate child pornography defences with defences to sexual penetration of a child under the age of 16 under section 45(4) of the *Crimes Act 1958* (Vic). Another key advantage of this approach is that it would potentially minimise confusion among young people about whom they can legally engage with in sexually intimate behaviour, including sexting behaviour.

⁵⁷⁸ *Crimes Act 1958* (Vic), section 70(2).

⁵⁷⁹ *Criminal Code Act 1924* (Tas), section 130E(2).

With regard to sexting-related behaviours and child pornography offences, the Committee believes that defences should be introduced so that children and young people will not be charged with child pornography offences when they send sexting messages to their peers. Defences should cover images that depict lawful sexual conduct, where the accused person is a minor depicted in the image, or where the accused person is not inappropriately older than any minor depicted in the image.

This approach, by providing a defence where lawful sexual activity is photographed or filmed, would have the benefit of maintaining consistency with Australia's obligations under the International Labour Organisation's Convention 182 on the Worst Forms of Child Labour, as it maintains the definition of a 'child' as a person under 18 for the purposes of child pornography offences, but recognises that it is not criminal behaviour for young people to engage in age-appropriate sexual activity with each other. This approach also has the benefit that the defences would not need to be changed if, at a later date, the age of consent provisions were amended.

A further advantage of this approach is that referring to lawful sexual conduct will ensure consistency between behaviour considered criminal under the child pornography offences, and other sexual offences. For example, although the age of consent for most purposes is 16, the *Crimes Act 1958* (Vic) provides that it is an offence for a person to "take part in an act of sexual penetration with a 16- or 17-year-old child to whom he or she is not married and who is under his or her care, supervision or authority."⁵⁸⁰ A defence that allows lawful sexual conduct – rather than exempting conduct where there is a specified age difference – will protect people who the criminal law considers vulnerable in the context of sexual offences.

6.2.3.2 Proposed new defences for child pornography offences

As noted in Finding 5 above, the Committee believes that there is a need to amend the defences applicable to the offence of possession of child pornography, and to make the defences available to all four Victorian child pornography offences, to ensure that defences are available to cover age-appropriate sexting, while also ensuring that genuinely exploitative conduct is still captured by the offences.

The Committee has given consideration to the form that the new defences should take, and proposes the following as a starting point:

It is a defence to a prosecution for an offence against subsection (1) to prove that:

- (a) The film or photograph depicts only the accused person; or
- (b) That, at the time of making, taking or being given the film or photograph, the accused was not more than 2 years older than the minor was or appeared to be; and
 - i) The film or photograph depicts the accused person engaged in lawful sexual activity; or

⁵⁸⁰ *Crimes Act 1958* (Vic), section 48(1).

- (ii) The film or photograph depicts the accused person and another person or persons with whom the accused could engage in lawful sexual activity; or
- (iii) The film or photograph depicts a person with whom the accused could engage in lawful sexual activity, or more than one person, all of whom the accused could engage in lawful sexual activity with.

The Committee makes the following observations regarding the proposed defences:

- the proposed defences are intended to be introduced as defences to each of the child pornography offences in the Victorian legislation;
- defence (a) covers the situation where a minor takes a self-portrait;
- defence (b)(i) covers the situation where an accused person is depicted engaged in lawful sexual activity, with reference to the sexual offence provisions in the *Crimes Act 1958* (Vic), but does not provide a defence to a person more than two years older than a minor aged 16 or 17 also depicted in the film or photograph. There will be no defence where the photograph depicts sexual activity that is unlawful;
- defence (b)(ii) covers the situation where the accused person is not depicted engaged in sexual activity, but is depicted with one or more other people, and the accused person could engage in lawful sexual activity with each of the other people depicted. For example, where the accused is pictured posing naked with one or several minors, but is not more than two years older than any of those minors. There is no defence, however, if the accused person was more than two years older than a minor aged 16 or 17 also depicted in the film or photograph at the time he or she made or was given the film or photograph;
- defence (b)(iii) covers the situation where the accused person who produced, procured, possessed or transmitted the photograph is not depicted in it – for example, where a minor sends the accused person a self-portrait. It also covers ‘third party’ transmission or possession – such as where a person to whom the image was not originally sent receives it, and possibly sends it on. Finally, it ensures that a person who is more than two years older than a minor aged 16 or 17 years depicted in the film or photograph will *not* have a defence to child pornography.

It is important to note that the proposed defences will not affect the criminal nature of an adult soliciting or procuring a minor to obtain sexually explicit images or videos of themselves or their peers. Under section 69 of the *Crimes Act 1958* (Vic), a person commits an indictable offence if they:

- (a) invite a minor to be in any way concerned in the making or production of child pornography; or
- (b) procure a minor for the purpose of making or producing child pornography; or
- (c) cause a minor to be in any way concerned in the making or production of child pornography; or
- (d) offer a minor to be in any way concerned in the making or production of child pornography.⁵⁸¹

Consequently, an adult who causes or invites a minor to create a sexually explicit image of themselves or of another minor will still commit a child pornography offence, as the adult will not be able to rely on any of the proposed defences (unless the adult's conduct was non-exploitative, and he or she was less than two years older than the minor).

The Committee notes that in certain circumstances people who possess intimate images involving 16- and 17-year-olds will not have a defence to child pornography offences. This will be the case when the person who makes, takes, or is given the image is more than two years older than the 16- or 17-year-old depicted. While the Committee is aware that this may maintain an anomalous situation where certain people who may engage in lawful sexual activity may not legally capture images of that activity, the Committee is also cognisant of the need to ensure that changes to the law do not create a loophole through which genuine offenders can avoid prosecution.

The Committee also notes that criminal law currently recognises that minors aged 16 and 17 years are, in some ways, more vulnerable than legal adults and require special protection in some circumstances. For this reason section 48(1) of the *Crimes Act 1958* (Vic) specifies that "a person must not take part in an act of sexual penetration with a 16- or 17-year-old child to whom he or she is not married and who is under his or her care, supervision or authority."⁵⁸² The inclusion of particular conditions for 16- and 17-year-olds in Recommendation 6 minimises opportunities for adults who are significantly older than a minor to induce the minor to produce images that may not be in his or her best interests.

The Committee believes that the introduction of these defences, in concert with the introduction of a specific offence for sexting, will provide an appropriate response to the entanglement of sexting by young people and child pornography laws.

⁵⁸¹ *ibid.*, 69.

⁵⁸² *ibid.*, 48(1).

Recommendation 6: That the Victorian Government introduce legislation to amend each of the child pornography offences in the *Crimes Act 1958* (Vic) and the *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* (Vic) to provide defences to the effect of the following:

It is a defence to a prosecution for an offence against subsection (1) to prove that:

*(a) The film or photograph depicts only the accused person; or
(b) That, at the time of making, taking or being given the film or photograph, the accused was not more than 2 years older than the minor was or appeared to be; and*

- (i) The film or photograph depicts the accused person engaged in lawful sexual activity; or*
- (ii) The film or photograph depicts the accused person and another person or persons with whom the accused could engage in lawful sexual activity; or*
- (iii) The film or photograph depicts a person with whom the accused could engage in lawful sexual activity, or more than one person, all of whom the accused could engage in lawful sexual activity with.*

6.2.3.3 Commonwealth child pornography offences

As noted in Chapter Four, child pornography offences also exist in the *Criminal Code Act 1995* (Cth), and these offences do not have sexting-related defences available. Consequently, it is possible that if the Committee's proposals under Recommendation 6 were introduced, children and minors who engaged in sexting could still be charged with Commonwealth child pornography offences. A situation could arise where a young person has a valid defence to a child pornography offence under the Victorian legislation, but has no defence to a Commonwealth child pornography offence.

The Committee intends that defences to Victorian child pornography offences should be introduced in concert with new provisions to deter malicious and harmful sexting practices, encompassing sexting by children and adults.

If Recommendation 6 is introduced, the Committee believes it would be appropriate for the Victorian Government to advocate for consistent provisions in law to be introduced by the Commonwealth, states and territories. The Committee proposes that the Victorian Attorney-General advocate at the Standing Council on Law and Justice (SCLJ), the successor body to the Standing Committee of Attorneys-General (SCAG),⁵⁸³ that all Australian jurisdictions amend their child pornography

⁵⁸³ On 17 September 2011, the Standing Committee of Attorneys-General transitioned to the Standing Council on Law and Justice: Standing Council on Law and Justice, 'Standing Council on Law and Justice (SCLJ)', viewed 7 January 2013, <www.sclj.gov.au>.

legislation to provide defences consistent with the proposed Victorian defences. This suggestion was raised in submissions to the inquiry.⁵⁸⁴

The SCLJ comprises the Attorneys-General of the Commonwealth and States and Territories and the Minister of Justice of New Zealand.⁵⁸⁵ According to SCLJ's website:

SCLJ provides a forum for members to discuss and progress matters of mutual interest relating to law and justice, including legal policy and service provision.⁵⁸⁶

Criminal justice is one of the broad themes that the work of the SCLJ will cover.⁵⁸⁷ The SCLJ can refer criminal law issues to the National Criminal Law Reform Committee, whose role it is to advise on such issues.⁵⁸⁸

Until such time as the Commonwealth criminal legislation is amended, it would be appropriate that Victoria Police and the Victorian Office of Public Prosecutions adopt an express policy that they will not prosecute using Commonwealth child pornography offences where an accused person would have a valid defence to child pornography charges under Victorian legislation. Consequently, the Committee recommends that, at such time that Recommendation 6 is implemented, the Victorian Government advocate at the Standing Council on Law and Justice that the Commonwealth, and other states and territories, amend their respective child pornography legislation to provide defences consistent with the new Victorian defences.

Recommendation 7: That at such time as the Victorian Parliament introduces legislation to give effect to Recommendation 6, the Victorian Government advocate to the Standing Council on Law and Justice that the Commonwealth, States and Territories amend their criminal legislation to provide defences to child pornography offences, consistent with the new Victorian defences.

Recommendation 8: That following the coming into operation of legislation from Recommendation 6, Victoria Police and the Victorian Office of Public Prosecutions adopt an express policy that they will not prosecute Commonwealth child pornography offences where an accused person would have a valid defence to child pornography charges under Victorian legislation.

⁵⁸⁴ National Children's and Youth Law Centre, *Submission no. 36*, 15 June 2012, p. 10; Office of the Child Safety Commissioner, *Submission no. 25*, 15 June 2012, p. 3.

⁵⁸⁵ Standing Council on Law and Justice, 'Standing Council on Law and Justice (SCLJ)', viewed 7 January 2013, <www.sclj.gov.au>.

⁵⁸⁶ Standing Council on Law and Justice, 'About SCLJ', viewed 7 January 2013, <www.sclj.gov.au>.

⁵⁸⁷ *ibid.*

⁵⁸⁸ Standing Council on Law and Justice, 'Criminal law', viewed 7 January 2013, <www.sclj.gov.au>.

6.2.4 Arguments for and against a new offence for non-consensual sexting

If the defences described in Recommendation 6 are introduced, it will have the effect of exempting some non-consensual sexting from the reach of child pornography laws – so that, for example, a young person who disseminates an intimate image without the consent of the person depicted may have a defence to child pornography charges. It is not the Committee’s intention, however, to suggest that non-consensual sexting is acceptable or appropriate behaviour. The Committee recognises that non-consensual sexting is a gross invasion of a person’s privacy, and as discussed in Chapter Two, the effects of this kind of sexting can be extremely serious. This is the case for adults as well as for minors.⁵⁸⁹

6.2.4.1 Appropriately reflecting harms from non-consensual sexting

A number of submissions suggested that people who engage in non-consensual sexting – both young people and adults – should potentially be subject to criminal charges, although most considered that child pornography charges were not generally appropriate.⁵⁹⁰ For example, Women’s Health West argued that the existing laws and protections available to victims/survivors of non-consensual sexting are inadequate:

... we do not believe that 18-year-olds, if they are taking photos of their 17-year-old girlfriend et cetera, are producing child pornography, but in saying that we recognise that the role of the law is there to protect and to ensure that non-consensual sexting behaviour is not occurring. I guess that really does lead into why we believe that it appears that the absence of specific legislation pertaining to technology-related sexual offences is problematic, and we feel like there is a gap that needs to be addressed, acknowledging that different sanctions, as per common practice, would apply to minors.⁵⁹¹

In considering the range of issues surrounding sexting practices, by young people and also by adults, the Committee recognises that in most cases the harm that arises from sexting occurs when a sexually explicit image or media of a person is made available to third parties without the consent of the person (or persons) depicted in the image or media. The Committee also recognises that harm may occur when a person threatens to make an intimate image available to third parties.

⁵⁸⁹ Although as a generalisation, adults may be more resilient than minors and young adults in dealing with the aftermath of a sexting message “gone viral”.

⁵⁹⁰ Children’s Legal Service, Legal Aid New South Wales, *Submission no. 50*, 27 June 2012, p. 7; Electronic Frontiers Australia, *Submission no. 38*, 15 June 2012, p. 2; Susan McLean, *Submission no. 12*, 13 June 2012, p. 13.

⁵⁹¹ Stephanie Rich, Health Promotion Worker, Women’s Health West, *Transcript of evidence*, Melbourne, 27 July 2012, p. 13.

6.2.4.2 Non-consensual sexting is detrimental to young people and adults

A key consideration in favour of introducing a specific offence for sexting is that only a proportion of harmful behaviour associated with sexting is adequately captured by current law. While offences are available under child pornography provisions for those who distribute intimate images or media of children and minors without consent, the non-consensual distribution of intimate images of adults is not captured by this legislation. Nevertheless, the Committee heard evidence that sexting is being used by adults to intimidate, humiliate and manipulate others.⁵⁹² As noted in Chapter Four, in many cases Victorian offences cannot be applied to non-consensual sexting by adults.

6.2.4.3 Commonwealth offences should not be relied upon

The Committee heard from a number of witnesses that section 474.17 of the *Criminal Code Act 1995* (Cth) – using a carriage service to menace, harass or cause offence – could be applied in situations where non-consensual sexting of adult images or media occurred. While the Committee believes it is likely that the Commonwealth offence would cover non-consensual sexting conduct, to date there is no clear case law on this point, so it is difficult to determine exactly how ‘offensive’ the non-consensual sexting must be to fall within the provisions. In March 2013 Victoria Police informed the Committee that it had charged 14 people with sexting-related offences under section 474.17 of the *Criminal Code Act 1995* (Cth).⁵⁹³

The Committee notes that, if Victoria was to rely on Commonwealth offences to prosecute sexting offences, minors would likely be charged under the Commonwealth child pornography offence, as this would best describe the circumstances of the offence.

Another consideration in favour of creating a specific Victorian sexting offence is that if Victoria were to rely on Commonwealth legislation to prosecute sexting offences, the Victorian Parliament would have little influence over subsequent changes to those offences, should the Commonwealth decide to amend them.

6.2.4.4 Increased prosecutions for sexting offences

In its evidence to the Committee, Victoria Police expressed a concern that the introduction of a specific offence for sexting may lead to increased numbers of people, including children and adults, coming before the courts:

... 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

⁵⁹² Women's Health West, *Submission no. 21*, 15 June 2012.

⁵⁹³ *Criminal Code Act 1995* (Cth), section 747.17.

method for Victoria Police to do that at the moment is through cautioning, and we can caution for any offence for a child.⁵⁹⁴

In his evidence to the Committee, Judge Paul Grant agreed that more people may come before the courts, but suggested that to some extent this may be a desirable outcome:

Judge GRANT — ... 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.⁵⁹⁵

In Chapter Four, the Committee noted that some children may be reluctant to raise concerns about sexting with authorities for fear that they may also be charged with sexting offences. It is also likely that in some cases, as described by Judge Grant above, police do not prosecute for child sexting offences because the appropriate offence is considered too onerous in the circumstances.

The Committee believes it is likely that prosecutions would increase should a specific sexting offence be introduced in Victoria. However, the Committee does not believe that this would necessarily be a bad outcome, for a number of reasons. First, the Committee believes it is likely that some people in the community are using sexting to harm others, and the Committee believes that where that harm is significant, it is appropriate that those people be prosecuted. Second, the Committee believes that a specific offence for sexting, that is seen by the community to be prosecuted, will assist to inform the community on expectations around the appropriate use of communications technologies.

The Committee also notes that Victoria Police will retain discretion whether or not to charge a person, whether the relevant offence is a specific sexting offence, a child pornography offence, or a Commonwealth offence. The Committee notes, and commends, the preference of Victoria Police to ensure that minors are kept out of the criminal justice system where possible. However, the Committee also notes that the introduction of a

⁵⁹⁴ Neil Paterson, Acting Commander, Intelligence and Covert Support Department, Victoria Police, *Transcript of evidence*, Melbourne, 18 September 2012, p. 16.

⁵⁹⁵ Paul Grant, President, Children's Court of Victoria, *Transcript of evidence*, Melbourne, 10 December 2012, p. 26.

specific sexting offence would not limit the capacity of Victoria Police to utilise instruments such as cautions where deemed appropriate. In some circumstances, the introduction of a specific sexting offence that is not a sexual offence may facilitate the issue of cautions.

6.2.4.5 Opportunity to disentangle sexting offences from sexual offences

The Committee has argued above that in many cases sexting offences differ from, and should not be treated as, sexual offences. Should a sexting offence be created, it should be introduced as a non-sexual offence, and people convicted of the offence should not be eligible for inclusion on the Sex Offenders Register.

The creation of a sexting offence as a non-sexual offence would help to ensure that the Sex Offenders Register is used to monitor people that represent a genuine and substantial threat to the community, including child sex abusers and adult consumers of child pornography, for example. By potentially reducing growth in the Sex Offenders Register, the ability of police to monitor people on the register would also be facilitated.

The Committee notes that Victorian child pornography offences were created to apply to people who engage in predatory and sexually exploitative conduct involving children. It is not appropriate that a person who is not behaving in a sexually exploitative way could face child pornography charges. Nevertheless, a person who acts maliciously, or even carelessly, in sexting conduct, while not being exploitative, can still cause serious harm to the victim depicted in the image or footage. Given the harm that can result from non-consensual sexting, and general community recognition that this is not appropriate behaviour, it is strongly arguable that non-consensual sexting should be considered criminal behaviour.

6.2.5 A new sexting offence

While the Committee believes a new sexting offence is warranted, the Committee also recognises that the offence must be carefully defined to ensure that it does not undermine efforts to appropriately prosecute child sexual abusers under the law. The Committee notes, with regard to prosecutions for any offence, that Victoria Police have a key duty to identify and charge people who have broken the law with the most appropriate offence available to them. It is the Committee's intention that, if following implementation of Recommendation 6 of this report, and the introduction of a new sexting offence, a person still meets the criteria for prosecution under Victoria's child pornography laws, they should be charged under those laws.

In order to sufficiently distinguish between sexting behaviour and child pornography, the new offence must accurately define a number of features of sexting behaviour. A key consideration for all sexting events should be whether consent was obtained to produce and/or distribute the image or media, and to ensure that the person who produced, distributed or

received an image or media depicting a child or minor is not inappropriately older than the person depicted.

The Committee notes that the new defences to child pornography offences described in Recommendation 6 will prevent children and minors from being prosecuted for some kinds of sexting. The Committee intends that in most cases sexting that involves the consensual distribution of intimate images from one person to another person with whom they could engage in lawful sexual activity should not be an offence. The Committee notes that, if Recommendation 6 were implemented, minors or children who produce, possess, procure or transmit images of children with whom they could *not* engage in lawful sexual activity could still be charged with a child pornography offence.

The Committee believes that the new sexting offence should cover at least the following circumstances:

- where a person forwards an intimate image, message or video to another person without the consent of the person depicted in that image, message, or video;
- where a person threatens to disseminate an intimate image, message or video, whether or not the person depicted in the image, message or video originally consented to the production or possession of that image;
- where the intimate image, message or video in question depicts a person that is nude or partially nude. This definition will include images that may be used to intimidate, humiliate or ridicule the person depicted, even if the image does not depict an ‘indecent sexual manner or context’; and
- for an offence to occur, the accused must intentionally disseminate the image or footage to at least one other person, or make the image or footage accessible by at least one other person. This would cover the accused emailing or texting the photo to at least one other person, and would also cover posting the photo or footage to an internet site.

Certain defences should also be made available under the new sexting offence. It should be a defence to establish that the person or persons depicted consented to the image being distributed. The onus should be on the accused to establish consent – so consent should be a defence, rather than lack of consent being a positive element of the offence.

It should also be a defence to establish that the person or persons depicted consented to the image being published. For example, a person who re-distributes an intimate image that appears on a pornographic website should not be open to criminal charges (although they may be pursued by the publisher under copyright law).

Finally, defences that apply in relation to child pornography offences should also apply to the new offence – that is, if the image was distributed

for a law enforcement purpose, or the image is part of a film, publication or computer game that has been classified.

The Committee believes that the maximum penalty for the new sexting offence should be comparable to penalties for distributing an image of another person's genital or anal region (as articulated in division 4A of the *Summary Offences Act 1966* (Vic), the 'upskirting' offence), of up to two years imprisonment. The Committee also believes that, due to the comparable nature of the new sexting offence with the 'upskirting' offence, that the sexting offence should be introduced to the *Summary Offences Act 1966* (Vic).

The Committee suggests that a new sexting offence contain the following provisions:

Non-consensual sexting offence

- (1) A person commits an offence if they intentionally distribute, or threaten to distribute, an intimate image of another person or persons.
- (2) It is a defence to a prosecution for an offence against subsection (1) to prove that either:
 - a) the person or persons depicted in the image consented to the image being distributed by the accused in the manner in which it was distributed; or
 - b) the person or persons depicted in the image consented, or may be reasonably presumed to have consented, to publication of the image.

Distribute means:

- (a) to publish, exhibit, communicate, send, supply or transmit to any other person, whether to a particular person or not; and
- (b) to make available for access by any other person, whether by a particular person or not.

Intimate image means a photograph or footage, whether in digital or another format, in which a person or persons are depicted:

- (a) engaged in sexual activity;
- (b) in an indecent sexual manner or context; or
- (c) in a state of partial or complete nudity.

Recommendation 9: That the Victorian Government introduce a specific offence for sexting to the *Summary Offences Act 1966* (Vic).

6.2.6 Intimate, covert or unauthorised filming offence

There have been a number of cases where offenders have filmed or photographed their offending behaviour, particularly where they have committed a sexual assault. Several such incidents have occurred in Victoria and elsewhere in Australia in recent years:

In October 2006 the media was filled with reports of a sexual assault 3 months earlier of a 17-year-old woman. The 12 young men responsible had recorded and since continued to distribute digital video images of the assault. The "Werribee DVD" was initially sold in Werribee schools for \$5 and later emerged for sale on Internet sites for up to \$60 with excerpts also made freely available on YouTube. Six months later, Sydney newspapers reported a sexual assault of a 17-year-old woman involving five teenage young men who filmed the assault on their mobile phones and distributed the image among fellow school students. In May 2007, news stories were again filled with reports of a recording of a sexual assault, this time five men attacking two young women aged 15 in Geelong and recording the assault on their mobile phone.⁵⁹⁶

There have also been accounts of sexual assaults being recorded and distributed via mobile phones or the internet:

... recent cases of sexual assaults of young women and girls being recorded and distributed have undeniably blurred any neat categorisation between so-called minor privacy and voyeurism related offences on the one hand, and sexual violence offences on the other.⁵⁹⁷

6.2.6.1 Filming a sexual offence as an aggravating factor

The issue of recording sexual assaults has been addressed in sentencing guidelines in the UK:

The issue has emerged as such a significant problem in the UK that judges' guidelines have been introduced prescribing a more severe penalty where crimes have been recorded and more severe again where the image has then been distributed. These guidelines establish a formal legal acknowledgement of the additional harm caused to victims where the original assault is recorded and the image distributed.⁵⁹⁸

Australian courts have recognised that filming a sexual assault can constitute an aggravating circumstance. For example, in the New South Wales District Court, a sentencing judge found that an offender photographing the sexual assault with his mobile phone aggravated the offender's criminality:

I regard the taking of the photographs by Petropoulos as aggravating his criminality. The photo was for his trophy cabinet; he could enjoy and sexually titillate himself with that photograph or those motions after the event. It was not enough that he demeaned her in the car; he sought to use that occasion to enjoy his demeaning of her at his leisure.⁵⁹⁹

⁵⁹⁶ Anastasia Powell, 'New technologies, unauthorised visual images and sexual assault', *ACSAA Aware*, no. 23, pp. 6-12, 2009, p. 7. (citations omitted)

⁵⁹⁷ *ibid.*, 6.

⁵⁹⁸ *ibid.*, 7. See also the Sentencing Guidelines Council, *Sexual Offences Act 2003: Definitive guideline*, The Sentencing Council for England and Wales, 2007, p. 10.

⁵⁹⁹ *R v Haralabidis, Lazaros and Petropoulos, Timotheos* [2010] NSWDC 175, paras 35, 60.

In Victoria, the criminal legislation does not list the factors or circumstances that are considered to aggravate a person's criminality in committing an offence. However, the *Sentencing Act 1991* (Vic) requires that in sentencing an offender, a sentencing court must have regard to the presence of any aggravating factors (amongst other things).⁶⁰⁰ As Victoria's criminal legislation does not identify aggravating factors, circumstances of aggravation are determined by the courts. Victoria's courts have found that the sentencing court is entitled to regard as an aggravating feature factors which increase the humiliation suffered by the victim, including the recording of sexual offences on video tape.⁶⁰¹ Thus, at present, the recording of a sexual offence is a matter that a sentencing judge can consider when determining the appropriate sentence for an offender. It is not necessary, nor desirable, to specifically list the filming of an offence as an aggravating factor, given that no other aggravating factors are explicitly mentioned in Victoria's criminal legislation.

6.2.6.2 Removal of the participant monitoring exception

In 2010, the Victorian Law Reform Commission (VLRC) recommended that the *Surveillance Devices Act 1999* (Vic) should be amended to remove what is known as the "participant monitoring exception".⁶⁰² At present, the *Surveillance Devices Act 1999* (Vic) prohibits the recording of a private conversation or private activity using a surveillance device without consent, where the person doing the recording is not a party to the conversation or activity.⁶⁰³ However, if the person doing the recording is a party to the conversation or activity, it is not unlawful for them to covertly record the conversation or activity. This means that it is not generally a crime for a person to covertly photograph or record their sexual activity with another person.

The VLRC recommended that the *Surveillance Devices Act 1999* (Vic) be amended to prohibit participant monitoring using a surveillance device, with exceptions for:

- law enforcement officers acting in the course of their duties; and
- where a principal party to the conversation or activity consents to the device being used, and the recording of the conversation or activity is reasonably necessary for the protection of the lawful interests of the principal party.⁶⁰⁴

As noted by the VLRC, it is strongly arguable that it is offensive in most circumstances for a person to record a private conversation or activity with another person without informing that other party. The VLRC's proposal to remove the participant monitoring exception from the *Surveillance Devices*

⁶⁰⁰ *Sentencing Act 1991* (Vic), section 5(2).

⁶⁰¹ Judicial College of Victoria, *Victorian sentencing manual*, Melbourne, 2006, p. section 31.6.1.11.

⁶⁰² Victorian Law Reform Commission, *Surveillance in public places*, Melbourne, Final Report 18, 2010, p. 120.

⁶⁰³ *Surveillance Devices Act 1999* (Vic), sections 6, 7.

⁶⁰⁴ Victorian Law Reform Commission, *Surveillance in public places*, Melbourne, Final Report 18, 2010, pp. 120, recommendation 18.

Act 1999 (Vic) seems to be a sensible and beneficial amendment, recognising that it is not acceptable for a person to covertly record their sexual activity without the consent of their partner. For the purpose of the current report, however, the Committee notes that the provisions it has recommended will adequately cover situations where inappropriate behaviour concerning sexting is involved.

6.2.6.3 A new criminal offence for the improper use of a surveillance device

The VLRC also recommended the creation of a criminal offence for the improper use of a surveillance device.⁶⁰⁵ The VLRC recommended that a new offence be introduced to the *Surveillance Devices Act 1999* (Vic) to make it unlawful to use a surveillance device (which would include a mobile phone with a camera) in such a way as to:

- a) intimidate, demean or harass a person of ordinary sensibilities; or to
- b) prevent or hinder a person of ordinary sensibilities from performing an act they are lawfully entitled to do.⁶⁰⁶

The VLRC proposed that a civil penalty and an alternative criminal penalty should apply for a breach of the offence.⁶⁰⁷ The VLRC also provided some examples of the types of situations to which the offence would apply:

- where individuals film violence for entertainment, such as the recording of a school yard fight on a mobile phone;
- where surveillance devices are used to record highly personal information, such as covertly recording consensual sexual activity; and
- recording people in distress during emergencies, for the purpose of entertainment.⁶⁰⁸

This proposed offence goes beyond sexting-type conduct – where sexual activity or intimate images are recorded – and is thus beyond the scope of the current Inquiry to recommend.

The Committee notes that, if the proposed new sexting offence described in Recommendation 9 is implemented, there will be little need for an offence such as the one proposed by the VLRC, at least in relation to sexting behaviour. The proposed new sexting offence would not criminalise covert filming of sexual activity, but would apply if a person threatened to distribute a sexual image obtained through covert filming (or otherwise) to others. Further, if the VLRC's recommendation that the *Surveillance Devices Act 1999* (Vic) be amended to remove the participant monitoring exception is implemented, the act of covertly filming private sexual activity will be recognised as criminal behaviour.

⁶⁰⁵ *ibid.*, 122-125.

⁶⁰⁶ *ibid.*, 125, recommendation 20.

⁶⁰⁷ *ibid.*, 125, recommendation 21.

⁶⁰⁸ *ibid.*, 123.

6.2.7 Discretionary sex offender registration

As discussed in Chapter Four, one of the significant consequences of an adult conviction for a child pornography offence (or another specified sexual offence) is being listed on the Sex Offenders Register. Registration is mandatory for adults, and sentencing courts in Victoria have no discretion in this regard. This contrasts with the discretionary registration of minors – if the person convicted was a minor at the time he or she committed the offence, the court may only order registration if it is satisfied that the person poses a sexual risk to a person or persons in the community.⁶⁰⁹

6.2.7.1 Negative impacts of mandatory registration

Submissions to the Inquiry overwhelmingly expressed the view that young people involved in sexting, whether consensual or non-consensual, should not be automatically included on the Sex Offenders Register, noting the long-term negative consequences of being registered.⁶¹⁰ The Office of the Victorian Privacy Commissioner suggested that review and reform regarding mandatory registration for young people charged with child pornography offences for sexting is urgent.⁶¹¹

Several submissions noted that the premise of registration is that people listed on the register present a risk of further sexual offending, and noted that this is not a valid assumption for those who engage in sexting behaviour.⁶¹² The Castan Centre for Human Rights Law noted that the purpose of the register is to protect people – especially children – from sexual abuse, by tracking high-risk sexual offenders, and that sexting teenagers do not belong on the register.⁶¹³

American academics Robert D. Richards and Clay Calvert have commented on the consequences of automatically grouping “sexting teens” with genuine sex offenders:

⁶⁰⁹ *Sex Offenders Registration Act 2004* (Vic), section 11(3).

⁶¹⁰ Australian Christian Lobby, *Submission no. 47*, 22 June 2012, p. 3; Centres Against Sexual Assault Forum, *Submission no. 32*, 15 June 2012; Family Planning Victoria, *Submission no. 18*, 14 June 2012, p. 3; headspace, *Submission no. 22*, 15 June 2012, p. 1; Just Leadership Program, Monash University Law Students' Society, *Submission no. 59*, 17 July 2012, pp. 5, 6; June Kane, *Submission no. 10*, 12 June 2012, p. 2; Liberty Victoria, *Submission no. 28*, 15 June 2012, pp. 2, 5; Name withheld, *Submission no. 56*, 10 July 2012, p. 8; Office of the Victorian Privacy Commissioner, *Submission no. 51*, 29 June 2012, p. 16; Parents Victoria, *Submission no. 33*, 15 June 2012; Royal Australian and New Zealand College of Psychiatrists, *Submission no. 13*, 14 June 2012, p. 3; South Eastern Centre Against Sexual Assault, *Submission no. 16*, 14 June 2012, p. 3; The Alannah and Madeline Foundation, *Submission no. 42*, 18 June 2012, p. 20; Victoria Legal Aid, *Submission no. 58*, 17 July 2012, p. 8; Victoria Police, *Submission no. 24*, 15 June 2012, p. 2; Youthlaw, *Submission no. 20*, 14 June 2012, p. 3.

⁶¹¹ Office of the Victorian Privacy Commissioner, *Submission no. 51*, 29 June 2012, p. 18.

⁶¹² See, for example, Castan Centre for Human Rights Law, *Submission no. 19*, 14 June 2012, p. 1; Criminal Bar Association, *Submission no. 11*, 13 June 2012, p. 4.

⁶¹³ Castan Centre for Human Rights Law, *Submission no. 19*, 14 June 2012, p. 1.

First, and perhaps most obvious, teenagers engaged in sexting are not knowingly harming minors in the same way that traditional child pornographers do. ... Second, the draconian penalties that stem from child pornography convictions can decimate a teenager's life – making it all but impossible for the teen to become a productive member of society. ... Finally, the stigma attached to being labelled a child pornographer is lasting. Few crimes carry such a pejorative marker, and members of the public often link child pornography with pedophilia and other heinous crimes – sometimes for good reason. ... Forcing teenagers who get caught sexting and are criminally prosecuted to register as sex offenders severely dilutes the importance and utility of the sex offender registry.⁶¹⁴

While Richards and Calvert's comments were made in relation to sex offender registration schemes in the United States, they apply equally to sex offender registration in Victoria.

A Victorian magistrate who has heard many sexting cases commented on mandatory registration under the *Sex Offenders Registration Act 2004* (Vic):

This legislation is the most draconian legislation ever passed in this state. It created an administrative "rubber stamp" approach to registration and eliminated the courts/judges/magistrates from the process. The judges and magistrates are the ones who hear the charges, hear details of any previous criminal history and hear submissions by counsel as to the background of the "offender". They are the ones qualified to make a reasonable assessment of the likelihood of re-offending or danger to the community. Their exclusion from the decision to register or not register a person as a sex offender is a gross breach of human rights.⁶¹⁵

The Royal Australian and New Zealand College of Psychiatrists (RANZCP) also noted that the "impact of being placed on the Sex Offenders Register has immense psychological and social implications for the offender. Effects include depression, anxiety, suicidal thoughts and suicide in addition to relationship difficulties or breakdown, family breakdown, loss of employment and the need to relocate residence."⁶¹⁶

6.2.7.2 The need for discretionary registration

Many of the witnesses from whom the Committee heard recommended that instead of mandatory registration, the judge who is sentencing a convicted adult should have the discretion to decide whether the person should be listed on the Sex Offenders Register or not, as is the case for a

⁶¹⁴ Robert D Richards and Clay Calvert, 'When sex and cell phones collide: inside the prosecution of a teen sexting case', *Hasting Communication and Entertainment Law Journal*, vol. 32, no. 1, pp. 1-40, 2009, pp. 35-36.

⁶¹⁵ Office of the Victorian Privacy Commissioner, *Submission no. 51*, 29 June 2012, pp. 17-18. These comments were made by a person who self-identified as a magistrate 'having heard many sexting cases', responding to an anonymous online survey undertaken by the OVPC's Youth Advisory Group.

⁶¹⁶ Royal Australian and New Zealand College of Psychiatrists, *Submission no. 13*, 14 June 2012, p. 3.

minor convicted of a child pornography offence.⁶¹⁷ This was also recommended by the VLRC in its recent review of Victoria's sex offenders registration scheme.⁶¹⁸

If the current child pornography offences remain unaltered – that is, if new defences are not introduced – it is critical that sex offender registration for adults becomes discretionary, to ensure that young people do not end up on the Sex Offenders Register for engaging in sexting behaviour.

However, even if the defences proposed above are made available for child pornography offences, it is still important that judges are provided with the discretion to determine whether an adult should be included on the register. As the VLRC has pointed out, the effectiveness of the register depends on resources being able to be allocated to monitor those who are most likely to pose a serious risk to children and members of the community. The effectiveness of the register is lost if offenders who do not pose a real risk are included with high-risk offenders, and resources are unable to be prioritised according to risk. The Committee agrees with the VLRC that the sentencing judge is in the best position to make a determination as to the level of risk posed by an offender, and to determine whether registration of the offender is warranted.

The RANZCP advocated that low-level offenders should be removed from the register.⁶¹⁹ Victoria Police Chief Commissioner Ken Lay also reportedly supports the removal of low-level offenders from the register – in an article about the release of the VLRC's report, Melbourne newspaper *The Age* reported that Chief Commissioner Lay commented that with police struggling to manage the register, consideration should be given to removing some low-level offenders.⁶²⁰

VLRC recommendations

One of the key findings of the VLRC report was that the current sex offender registration requirements have the result that people who are at low risk of re-offending are categorised in exactly the same manner as those who may be dangerous re-offenders, whom police and child protection authorities should be focusing upon:

As at 1 December 2011, 4165 people had been included in the Sex Offenders Register in the seven years since the scheme commenced. At the current rate of increase, there will be approximately 10,000 registrations by 2020. As details are collected from all registered offenders for many years – and from some for life – the value of the information that is

⁶¹⁷ Australian Council of Educational Research, *Submission no. 35*, 15 June 2012, p. 8; Civil Liberties Australia, *Submission no. 27*, 15 June 2012; Criminal Bar Association, *Submission no. 11*, 13 June 2012, p. 4; Law Institute of Victoria, *Submission no. 46*, 22 June 2012; South Eastern Centre Against Sexual Assault, *Submission no. 16*, 14 June 2012.

⁶¹⁸ Victorian Law Reform Commission, *Sex offenders registration: Final report*, Melbourne, 2011, pp. xxii, recommendation 4.

⁶¹⁹ Royal Australian and New Zealand College of Psychiatrists, *Submission no. 13*, 14 June 2012, p. 3.

⁶²⁰ Nicole Brady, 'Call to remove sexters from offender register', *The Age*, 22 April 2012, viewed 26 February 2013, <www.theage.com.au>.

collected is highly likely to decline as the Register continues to expand. Details about people who might be potentially dangerous re-offenders sit alongside those of offenders who pose no risk of harm, with police and child protection authorities having no reasonable means of allocating risk ratings, and investigative resources, to particular offenders.⁶²¹

The VLRC considered that the current registration scheme involving automatic registration for adult sex offenders is unsustainable:

... not all sex offenders present the same risk of committing further sexual offences. The automatic registration of every adult who commits a Class 1 or Class 2 offence has extended the reach of the scheme to offenders who are highly unlikely, based on any reasonable assessment, to offend again. In practice, it has not been apparent to people who witness the scheme in operation, such as judges, magistrates, legal practitioners and police officers, why reporting obligations are imposed on an offender who is highly unlikely to re-offend.⁶²²

The VLRC reached the conclusion that mandatory registration for adults who are convicted of sex offences should be replaced with a process that allows for individual assessment of offenders, and registration should only occur by court order.⁶²³ The VLRC also recommended against the registration of minors in all but exceptional circumstances:

The Commission believes that children and young people should be included in the Register only in exceptional circumstances, because there are other mechanisms that can be used to protect children from the risk of sexual abuse and because of the impact of registration on a young person.⁶²⁴

Finally, the VLRC recommended establishing a panel of experts to review the circumstances of each person currently listed on the sex offender register, to determine how they should be dealt with under the new scheme proposed by the VLRC.⁶²⁵

Discretion in other Australian jurisdictions

Tasmania is the only Australian jurisdiction that currently allows judicial discretion in the registration of adult sex offenders.⁶²⁶ While Tasmania does not mandate registration for adults, there is a statutory presumption toward registration: the legislation provides that the court is to make an order directing the registration of a person convicted of a reportable offence “unless the court is satisfied that the person does not pose a risk of

⁶²¹ Victorian Law Reform Commission, *Sex offenders registration: Final report*, Melbourne, 2011, p. xii.

⁶²² *ibid.*, 60, para 5.6.

⁶²³ *ibid.*, 67-68.

⁶²⁴ *ibid.*, 76-77.

⁶²⁵ *ibid.*, 153-157.

⁶²⁶ *ibid.*, 61, para 5.13.

committing a reportable offence in the future”.⁶²⁷ All other states mandate the registration of adult sex offenders.⁶²⁸

In January 2012, after the VLRC’s report was released, the Law Reform Commission of Western Australia (LRCWA) released a report reviewing Western Australia’s sex offender registration scheme, which is governed by the *Community Protection (Offender Reporting) Act 2004 (WA)*.⁶²⁹ The LRCWA concluded that a degree of flexibility should be incorporated into the Western Australian sex offender registration scheme, in order to ensure that it is not unfairly applied to low-risk offenders or less-serious offences.⁶³⁰ The LRCWA stated that:

Because the primary purpose of the CPOR Act is community protection, offender registration should, as far as practicable, be based on an assessment of risk. ... the inclusion of those who do not pose any significant risk to the community ‘not only works an injustice upon those persons who are then made subject to the onerous conditions of registration, but also dilutes the forensic value of the register as a database of persons who pose a real risk of recidivism’.⁶³¹

The LRCWA recommended that adults who are sentenced for a Class 1 or Class 2 offence⁶³² should remain subject to automatic registration, unless they can establish first, that exceptional circumstances exist, and second, that they do not pose a risk to the lives or sexual safety of one or more persons, or persons generally.⁶³³ The LRCWA detailed some ‘exceptional circumstances’ that it recommended should be specified in the amended legislation – such as where the offence involved consensual sexual activity, and the offender believed the conduct was not unlawful – as well as “any other circumstance considered by the court to be exceptional”.⁶³⁴

To the Committee’s knowledge, the Western Australian Government has not yet indicated whether it intends to implement the LRCWA’s recommendations.

The Committee believes that, should the Victorian Government not accept Recommendation 6 and Recommendation 9 of this Report, regarding the introduction of certain defences to child pornography charges and the introduction of a new offence for sexting, sentencing judges should be

⁶²⁷ *Community Protection (Offender Reporting) Act 2005 (Tas)*, section 6.

⁶²⁸ Victorian Law Reform Commission, *Sex offenders registration: Final report*, Melbourne, 2011, pp. 61, para 5.13.

⁶²⁹ Law Reform Commission of Western Australia, *Community Protection (Offender Reporting) Act 2004*, Perth, Final Report, Project No. 101, 2012.

⁶³⁰ *ibid.*, v.

⁶³¹ *ibid.* quoting Liberty Victoria, *Submission no. 18*, August 2011, Sex Offenders Registration Act, Victorian Law Reform Commission, p. 2.

⁶³² Class 1 offences are the more serious offences and include murder (of a child), sexual offences against a child under 13 years, sexual offences against a child of or over 13 and under 16 years, and sexual penetration without consent (of a child). Class 2 offences include various child pornography offences, indecent assault (of a child) and indecent recording (of a child). Class 1 and Class 2 offences are listed in full in Schedules 1 and 2 of the *Community Protection (Offender Reporting) Act 2004 (WA)*.

⁶³³ Law Reform Commission of Western Australia, *Community Protection (Offender Reporting) Act 2004*, Perth, Final Report, Project No. 101, 2012, pp. 52-54.

⁶³⁴ *ibid.*, 53, recommendation 3.

empowered to use discretion to determine whether a person who commits a sexting offence should go on the Sex Offenders Register. This would help prevent circumstances arising where a person who represents little threat to the public, and does not require ongoing and intense monitoring by police, is listed on the Sex Offenders Register for a sexting-related offence. Allowing sentencing judges discretion in this matter would also ensure that genuinely predatory offenders who commit offences related to sexting under the current legislative regime (that is, where some sexting incidents are treated as child pornography offences) can still be listed on the Register.

Recommendation 10: That, if Recommendation 6 and Recommendation 9 are not accepted in full, the Victorian Government introduce legislation to amend the *Sex Offenders Registration Act 2004* (Vic) so that sentencing judges have discretion whether to order that an adult offender convicted of a sexting-related offence be listed on the Sex Offenders Register.

6.2.7.3 Sex offender registration for children

VLA recommended restricting the application of the *Sex Offender Registration Act 2004* (Vic) so as to never apply to children under 18 years old in the Children's Court.⁶³⁵ VLA suggested there should be discretion where children are sentenced in higher courts,⁶³⁶ arguing that this would prevent low-level matters in the Children's Court attracting registration, while providing appropriate discretion in cases where children are charged with more serious offences.⁶³⁷

Victoria Police also takes the view that people under the age of 18 would be best dealt with so as to achieve a therapeutic justice outcome rather than being listed on the Sex Offenders Register.⁶³⁸

6.2.7.4 Review of the Sex Offenders Register

At present, there may be some young Victorians who have been convicted of child pornography offences for sexting behaviour and have subsequently been registered on the Sex Offenders Register. As the Committee was not party to the legal proceedings surrounding these cases, it is not in a position, and nor would it be appropriate for it, to determine whether the individual cases warranted inclusion on the register.

The Committee heard evidence from a variety of sources suggesting that the circumstances of the offending by some young people did not warrant their inclusion on the register, because those people did not represent a threat to the public. The Committee also heard, however, contrary views suggesting that all people currently listed on the register for sexting-type offences did represent a threat to the public, and should remain on the register.

⁶³⁵ Victoria Legal Aid, *Submission no. 58*, 17 July 2012, p. 8.

⁶³⁶ *ibid.*

⁶³⁷ *ibid.*

⁶³⁸ Neil Paterson, Acting Commander, Intelligence and Covert Support Department, Victoria Police, *Transcript of evidence*, Melbourne, 18 September 2012, p. 12.

In its review of the Sex Offenders Register, the VLRC recommended that a Sex Offenders Registration Review Panel should be established, and its role should be to review all registrations that have occurred or occur before the VLRC's recommended changes to the *Sex Offenders Registration Act 2004* (Vic) are implemented.⁶³⁹ The VLRC recommended that the Panel be permitted to terminate an existing registration for offences such as child pornography offences where it is satisfied that no useful protective purpose is served by the registration continuing.⁶⁴⁰ The CBA indicated to the Committee that it endorses this recommendation.⁶⁴¹

Inclusion on the register imposes severe and onerous obligations on offenders. The Committee believes that these obligations are sufficiently severe that it would represent a significant injustice if a person were inappropriately included on the register. Consequently, the Committee recommends that a mechanism be established to review the registration of a person listed on the register, if that person would have had a defence to child pornography charges if Recommendation 6 of this Report had been current when that person committed the offence.

Recommendation 11: That, following the coming into operation of legislation from Recommendation 6, the Victorian Government establish a mechanism to review the registration of any person currently listed on the Sex Offenders Register, where that person would have had a defence under legislation introduced in accordance with Recommendation 6.

A number of submissions supported a review of the Sex Offenders Register to ensure that low-level offenders who pose little risk to the sexual safety of members of the community are removed from the register.⁶⁴²

As of 1 December 2011, 4165 people were included on Victoria's Sex Offenders Register.⁶⁴³ It is estimated that there will be approximately 10 000 registrations by 2020.⁶⁴⁴ The Law Institute of Victoria (LIV) suggested that the number of people on the register would not pose an issue if everyone on it actually posed a risk; however, the LIV considers it likely that the register includes thousands of offenders who pose no threat to the sexual safety of children.⁶⁴⁵ According to the LIV, the inclusion of these people has the effect of diluting the utility of the register, undermining its purpose, and increasing the cost of administering the register.⁶⁴⁶

⁶³⁹ Victorian Law Reform Commission, *Sex offenders registration: Final report*, Melbourne, 2011, pp. recommendations 70, 71, p. xxx.

⁶⁴⁰ *ibid.*, recommendation 75, p. xxx.

⁶⁴¹ Tony Trood, Member, Criminal Bar Association, *Transcript of evidence*, Melbourne, 27 July 2012, p. 21.

⁶⁴² Castan Centre for Human Rights Law, *Submission no. 19*, 14 June 2012, p. 3; Law Institute of Victoria, *Submission no. 46*, 22 June 2012, p. 8; Office of the Victorian Privacy Commissioner, *Submission no. 51*, 29 June 2012, p. 18; Royal Australian and New Zealand College of Psychiatrists, *Submission no. 13*, 14 June 2012, p. 3.

⁶⁴³ Victorian Law Reform Commission, *Sex offenders registration: Final report*, Melbourne, 2011, pp. 60, para 5.8.

⁶⁴⁴ *ibid.*

⁶⁴⁵ Law Institute of Victoria, *Submission no. 46*, 22 June 2012, p. 7.

⁶⁴⁶ *ibid.*

Chapter Seven: Non-criminal law and sexting

A range of civil laws, including laws relating to copyright, breach of confidence, and possibly the torts of intentional infliction of harm, and defamation, may potentially apply to sexting in some circumstances. Sexting could also constitute sexual harassment in breach of equal opportunity and sexual discrimination laws.

However, most of these laws preceded the technology that enables sexting, and were not developed with sexting in mind. As a result, the 'regulation' of sexting is piecemeal and does not necessarily provide adequate or well-adapted remedies for people who are victims of non-consensual sexting behaviour:

As often is the case with an activity not contemplated at the time the relevant law was created, it is also clear that the regulation of sexting is haphazard, and in large parts coincidental.⁶⁴⁷

The Committee recognises the serious harm and distress that may be suffered by victims of non-consensual sexting. The Committee believes it is important that such victims have recourse to civil remedies in order to:

- stop the behaviour;
- be assured that intimate images will not be distributed against their wishes; and
- obtain compensation where damage has been inflicted on the victim.

In this Chapter, the Committee reviews the current civil laws that may apply to sexting, and considers whether they provide adequate remedies for victims of non-consensual sexting. The Committee examines arguments for and against creating a new statutory cause of action for serious invasion of privacy, and considers administrative mechanisms that can be utilised by victims of sexting.

⁶⁴⁷ Dan Svantesson, 'Sexting' and the law: how Australia regulates electronic communication of non-professional sexual content', *Bond Law Review*, vol. 22, no. 2, pp. 41-57, 2010, p. 57.

7.1 Current laws that may apply to sexting

7.1.1 Copyright law

Under Australian copyright law, the author or creator of an original artistic work owns copyright in that work.⁶⁴⁸ 'Artistic works' include photographs,⁶⁴⁹ and the person who takes a photograph is considered to be the author of it.⁶⁵⁰ Similarly, copyright subsists in cinematographic films (that is, video footage, including digital video).⁶⁵¹

According to Prof. Dan Svantesson, copyright law can provide options for legal recourse where a person takes a photograph or footage of themselves, and that photograph or footage is distributed further – if, for example, the intended recipient sends the image on to others via email or posts it on YouTube – without the person's consent:

Perhaps one of the easiest ways for a victim of unauthorised re-distribution of images or videos to take action is under copyright law. Like creators of other forms of content, a person who has captured photographs or videos of themselves automatically enjoys copyright protection for that content. In more detail, the protection extends to the copying and publication of the content, as well as making the content available to the public. The fact that a person has chosen to communicate the content to another person means neither that they have abandoned their copyright, nor that they have automatically consented to the content being re-distributed.

Consequently, where the recipient of sexting content, for example, forwards it to a third person, she/he is likely to be acting in violation of Australian copyright law. Similarly, were the recipient of sexting content to make it available online (e.g. on a social networking site or on video facilities such as YouTube), she/he is likely to be acting in violation of Australian copyright law, in that she/he has made the content available to the public.⁶⁵²

Any person who believes a copyright they hold has been infringed has the right to initiate a court action in respect of the infringement.⁶⁵³ Remedies that a court can order against the person that infringes copyright include injunctions (usually to prevent continued infringement of copyright), an order that copies of the infringing article be destroyed or delivered up to the copyright owner, and either an award of damages or an account of profits.⁶⁵⁴ A court may also award additional damages, taking into account

⁶⁴⁸ *Copyright Act 1968* (Cth), sections 32, 35(2).

⁶⁴⁹ Photographs are considered to be artistic works "whether the work is of artistic quality or not": *ibid.*, 10(1).

⁶⁵⁰ *ibid.*

⁶⁵¹ *ibid.*, 90.; "cinematograph film" is defined in section 10(1).

⁶⁵² Dan Svantesson, "Sexting' and the law: how Australia regulates electronic communication of non-professional sexual content", *Bond Law Review*, vol. 22, no. 2, pp. 41-57, 2010, pp. 56-57 (citations omitted).

⁶⁵³ *Copyright Act 1968* (Cth), section 115(1).

⁶⁵⁴ *ibid.*, 115(2), 133.

matters relevant to the infringement that occurred (such as whether the infringement was flagrant).⁶⁵⁵

A significant limitation to applying copyright law to non-consensual sexting is that a right of action under copyright law will only exist where the victim is the person who took the photograph – that is, if the image or footage is a self-portrait. This means that if someone else, such as a boyfriend or girlfriend, took the photograph, he or she will own copyright in the photograph, and the person depicted in the photograph will have no right to action under copyright law.

7.1.2 Breach of confidence

As the Office of the Victorian Privacy Commissioner (OVPC) noted, the common law tort of breach of confidence may potentially apply where intimate images are distributed without consent.⁶⁵⁶ Under Australian confidentiality law, three elements need to be established in an action for breach of confidence:

- the information must be of a confidential nature;
- the circumstances of the communication of the information must have imported an obligation of confidentiality; and
- there must be an actual, or an actual threat of, unauthorised use of the confidential information.⁶⁵⁷

If all of these elements are present, a person may be able to pursue an action for breach of confidentiality to protect against the use of the confidential information, or to recover damages where confidential information has been disclosed.

Prof. Svantesson outlined three elements required for a claim for breach of confidence, and suggested that non-consensual sexting could in many cases satisfy these three elements:

So could it then be said that images and videos used in sexting constitute information of a confidential nature? The easiest way to answer this question is to focus on when information is not of a confidential nature. Information is not of a confidential nature where the information is publicly available or can be derived from publicly available information. In other words, to be of a confidential nature, the information must be private in some sense, but need not be an absolute secret known only by the party originally communicating it. Thus, in most instances, images and videos used in sexting would constitute information of a confidential nature.

Whether the situation in a particular case was such that the circumstances of the communication impose confidentiality is judged by reference to whether a reasonable person, being in the position of the recipient, would

⁶⁵⁵ *ibid.*, 115(4).

⁶⁵⁶ Office of the Victorian Privacy Commissioner, *Submission no. 51*, 29 June 2012, p. 15.

⁶⁵⁷ *Commonwealth v John Fairfax & Sons Ltd* [1980] HCA 44, para 25.

have realised that the circumstances of the communication imposed confidentiality. Typically, this test is affected by:

- The nature of the information; and
- The nature of the context in which the communication took place.

The typical sexting situation would certainly seem to also meet this test – it would be reasonable for the receiver to assume that the communication imposes confidentiality.

The third aspect of an action for breach of confidentiality is unauthorised use of the confidential information, or the threat of such a use. In other words, an action does not lie until the person who communicated the confidential information stands to lose something.⁶⁵⁸

The Victorian Court of Appeal case of *Giller v Procopets*,⁶⁵⁹ described in Case Study 13 below, illustrates how the breach of confidence tort has been applied in circumstances where an intimate photograph or footage of a person is distributed, or threatened to be distributed, without consent.

*Case Study 13: Giller v Procopets*⁶⁶⁰

Ms Giller lived in a de facto relationship with Mr Procopets for about three years, in a home which he owned. Mr Procopets was physically abusive to Ms Giller on a number of occasions, and subsequently the couple separated.

Their sexual relationship continued despite the separation. Mr Procopets filmed their sexual activities using a hidden camera. For a time Ms Giller was unaware of this, but she had sex with him on some occasions after she discovered he was filming them. As their relationship deteriorated, Mr Procopets began threatening to show the videos to Ms Giller's family and friends.

Mr Procopets took a video tape to Ms Giller's parents' house, and left it with her brother, though her family refused to look at it. He showed Ms Giller's mother photographs of Ms Giller which involved some sexual activity and nudity. He tried to show the video to a couple who were Ms Giller's friends, and showed it to the elderly mother of another friend, taking a VCR with him in order to do so. He also phoned Ms Giller's employer and said that he had a video of her engaging in sexual activity, in circumstances where (he said) it was unethical for her to do so.

In 1999, Ms Giller began proceedings in the Supreme Court of Victoria seeking, amongst other things, damages for breach of confidence, intentional infliction of mental harm and/or invasion of privacy arising out of Mr Procopets' conduct in showing or threatening to show the video of Ms Giller.

⁶⁵⁸ Dan Svantesson, 'Sexting' and the law: how Australia regulates electronic communication of non-professional sexual content', *Bond Law Review*, vol. 22, no. 2, pp. 41-57, 2010, p. 54.

⁶⁵⁹ *Giller v Procopets* [2008] VSCA 236.

⁶⁶⁰ *ibid.* The text of this case study is drawn largely from the Supreme Court of Victoria, 'Summary of judgment: *Giller v Procopets* [2008] VSCA 236', viewed 18 January 2013, <www.supremecourt.vic.gov.au>.

The Court of Appeal held that Ms Giller was entitled to compensation for the mental distress and embarrassment caused by the publication of the videotapes. The Court followed English decisions awarding damages for mental distress resulting from a breach of confidence, including cases in which:

- *Naomi Campbell was awarded damages for mental distress suffered as a result of a newspaper report showing that she had attended Narcotics Anonymous; and*
- *Michael Douglas and Catherine Zeta Jones received damages for unauthorised publication of their wedding photos.*

The Court (by majority) awarded Ms Giller damages of \$40 000 for breach of confidence, including \$10 000 as compensation for her humiliation and distress. The Court (also by majority) dismissed Ms Giller's separate claim for the intentional infliction of mental harm by Mr Procopets.

Because the award of damages in this case was based on breach of the confidential relationship between sexual partners, the Court did not have to decide whether Australian law recognises a stand-alone right to recover damages for breach of privacy.

Although *Giller v Procopets* does not technically involve sexting – as the video footage was neither created nor shared by electronic means, given the conduct occurred in 1996 – the facts of this case would be analogous to a scenario where footage is filmed via mobile phone and distributed by email, MMS or by being posted on the internet. Consequently, a person may potentially succeed in an action for a breach of confidence if he or she is filmed or photographed in intimate circumstances and that footage is disseminated without consent. Likewise, if a person takes a self-portrait and sends it to a sexual partner who further distributes it, the person may have a claim for breach of confidence.

Where the court has made a finding of breach of confidence (or threatened breach of confidence) it may award damages, compensation or an account of profits, injunctions, or an order for the destruction, or surrender, of the confidential material.⁶⁶¹

However, there are limits to the circumstances in which breach of confidence may be applied. One significant limit is the requirement that the circumstances impose a duty of confidentiality. The OVPC noted that this requirement suggests that while a duty of confidentiality may apply, for example, between sexual partners, it is unlikely to arise where a third party receives a sexting message:

An example is that of where a third party comes across (or inadvertently) finds or accesses a sexting image intended to stay between two people – for example, an error in sending or an unauthorised access. The third party

⁶⁶¹ Leo Tsaknis, 'The jurisdictional basis, elements and remedies in the action for breach of confidence - uncertainty abounds', *Bond Law Review*, vol. 5, no. 1, pp. 18-48, 1993, pp. 23-31.

was not a party to the communication, and therefore it would be difficult to establish that they owed a “duty of confidence”.⁶⁶²

There may be other circumstances in which a duty of confidentiality does not arise – such as where a third party uses a hidden camera to record another person’s sexual activity. Consequently, not everyone who is the victim of dissemination of an intimate image of themselves will be able to rely on a cause of action for a breach of confidence.

7.1.3 Intentional infliction of harm

Australian law recognises the existence of a tort of intentional infliction of harm, based on the English case of *Wilkinson v Downton*,⁶⁶³ which first recognised such a tort. However, Australian cases that have accepted the existence of this tort have assumed that to recover damages a plaintiff must demonstrate that he or she has suffered physical harm as a result of the defendant’s actions – that is, the plaintiff must have suffered ‘nervous shock’, or a recognisable psychiatric injury, as opposed to merely suffering ‘mental distress’.

It is unlikely therefore that a person who is humiliated as a result of another person disseminating an intimate image in which they are depicted would be able to recover damages or pursue other remedies under this tort.

Limitations on recovering damages under this tort have been the subject of criticism, and over time the law may develop to allow the recovery of damages for mental distress, as is the case with other intentional torts such as defamation and false imprisonment. For example, the tort was considered in the case of *Giller v Procopets*, described in Case Study 13 above. Ms Giller claimed that Mr Procopets had engaged in conduct calculated to degrade and humiliate her and cause her emotional distress, and claimed damages based on “the tort of intentional infliction of emotional distress”.⁶⁶⁴

At trial, the judge concluded that he was bound to reject Ms Giller’s claim in this regard:

In the absence of any authority to support the contention that damages are recoverable for mental distress, it is my opinion that Australian law precludes [Ms Giller] recovering damages for intentional infliction of mental harm resulting in distress, humiliation and the like.⁶⁶⁵

However, despite his conclusion, the trial judge also noted that there was “a strong argument for compensation for distress in these circumstances”.⁶⁶⁶ He considered that the distribution and showing of the video was analogous to the publication of a defamatory imputation, and

⁶⁶² Office of the Victorian Privacy Commissioner, *Submission no. 51*, 29 June 2012, p. 15.

⁶⁶³ *Wilkinson v Downton* [1897] 2 QB 57.

⁶⁶⁴ *Giller v Procopets* [2008] VSCA 236, para 3.

⁶⁶⁵ *ibid.*, para 4.

⁶⁶⁶ *ibid.*

suggested that “the law should permit recovery for distress depending upon the gravity of the wrongful act and the effect upon the victim”.⁶⁶⁷

The trial decision was appealed to the Court of Appeal of the Supreme Court of Victoria. In that decision, one of the three judges, President Maxwell, indicated that he would uphold Ms Giller’s claim for the intentional infliction of mental distress.⁶⁶⁸ President Maxwell noted that both the law and psychiatry have come a long way since *Wilkinson v Downton* was decided in 1897, and suggested that the advance of medical science:

... means that it is no longer necessary to insist on physical proof of mental harm and no longer necessary, or appropriate, to insist on proof of a ‘recognised mental illness’.⁶⁶⁹

President Maxwell also considered that although no Australian authority has recognised a claim for the intentional infliction of mental distress, there is no decision in Australia holding that such a claim would be without legal foundation or otherwise untenable. He noted that claims of this kind have long been recognised by American courts, and that it appears that the law in the United Kingdom may soon also develop in this direction.⁶⁷⁰

However, the other two Court of Appeal judges, Justice Ashley and Justice Neave, declined to accept Ms Giller’s claim for damages based on intentional infliction of harm.⁶⁷¹ Justice Neave agreed with President Maxwell that no precedent positively precludes expanding the tort to enable the recovery of damages for mental distress; however, her Honour considered that as Ms Giller was entitled to receive damages for breach of confidence, the question of whether the tort of infliction of harm should be expanded did not need to be considered.⁶⁷² Justice Neave also suggested that if the intentional infliction of mental distress is to be recognised as a tort, the legislature may be better placed to determine how it should be framed.⁶⁷³

Consequently, while there are indications that the tort of intentional infliction of harm could expand to allow the recovery of damages for mental distress, at this stage there remains significant doubt as to how this area of law will evolve. In addition, even if the tort expands to cover mental distress, a key aspect of the tort is that the infliction of harm is *intentional*, so it would be necessary to prove that a defendant *intended* to inflict mental distress upon the plaintiff. Such intention may not be simple to prove, and so this requirement would further limit the utility of this tort in relation to sexting.

⁶⁶⁷ *ibid.*

⁶⁶⁸ *ibid.*, para 2.

⁶⁶⁹ *ibid.*, para 6.

⁶⁷⁰ *ibid.*, para 7.

⁶⁷¹ *ibid.*, paras 164-165 (Ashley JA), paras 471, 478 (Neave JA).

⁶⁷² *ibid.*, para 471.

⁶⁷³ *ibid.*, para 476.

7.1.4 Defamation

A person who has had an intimate image of himself or herself distributed or published without consent could seek to recover damages by pursuing an action in defamation.

As with breach of confidence and intentional infliction of harm, defamation is a tort that has developed through common law. However, in 2006, each of Australia's states and territories enacted uniform legislation pertaining to defamation in an attempt to harmonise defamation law across Australia.⁶⁷⁴ This legislation was intended to amend rather than to replace the common law, and consequently, the basis for a claim of defamation remains the same. The three classic conditions that a plaintiff needs to establish to succeed in a defamation claim are:

- that the imputations complained of were published to (i.e. entered the mind of) a third person;
- that the plaintiff was identified as the one who the imputations relate to; and
- that the imputations were in fact defamatory.⁶⁷⁵

Prof. Svantesson suggests that the first condition could be established by a victim of sexting where he or she can prove that another person has sent the image to someone else, or has posted the image to a website that at least one person has viewed since the posting. The second condition may also be relatively easy to establish, if the victim's face is shown in the photograph; it may be more problematic if the image showed only intimate body parts without further indication of the victim's identity.⁶⁷⁶

The third condition is the most complex. Whether images are defamatory is judged "by reference to the standard of the hypothetical referee, namely ordinary, reasonable, fair-minded members of society".⁶⁷⁷ As Svantesson explains:

Applying this standard, an imputation is defamatory if it:

- (i) 'is likely to injure the reputation of the plaintiff by exposing him or her to hatred, contempt or ridicule.'

⁶⁷⁴ Dan Svantesson, 'Sexting' and the law: how Australia regulates electronic communication of non-professional sexual content', *Bond Law Review*, vol. 22, no. 2, pp. 41-57, 2010, p. 51. The relevant Victorian legislation is the *Defamation Act 2005* (Vic).

⁶⁷⁵ Dan Svantesson, 'Sexting' and the law: how Australia regulates electronic communication of non-professional sexual content', *Bond Law Review*, vol. 22, no. 2, pp. 41-57, 2010, pp. 51-52., referring to *Consolidated Trust Company Limited v Browne* (1948) 49 SR (NSW) 86.

⁶⁷⁶ Dan Svantesson, 'Sexting' and the law: how Australia regulates electronic communication of non-professional sexual content', *Bond Law Review*, vol. 22, no. 2, pp. 41-57, 2010, p. 52.

⁶⁷⁷ *ibid.*, quoting Des Butler and Sharon Rodrick, *Australian Media Law*, Lawbook Co., 3rd edition, 35, p. 35., referring to *Reader's Digest Services Pty Ltd v Lamb* [1982] HCA 4.

- (ii) 'contains a statement about the plaintiff which would tend to cause the plaintiff to be shunned or avoided.'; or
- (iii) 'has the tendency to lower the plaintiff in the estimate of others.'

The re-distribution of sexting materials could do all three things.⁶⁷⁸

The main remedy available for a successful defamation claim is damages.⁶⁷⁹ If the material has not yet been published, the plaintiff may be able to obtain an injunction to prevent its publication, although courts will rarely make such an order.⁶⁸⁰

Plaintiffs have succeeded in past defamation actions where intimate images have been published without their consent. Australian academic David Rolph has examined the application of defamation laws to the publication of naked photographs, discussing two cases where plaintiffs have been awarded damages.⁶⁸¹ One of these examples concerned Andrew Ettingshausen, a well-known Australian rugby league player:

*Case Study 14: Andrew Ettingshausen*⁶⁸²

In 1991, HQ magazine published an article under the title "Hunks" which featured a photograph of three rugby league players, one of whom was Andrew Ettingshausen, in the showers after a match. In the photograph, Ettingshausen was standing facing the camera, and his penis was visible.

Immediately after publication of the magazine, Ettingshausen commenced defamation proceedings against the publisher, Australian Consolidated Press Ltd (ACP). Ettingshausen claimed that the publication of the photograph conveyed imputations, including that he had deliberately permitted a photograph to be taken of him with his genitals exposed for the purposes of reproduction in a publication with a widespread readership.

The trial judge had no difficulty in concluding that the ordinary, reasonable reader could find that this imputation was conveyed on the available evidence. The jury considering the case found that this imputation was in fact conveyed, and was defamatory, and awarded Ettingshausen \$350 000 in damages.

ACP appealed this decision to the New South Wales Court of Appeal, which dismissed the appeal as to liability, but unanimously agreed that the amount of damages awarded by the jury was manifestly excessive, and ordered a retrial on this aspect. At the second trial, the jury awarded Ettingshausen a lesser amount of \$100 000 in damages.

⁶⁷⁸ Dan Svantesson, 'Sexting' and the law: how Australia regulates electronic communication of non-professional sexual content', *Bond Law Review*, vol. 22, no. 2, pp. 41-57, 2010, pp. 52-53 (citations omitted).

⁶⁷⁹ *Defamation Act 2005* (Vic), sections 34-39.

⁶⁸⁰ David Rolph, *Irreconcilable differences? Interlocutory injunctions for defamation and privacy*, University of Sydney, Legal Studies Research Paper No. 12/51, 2012, p. 1., citing *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57.

⁶⁸¹ David Rolph, *Dirty pictures: defamation, reputation and nudity*, University of Sydney, Legal Studies Research Paper No. 07/78, 2007.

⁶⁸² The facts in this case study are drawn from *ibid.*, 2-5.

In the other case discussed by David Rolph, a woman who was not a celebrity succeeded in claiming damages for defamation for the publication of a naked photograph of her in a “salacious” magazine:

*Case Study 15: Shepherd v Walsh*⁶⁸³

In the mid-1990s, Sonia Shepherd commenced defamation proceedings in the Supreme Court of Queensland, against the publisher, printer and distributor of the Picture magazine, and against her ex-boyfriend, Anthony Patterson.

In the early 1990s, Shepherd and Patterson were in a relationship. Patterson surprised Shepherd in their bedroom one day, taking a photograph of her, despite her protestations. He assured her that there was no film in the camera when in fact, there was.

Their relationship ended, and as an act of revenge, Patterson convinced his new girlfriend to submit the naked photograph of Shepherd, together with some lewd commentary, and to verify in a telephone call from the magazine editor that she was the person depicted in the photograph. The magazine printed the picture and the text in its “Home Girls” section, a popular segment of the magazine that published self-submitted naked photographs of women. Women who submitted photographs were paid a small amount by the magazine if their photograph was published.

Shepherd’s photograph appeared in the 1 November 1995 edition of The Picture. Her face was clearly visible. Shepherd became aware that her photograph had been published when she received a letter from her sister in December 1995 (who had been alerted to the picture by a friend of her husband):

“We saw that photo of you in that girlie magazine, and you call yourself a Christian. I don’t believe anything you say.”

The trial judge in the Supreme Court of Queensland upheld Shepherd’s claim against all of the defendants, granting \$50 000 compensatory damages, and a further \$20 000 in exemplary damages, against Shepherd’s ex-boyfriend, who the judge found had acted in contemptuous disregard of Shepherd’s rights.

Although these two cases illustrate that it may be possible for a person whose naked image has been published without their consent to succeed and obtain damages through a defamation claim, success is not guaranteed. A defendant to a defamation action has several possible defences, the most relevant being “justification”.⁶⁸⁴

Under the *Defamation Act 2005* (Vic), it is a defence to the publication of matter that is defamatory if the defendant can prove that the defamatory

⁶⁸³ The facts in this case study are drawn from *ibid.*, 5-6.

⁶⁸⁴ Dan Svantesson, 'Sexting' and the law: how Australia regulates electronic communication of non-professional sexual content', *Bond Law Review*, vol. 22, no. 2, pp. 41-57, 2010, p. 53.

imputations that the plaintiff complains are conveyed by the material are substantially true.⁶⁸⁵ Establishing this provides the defendant with a complete defence, even if the publication of the material was motivated by malice.⁶⁸⁶

Thus it becomes important to consider what imputations are conveyed by the dissemination or publication of the material. If, as in the *Ettingshausen* and *Shepherd* cases above, publication implies that the person depicted consented to the image being published, then a defamation action may succeed. However, given the ease with which images can be published and disseminated electronically, it is uncertain what imputations could be proven where an image is distributed or posted on a website. One imputation may be that the person depicted voluntarily participated in the production of the image, although that might not be the case. It is not clear to what extent further imputations could arise – given our knowledge that non-consensual sexting occurs with some frequency, it would not necessarily be imputed that the person depicted consented to the image being shared with third parties. If it could be argued that there is an imputation that the person depicted is sexually promiscuous, the defendant would have a defence of justification if they could establish that this was in fact true, which is highly undesirable.

So while it is possible that a person who is the victim of non-consensual sexting could succeed in a defamation action, such a result is by no means likely.

7.1.5 Sexual harassment law

As noted by the Victorian Equal Opportunity and Human Rights Commission (VEOHRC), sending unwelcome sexual text messages or images to another person may in certain circumstances amount to sexual harassment in contravention of the *Equal Opportunity Act 2010* (Vic) and/or the *Sex Discrimination Act 1984* (Cth) (which contains similar provisions).⁶⁸⁷

The *Equal Opportunity Act 2010* (Vic) defines sexual harassment:

92 What is sexual harassment?

- (1) For the purpose of this Act, a person sexually harasses another person if he or she –
 - (a) makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the other person; or
 - (b) engages in any other unwelcome conduct of a sexual nature in relation to the other person –

⁶⁸⁵ *Defamation Act 2005* (Vic), section 25.

⁶⁸⁶ Dan Svantesson, 'Sexting' and the law: how Australia regulates electronic communication of non-professional sexual content', *Bond Law Review*, vol. 22, no. 2, pp. 41-57, 2010, p. 53.

⁶⁸⁷ Victorian Equal Opportunity and Human Rights Commission, *Submission no. 41*, 18 June 2012, p. 2.

in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the other person would be offended, humiliated or intimidated.

- (2) In subsection (1) *conduct of a sexual nature* includes –
- (a) subjecting a person to any act of physical intimacy;
 - (b) making, orally or in writing, any remark or statement with sexual connotations to a person or about a person in his or her presence;
 - (c) making any gesture, action or comment of a sexual nature in a person's presence.⁶⁸⁸

Conduct amounting to sexual harassment is prohibited by the *Equal Opportunity Act 2010* (Vic) in a number of contexts, including employment, education, the provision of goods and services, accommodation, clubs and local government.⁶⁸⁹

Courts have found that sexting conduct can constitute sexual harassment. For example, in a 2009 case, the Federal Court of Australia ordered that compensation be paid to a female employee who was subjected to sexual harassment and sexual discrimination in the workplace in circumstances involving sexting.⁶⁹⁰ The employee was subjected to a range of conduct, including a male co-worker sending her via MMS an image depicting a woman giving a man oral sex. The Court found that this male co-worker engaged in unlawful sexual harassment in sending the woman this image, contrary to the *Sex Discrimination Act 1984* (Cth).⁶⁹¹

A person who claims that someone else has acted against them in breach of the *Equal Opportunity Act 2010* (Vic) can bring a dispute to the VEOHRC, which can provide dispute resolution for the matter.⁶⁹²

Whether a person who has a complaint has sought dispute resolution through the VEOHRC or not, they can also apply to the Victorian Civil and Administrative Tribunal (VCAT) in respect of the alleged sexual harassment.⁶⁹³ If VCAT finds that a person has contravened sexual harassment provisions, VCAT can make one or more orders including:

- an order that the person refrain from committing any further contraventions;
- an order that the person pay the applicant compensation for the loss, damage or injury they suffered because of the contravention;
- or

⁶⁸⁸ *Equal Opportunity Act 2010* (Vic), section 92.

⁶⁸⁹ *ibid.*, 93-102.

⁶⁹⁰ *Poniatowska v Hickinbotham* [2009] FCA 680.

⁶⁹¹ *ibid.*, paras 298, 330, 362.

⁶⁹² *Equal Opportunity Act 2010* (Vic), section 113.

⁶⁹³ *ibid.*, 122, 123.

- an order that the person do anything specified, with a view to redressing the applicant's loss, damage or injury resulting from the contravention.⁶⁹⁴

However, both the *Equal Opportunity Act 2010* (Vic) and the *Sex Discrimination Act 1984* (Cth) apply only to certain aspects of public life, such as employment, education, the provision of goods and services, accommodation, clubs and local government.⁶⁹⁵ If behaviour amounting to sexual harassment occurs outside of any of these contexts, it will not be in breach of either of these Acts.

7.1.6 Other areas of law

There are a couple of other areas of law that have some relevance to sexting.

In relation to sexting in a family violence context, the Eastern Community Legal Centre (ECLC) noted that it is possible to obtain an order under the *Family Violence Protection Act 2008* (Vic) to prohibit another person from publishing on the internet, by email or other electronic communication any material about the protected person.⁶⁹⁶ However, the ECLC suggested that sometimes this particular order is not adequate protection for victims of sexting, particularly threatened sexting, and for this reason advocated increasing education about the applicability of criminal provisions such as stalking.⁶⁹⁷ This was discussed in further detail in Chapter Four.

Classification laws may also be relevant where intimate images are posted on the internet. The Australian Communications and Media Authority (ACMA) investigates complaints about potentially illegal online content. The ACMA's role is explained further below.

7.1.7 Shortcomings of existing legal avenues

As the above survey of the existing law has revealed, there are limitations to the capacity of existing legal doctrines to provide suitable remedies to a person who is the victim of non-consensual sexting. These causes of action are not well suited to sexting, and none of them offer victims of non-consensual sexting a definitive means to obtain redress and damages.

To illustrate the potential applicability of the current law, it is useful to consider a well-known example of a non-consensual sexting incident.

⁶⁹⁴ *ibid.*, 125.

⁶⁹⁵ Victorian Equal Opportunity and Human Rights Commission, *Submission no. 41*, 18 June 2012, p. 2.

⁶⁹⁶ Eastern Community Legal Centre, *Submission no. 23*, 15 June 2012.

⁶⁹⁷ *ibid.*

*Case Study 16: Lara Bingle and Brendan Fevola*⁶⁹⁸

Model Lara Bingle and AFL player Brendan Fevola were involved in a short sexual relationship of approximately five weeks that began in September 2006. During that time, Fevola took a photograph on his phone of Bingle taking a shower and attempting to cover herself with her arm. From Bingle's expression in the photograph, it appeared that she was not happy that the photo was taken.

The photograph of Bingle surfaced in early 2010, and was published by Woman's Day magazine on 1 March 2010. At this time, Bingle was engaged to cricketer Michael Clarke. According to an unnamed footballer, the image had been circulating in football circles for a couple of years, and was on a lot of people's phones. The footballer said that "Fev made no secret of his affair and seemed comfortable to pass it around to others".

Bingle's manager indicated that Bingle would be taking legal action against Fevola, "for breach of privacy, defamation and misuse of her image."

However, the law suit never materialised.

Bingle went on to give an exclusive interview with Woman's Day magazine (the same magazine that published her picture), telling "her side of the story", which appeared in the 8 March 2010 edition of the magazine. The fee for the interview was not disclosed, but was rumoured to be around \$200 000.

In the Bingle case, it is not known why Ms Bingle ultimately did not pursue court action against Mr Fevola. It is possible that she decided for personal reasons; however, it is also possible that the uncertainty of success may have dissuaded her from pursuing legal action. Considering each of the areas of law discussed above, and whether Ms Bingle could have employed them in a case against Mr Fevola:

- **Copyright law:** Ms Bingle did not take the photograph, and therefore could not succeed in a breach of copyright claim.
- **Breach of confidence:** This appears to be the most likely basis upon which Ms Bingle could have succeeded. Given their intimate relationship, it is likely that Mr Fevola owed her a duty of confidence. However, given that Ms Bingle had posed for and consented to the publication of nude photographs previously, it is possible that a court could conclude that the information – the nude picture – was not of a confidential nature.

⁶⁹⁸ The facts in this case study are drawn from Jason Bosland and Vicki Huang, "Where the bloody hell are you?": Lara Bingle in search of a cause of action', *Fortnightly Review of IP & Media Law*, 12 March 2010, viewed 12 March 2013, <www.fornightlyreview.com>; Fiona Byrne, 'Lara Bingle to sue Brendan Fevola over nude photo', *Herald Sun*, 2 March 2010, viewed 12 March 2013, <www.heraldsun.com.au>.

- **Intentional infliction of harm:** As Ms Bingle does not appear to have suffered any recognised psychiatric injury as a result of the dissemination of the photograph, it is unlikely that she could succeed with a claim on the basis of intentional infliction of harm.
- **Defamation:** It is difficult to conceive of imputations arising from the dissemination of the photograph that could be held to be defamatory. It is unlikely that there could be an imputation that Ms Bingle consented to be photographed or for the image to be disseminated, as her expression in the photo is one of distress. It is also unlikely that the photograph could convey any sexual imputations, as she was depicted in the innocent act of taking a shower. It is unlikely, therefore, that Ms Bingle could have succeeded with a defamation claim.
- **Sexual harassment:** The dissemination of the photograph did not occur in any of the contexts to which the *Equal Opportunity Act 2010* (Vic) applies. Further, it is not clear that dissemination of Ms Bingle's photograph on its own could constitute "conduct of a sexual nature".

It is clear to the Committee that the law as it currently stands is not sufficient to protect and provide redress to victims of non-consensual sexting. The failure of the existing causes of action to adequately address non-consensual sexting demonstrates the inherent problem of attempting to protect what are essentially privacy interests through causes of action which were not designed for that purpose.⁶⁹⁹

Finding 8: Current laws for breach of confidence, copyright, intentional infliction of harm, defamation and sexual harassment are unsuited to provide victims of non-consensual sexting with legal remedies against a person who has disseminated, or threatens to disseminate, an intimate image of them without consent.

7.2 Tort of privacy

The Committee heard evidence that it would be desirable to provide victims of sexting with better means to pursue civil remedies against a person who distributes their image without consent. At present, there is no specific mechanism for a person to take civil action in such circumstances. In some cases, the only recourse will be to seek criminal prosecution of a person, which is at the discretion of Victoria Police and the Office of Public Prosecutions, and does not offer any compensation to the victim.

Sexting is not currently covered by privacy laws, as Australian privacy legislation applies only to government organisations and private sector

⁶⁹⁹ See Jason Bosland and Vicki Huang, "Where the bloody hell are you?": Lara Bingle in search of a cause of action', *Fornightly Review of IP & Media Law*, 12 March 2010, viewed 12 March 2013, <www.fornightlyreview.com>.

companies, and does not generally place legal obligations on individuals.⁷⁰⁰

There is no common law tort of invasion of privacy in Australia, and no appellate court in Australia has recognised the existence of such a tort.⁷⁰¹ While judges of the High Court of Australia observed in 2001 that there is no barrier to the creation of a tort of invasion of privacy,⁷⁰² no such tort has yet developed through case law, which tends to evolve gradually and slowly.

Nor is there a statutory cause of action for an invasion of privacy in any Australian jurisdiction. The OVPC has suggested that a statutory cause of action for a breach of privacy would go a long way to creating alternate non-criminal protections for individuals who have their own sexting images maliciously distributed.⁷⁰³ Such a tort could also potentially provide for restraining orders and injunctions for threatened disclosures.⁷⁰⁴

A statutory cause of action for a breach of privacy has now been recommended by the Australian Law Reform Commission (ALRC), the Victorian Law Reform Commission (VLRC), and the New South Wales Law Reform Commission (NSWLRC).⁷⁰⁵ The OVPC urged the Committee to consider, should the Commonwealth not progress with a cause of action for breach of privacy at a federal level, whether Victoria should proceed with the creation of such a statutory cause of action.⁷⁰⁶

Many submissions received by the Committee expressed the view that non-consensual sexting is a fundamental breach of a person's privacy. The Alannah and Madeline Foundation suggested the need for remedies that are traditionally associated with a tort that has been proven:

If one or other of the participants further disseminates the material [i.e. a sexted image] to others without the consent of the participants, this is a serious breach of privacy which arguably should give rise to actions for an injunction and damages.⁷⁰⁷

In the following pages the Committee reviews the common law surrounding privacy and the various law reform commission proposals, and explores the possibility of creating a cause of action for serious invasions of privacy.

7.2.1 Current common law

There is no common law right to privacy in Australia. No appellate court in Australia has recognised an infringement of privacy as a basis upon which

⁷⁰⁰ As noted by Office of the Victorian Privacy Commissioner, *Submission no. 51*, 29 June 2012, p. 14.

⁷⁰¹ Victorian Law Reform Commission, *Surveillance in public places*, Melbourne, Final Report 18, 2010, pp. 128-129.

⁷⁰² See *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* [2001] HCA 63.

⁷⁰³ Office of the Victorian Privacy Commissioner, *Submission no. 51*, 29 June 2012, p. 21.

⁷⁰⁴ *ibid.*

⁷⁰⁵ *ibid.*

⁷⁰⁶ *ibid.*

⁷⁰⁷ The Alannah and Madeline Foundation, *Submission no. 42*, 18 June 2012, p. 20.

damages can be obtained through civil action. This means that a person who has suffered an invasion of privacy can only seek redress where they can establish some other cause of action (such as a breach of confidence, intentional infliction of mental distress, or defamation, as explained above) that applies incidentally to the privacy-infringing conduct.⁷⁰⁸

7.2.1.1 Australian case law on privacy

There has been little movement towards recognising a common law tort of privacy in Australia.

ABC v Lenah Game Meats

The most recent High Court consideration of the law of privacy in Australia was the 2001 decision of *ABC v Lenah Game Meats Pty Ltd*.⁷⁰⁹ In that case, a meat-processing corporation was seeking an injunction to prevent the ABC from broadcasting unlawfully-made footage of operations at a “brush tail possum processing facility”. The court found that there was no basis for an injunction. The court did not determine whether a tort of privacy could exist, as the party seeking to have its privacy protected was a corporation, and the court considered that any developments in the field of privacy would be for the benefit of individuals, not of corporations.⁷¹⁰ However, the court did not rule out the existence of a tort of privacy, and expressly noted that a previous High Court decision, which some had thought excluded the possibility of a tort of privacy, did not foreclose debate on such a tort.⁷¹¹

More recent decisions

Since the *ABC v Lenah Game Meats* decision, two lower court decisions have accepted the plaintiff’s claims for an invasion of privacy:

- *Grosse v Purvis*:⁷¹² This 2003 decision of the Queensland District Court was the first in which an Australian court awarded damages for breach of privacy. The plaintiff had suffered persistent and intentional stalking by a former lover. Senior Judge Skoien held that the plaintiff was entitled to damages for invasion of her privacy.
- *Doe v ABC & Ors*:⁷¹³ The plaintiff had been attacked and raped by her estranged husband, who was convicted and sentenced for two counts of rape and one count of common assault. On the day the sentence was passed, ABC radio news reported on the case in three subsequent news bulletins. Two of the bulletins identified the husband by name and described the offences he had been convicted of as rapes within the marriage; the third bulletin named

⁷⁰⁸ Normann Witzleb, Submission to the Inquiry 'A Commonwealth statutory cause of action for serious invasion of privacy', Australian Government Department of the Prime Minister and Cabinet, p. 3.

⁷⁰⁹ *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* [2001] HCA 63.

⁷¹⁰ *ibid.*, para 132 (Gummow and Hayne JJ).

⁷¹¹ *ibid.*

⁷¹² *Grosse v Purvis* [2003] QDC 151.

⁷¹³ *Doe v ABC & Ors* [2007] VCC 281.

the plaintiff and referred to her as the victim. This was in breach of the *Judicial Proceedings Reports Act 1958* (Vic). Judge Hampel, of the County Court of Victoria, held that the invasion of privacy alleged was an actionable wrong which gave rise to a right to recover damages according to the ordinary principles governing damages in tort.

However, no superior courts in Australia have endorsed the existence of a tort of privacy. Decisions of the New South Wales Supreme Court and the Court of Appeal of the Supreme Court of Victoria have not denied the existence of the tort, but have declined to consider whether it exists.⁷¹⁴ A decision of the Federal Court of Australia found that “in Australia at the moment there is no tort of privacy ...”⁷¹⁵

While it remains possible that a tort of privacy could develop through the common law, for the existence of such a tort to be widely recognised, it would be necessary for the High Court to make a definitive and binding statement on the issue. For this to be able to occur, a suitable case would need to make its way to the High Court, which would require a well-resourced litigant who is prepared to proceed through the expense and the time required for several levels of appeal, and to risk failure given the uncertainty of the law. A very small number of cases reach the High Court for determination. The prospects of this occurring in the near future – and of the High Court affirming the existence of the tort – are unknown.

7.2.1.2 New Zealand’s tort of invasion of privacy

In contrast to Australia, a tort of invasion of privacy exists in New Zealand. The existence of such a tort was recognised by the New Zealand Court of Appeal in 2004, in the landmark case *Hosking v Runting* (although by a bare majority of three to two judges).⁷¹⁶ In New Zealand, the tort provides a remedy where:

- there are facts in respect of which there is a reasonable expectation of privacy; and
- publicity given to those private facts would be considered highly offensive to an objective reasonable person.⁷¹⁷

A defence to the tort exists such that publication of the material is justified if there is a legitimate public concern in the information.⁷¹⁸ The remedies available for the tort are damages and injunction.

The tort has been applied in at least three reported cases since its recognition in *Hosking v Runting*:

⁷¹⁴ *Giller v Procopets* [2008] VSCA 236, paras 167-168 (Ashley JA), para 452 (Neave JA); *Gee v Burger* [2009] NSWSC 149, para 55 (McLaughlin AsJ).

⁷¹⁵ *Kalaba v Commonwealth of Australia* [2004] FCA 763, para 6 (Heerey J).

⁷¹⁶ *Hosking v Runting* [2005] 1 NZLR 1 (CA).

⁷¹⁷ *ibid.*, para 117.

⁷¹⁸ *ibid.*, para 129.

- in *Rogers v Television New Zealand Ltd*, three judges of the Supreme Court of New Zealand considered that there could be no reasonable expectation of privacy in a murder confession made to police, even though the confession was excluded from evidence at the trial;⁷¹⁹
- *Andrews v Television New Zealand Ltd* clarified that there can sometimes be expectations of privacy in a public place, but even if there is a reasonable expectation of privacy, the plaintiff will still fail if the publicity is not highly offensive;⁷²⁰ and
- *Brown v Attorney-General* demonstrated the difficulties which can sometimes arise in applying the ‘highly offensive’ requirement and the public concern defence.⁷²¹

The New Zealand Law Commission (NZLC) noted each of these cases, and noted some of the difficulties with the new tort in a report it released on invasion of privacy in 2009.⁷²² The NZLC noted that as the tort is still in the early stages of development, many aspects of the tort have not yet been tested – for example, it is yet to be determined whether there are defences other than public concern, and remedies other than injunction and damages. While the NZLC recognised that codifying the tort could close some of these gaps and provide greater certainty, it recommended that the tort should be left to develop at common law. The NZLC’s view was that the common law allows judges to make informed decisions on the facts of actual cases; it also provides flexibility and can develop with the times.⁷²³

However, the NZLC also recognised that the situation is different in Australia, where the existence of a privacy tort has not been recognised.⁷²⁴ It noted that the development of the common law is “dependent on the accidents of litigation” and develops slowly.⁷²⁵ The NZLC also suggested that codifying the law in a statute renders it more accessible than the common law, allows gaps to be filled in, and can provide greater certainty.⁷²⁶

7.2.2 Proposals for a statutory privacy action

Protection of privacy has been the subject of three recent reports by Australian law reform research bodies – the ALRC (2008), the NSWLRC (2009) and the VLRC (2010). Each of these reports concluded that the current privacy protections provided under the common law are inadequate, and recommended enacting a statutory cause of action for the invasion of privacy. The recommendations of each of the Commissions are discussed below.

⁷¹⁹ *Rogers v Television New Zealand Ltd* [2008] 2 NZLR 78 (SC).

⁷²⁰ *Andrews v Television New Zealand Ltd* [2009] 1 NZLR 220 (HC).

⁷²¹ *Brown v Attorney-General* [2006] DCR 630.

⁷²² New Zealand Law Commission, *Invasion of privacy: penalties and remedies*, NZLC, 2009.

⁷²³ *ibid.*, 90, para 7.9.

⁷²⁴ *ibid.*, 91, para 7.12.

⁷²⁵ *ibid.*, 90, para 7.8.

⁷²⁶ *ibid.*

7.2.2.1 Australian Law Reform Commission report (2008)

After commencing its Inquiry in 2006, the ALRC tabled a report proposing that a single cause of action for serious invasions of privacy be legislated in Commonwealth law.⁷²⁷ It recommended that the legislation should contain a non-exhaustive list of the types of invasion that would fall within the cause of action, suggesting the following examples:

- a) there has been an interference with an individual's home or family life;
- b) an individual has been subjected to unauthorised surveillance;
- c) an individual's correspondence or private written, oral or electronic communication has been interfered with, misused or disclosed; or
- d) sensitive facts relating to an individual's private life have been disclosed.⁷²⁸

The ALRC recommended that to establish liability, a claimant must be able to prove that there is a reasonable expectation of privacy, and that the act or conduct complained of is highly offensive to a reasonable person of ordinary sensibilities.⁷²⁹

In determining whether there has been an invasion of privacy, a court would be required to take into account whether the public interest in maintaining the claimant's privacy outweighs other matters of public interest, including the interest of the public to be informed about matters of public concern, and the public interest in allowing freedom of expression.⁷³⁰

The ALRC recommended that the cause of action should be limited to natural persons, should be actionable without proof of damage, and should be restricted to intentional or reckless acts on the part of the respondent, meaning that merely negligent acts would be excluded.⁷³¹

The ALRC also considered defences that should be available to the cause of action for a serious invasion of privacy. It suggested that they should be listed exhaustively in the legislation, and should include that the:

- a) act or conduct was incidental to the exercise of a lawful right of defence of person or property;
- b) act or conduct was required or authorised by or under law; or
- c) publication of the information was, under the law of defamation, privileged.⁷³²

⁷²⁷ Australian Law Reform Commission, *For your information: Australian privacy law and practice*, ALRC, Volume 3: Final report 108, 2008, pp. recommendation 74-1.

⁷²⁸ *ibid.*

⁷²⁹ *ibid.*, recommendation 74-2.

⁷³⁰ *ibid.*

⁷³¹ *ibid.*, recommendation 74-3.

⁷³² *ibid.*, recommendation 74-4.

In terms of remedies, the ALRC recommended that the court should be empowered to choose the remedy that is most appropriate in the circumstances, which would include any one or more of:

- a) damages, including aggravated damages, but not exemplary damages;
- b) an account of profits;
- c) an injunction;
- d) an order requiring the respondent to apologise to the claimant;
- e) a correction order;
- f) an order for the delivery up and destruction of material; and
- g) a declaration.⁷³³

7.2.2.2 New South Wales Law Reform Commission report (2009)

The NSWLRC also recommended a single statutory cause of action for the invasion of privacy – to be introduced into the *Civil Liability Act 2002* (NSW) – but unlike the ALRC, the NSWLRC did not limit the cause of action to serious invasions of privacy.⁷³⁴

The two elements of the NSWLRC’s proposed cause of action are first, that the plaintiff had a reasonable expectation of privacy in the circumstances having regard to any relevant public interest and that the respondent invaded that privacy, and second, that the plaintiff did not consent to the respondent’s conduct.⁷³⁵ This places a positive burden on the plaintiff to establish a lack of consent on his or her part.

In contrast to the ALRC, the NSWLRC did not recommend that the conduct must be “highly offensive” to be actionable. However, the NSWLRC listed a number of matters that it recommended a court should be required to consider when deciding whether there has been an invasion of privacy, including the nature of the subject matter, the nature of the conduct of both parties, the plaintiff’s public profile and vulnerability, and the effect of the defendant’s conduct on the plaintiff.⁷³⁶

Similar to the ALRC report, the NSWLRC recommended that the cause of action should only be available to living individuals.⁷³⁷ The NSWLRC did not recommend that the cause of action should be limited to intentional or reckless conduct, suggesting that the defendant’s level of culpability should be considered by the court when determining whether the plaintiff’s privacy has been invaded.⁷³⁸

⁷³³ *ibid.*, recommendation 74-5.

⁷³⁴ New South Wales Law Reform Commission, *Invasion of privacy*, NSWLRC, Sydney, Report 120, 2009.

⁷³⁵ *ibid.*, Appendix A – Draft Bill, clauses 74(2), 74(4).

⁷³⁶ *ibid.*, Appendix A – Draft Bill, clause 74(3).

⁷³⁷ *ibid.*, Appendix A – Draft Bill, clauses 74(1), 79.

⁷³⁸ Clause 74(3)(a) of the draft bill provides the matters which a court must take into account in determining whether an individual’s privacy has been invaded by the conduct. The matters listed include the nature of the conduct concerned, and the

The NSWLRC recommended essentially the same defences as proposed by the ALRC (with two defences relating to defamation law), and added a further proposed defence where the defendant's conduct involved publication of information as an employer or agent of a subordinate distributor, and the defendant could not have reasonably known that the publication constituted an invasion of privacy.⁷³⁹

The NSWLRC recommended similar remedies be available to a court as the ALRC recommended. Although the NSWLRC did not specifically include an account of profits, an order for an apology and a correction order in the list of remedies, it did include a general provision that the court should be able to order "such other relief as the court considers necessary in the circumstances".⁷⁴⁰ The NSWLRC also recommended that the maximum amount that could be awarded for non-economic loss should be \$150 000.⁷⁴¹

7.2.2.3 Victorian Law Reform Commission report (2010)

The VLRC's report is the most recent of the three law reform bodies, having been released in May 2010.⁷⁴² Unlike the ALRC's and NSWLRC's relatively broad proposals for a single cause of action, the VLRC recommended that two overlapping, limited causes of action for serious invasions of privacy should be legislated:

- a cause of action for serious invasion of privacy caused by misuse of private information; and
- a cause of action for serious invasion of privacy caused by intrusion upon seclusion.⁷⁴³

The first of these causes of action is most relevant for a person who has had an intimate image of themselves distributed by someone else. The elements of the cause of action suggested by the VLRC are:

- a) D misused, by publication or otherwise, information about P in respect of which he/she had a reasonable expectation of privacy; and
- b) a reasonable person would consider D's misuse of that information highly offensive.⁷⁴⁴

These elements are consistent with the elements of the broader cause of action proposed by the ALRC.⁷⁴⁵ The proposed cause of action would

conduct of the individual and of the alleged wrongdoer both before and after the conduct.

⁷³⁹ New South Wales Law Reform Commission, *Invasion of privacy*, NSWLRC, Sydney, Report 120, 2009, pp. Appendix A – Draft Bill, clause 74(3).

⁷⁴⁰ *ibid.*, Appendix A – Draft Bill, clause 76(1).

⁷⁴¹ *ibid.*, Appendix A – Draft Bill, clause 77.

⁷⁴² Victorian Law Reform Commission, *Surveillance in public places*, Melbourne, Final Report 18, 2010.

⁷⁴³ *ibid.*, 153, recommendations 25 & 26.

⁷⁴⁴ *ibid.*, 153, recommendation 25.

appear to cover the scenario where a person distributes an intimate image depicting another person, whether the distributor obtained that image consensually or not, as a person would in most circumstances have a reasonable expectation that such an image would be kept private, and the misuse of such an intimate image would likely be considered highly offensive.

The VLRC suggested potential defences to this cause of action, which could include:

- where the act or conduct is incidental to the exercise of a lawful right of defence of person or property;
- where the act or conduct is required or authorised by or under the law;
- where publication of the information is subject to privilege under the law of defamation;
- consent;
- where the defendant was a public officer engaged in his or her duty and acted in a way that was not disproportionate to the matter being investigated and not committed in the course of a trespass; and
- where D's conduct was in the public interest, or if involving a publication, the publication was privileged or fair comment.⁷⁴⁶

The remedies that the VLRC proposed would be available to a person who proves an invasion of privacy were compensatory damages, injunctions – which could be sought to prevent the initial publication or dissemination of an image, or to prevent its ongoing publication, such as on a website – and declarations.⁷⁴⁷

The VLRC noted the ALRC's and the NSWLRC's proposals for a statutory cause of action for invasion of privacy, and recognised that national consistency should be promoted. However, while Commonwealth legislation would probably override legislation enacted by Victoria regarding a cause of action for invasion of privacy, the VLRC noted that the Commonwealth has not yet taken any action towards implementing the ALRC's recommendations in this regard, and may take further time to do so, if they are implemented at all. The VLRC suggested that Victoria could lead the way by legislating a statutory cause of action.⁷⁴⁸

⁷⁴⁵ As discussed above, the broader cause of action proposed by the ALRC is not limited to the misuse of private information, but relates to any act or conduct that invades a person's privacy.

⁷⁴⁶ Victorian Law Reform Commission, *Surveillance in public places*, Melbourne, Final Report 18, 2010, pp. 153-158.

⁷⁴⁷ *ibid.*, 160-163, recommendation 29.

⁷⁴⁸ *ibid.*, 128.

7.2.2.4 Common ground between the three proposals

As noted by Australian academic Dr Norman Witzleb, the three proposals from the law reform commissions are in agreement about most of the key features of a statutory cause of action for privacy. All three proposals:

- a) advocate the introduction of a statutory cause of action, rather than leaving the law to develop and evolve solely through the courts;
- b) suggest that the cause of action should only be available to living, natural persons (excluding bodies corporate as well as actions on behalf of deceased persons);
- c) identify intrusion into seclusion and misuse of personal information as the privacy wrongs that should be the focus of the cause of action;
- d) require, as a necessary condition of liability, that the defendant intrude into a situation where a plaintiff has a “reasonable expectation of privacy”;
- e) envisage liability without the necessity of proving actual damage;
- f) provide that the privacy interest will not be protected where it is outweighed by public interests (particularly freedom of expression), as well as where certain other defences are made out; and
- g) provide for compensatory damages, injunctions and declarations as potential remedies, and bar the availability of exemplary damages.⁷⁴⁹

These consistencies between the proposals suggest that there is a substantial degree of consensus on the major aspects of a statutory cause of action for breach of privacy. All three law reform bodies were in agreement that such a cause of action should be legislated, rather than waiting for common law in this area to develop.

7.2.2.5 The current Australian Government position

As mentioned above, when the VLRC released its report in May 2010, it noted that it could be some time before the Commonwealth Parliament enacted any legislation giving effect to the ALRC’s recommendations to introduce a statutory privacy cause of action, if such action were taken at all. The VLRC suggested that the Victorian Parliament could play a leadership role by taking the initiative to legislate such a cause of action at the state level.⁷⁵⁰

⁷⁴⁹ Normann Witzleb, 'How should an Australian statutory cause of action protecting privacy be framed?', in Dorr and Weaver (eds.), *The right to privacy in the light of media convergence: perspectives from three continents*, pp. 237-254, De Gruyter, Berlin, Germany, 2012, pp. 239-240.

⁷⁵⁰ Victorian Law Reform Commission, *Surveillance in public places*, Melbourne, Final Report 18, 2010.

In September 2011, the Australian Government released an issues paper canvassing whether there should be a Commonwealth statutory cause of action for serious invasion of privacy.⁷⁵¹ The paper invited comments to inform the Government's response to the ALRC's recommendations to introduce a statutory cause of action for serious invasions of privacy of natural persons. The paper asked whether Australia should introduce a statutory cause of action for invasion of privacy and, if so, what elements it might include. Submissions in response to the Australian Government's issues paper closed in November 2011.⁷⁵²

The Australian Government has not yet indicated a definitive position on whether a statutory cause of action for serious invasions of privacy should be created by Commonwealth legislation.⁷⁵³ However, on 12 March 2013, in a media release announcing reforms to media regulation, the Federal Minister for Broadband, Communications and the Digital Economy stated that "[t]he Privacy Tort will be referred to the Australian Law Reform Commission for detailed examination."⁷⁵⁴ This suggests that a tort of privacy is unlikely to be introduced in the short or medium term.⁷⁵⁵

7.2.2.6 A privacy tort for Victoria

The Committee notes that legislating to provide a cause of action for invasion of privacy is a significant task, and that it would comprise a fundamental change to the Australian legal landscape, with potentially far-reaching effects. Each of the law reform commissions have expended time and resources developing proposals for a privacy cause of action.

While the Committee received limited evidence on broader issues surrounding the introduction of a privacy tort, it did receive evidence about how a privacy tort could assist to protect people who suffer an invasion of privacy from occurrences of sexting. Accordingly, the Committee has limited its consideration to a form of cause of action for invasion of privacy that would adequately protect those who are victims of a sexting-related breach of privacy.

In this context, the Committee believes that the VLRC's proposal for a cause of action for the offensive misuse of private information strikes an appropriate balance between protecting a person's privacy, and not

⁷⁵¹ Australian Government Department of the Prime Minister and Cabinet, *A Commonwealth statutory cause of action for serious invasion of privacy*, Commonwealth of Australia, Issues paper, 2011.

⁷⁵² Australian Government Attorney-General's Department, 'Right to sue for serious invasion of personal privacy - issues paper', viewed 16 January 2013, <www.ag.gov.au>.

⁷⁵³ See Australian Government Department of the Prime Minister and Cabinet, 'Privacy reforms', viewed 16 January 2013, <www.dpmc.gov.au>., noting that the Australian Government has not yet responded to 98 recommendations in the ALRC's Report on privacy, including recommendations relating to introducing a statutory cause of action for serious invasion of privacy.

⁷⁵⁴ Stephen Conroy, 'Government response to Convergence review and Finkelstein inquiry' (Media Release, 12 March 2013).

⁷⁵⁵ Bruce Baer Arnold, 'Reform that wobbles like jelly: a spineless approach to privacy protection', *The Conversation*, 14 March 2013, viewed 14 March 2013, <www.theconversation.edu.au>.

unnecessarily constraining freedom of speech. The relevant VLRC recommendations are listed in Appendix Four. The Committee supports the VLRC's recommendations insofar as they relate to a cause of action for a serious invasion of privacy by misuse of private information.

If implemented, the Committee believes that the VLRC's proposal would provide an appropriate mechanism for a person to seek civil recourse where they have suffered embarrassment, humiliation or distress because someone else has distributed, or has threatened to distribute, an intimate image of that person.

As this proposed cause of action is fairly limited, the Committee believes that it could be legislated without causing undue repercussions in terms of restricting freedom of speech or impinging unduly on personal freedoms. It could also be legislated immediately, leaving open the possibility of broadening the legislation at a later date to cover a wider range of conduct that could constitute a serious invasion of privacy.

The VLRC recommended that injunctions should be a remedy available where a serious invasion of privacy is established.⁷⁵⁶ The VLRC indicated in the report that it was using the term 'injunction' broadly to refer to any order of a tribunal or court that compels specified conduct, and stated that this would include injunctions to prevent the initial or ongoing publication of material, and orders to direct a person to apologise for privacy-breaching conduct.⁷⁵⁷ The Committee suggests that orders for the delivery up and destruction of material – a remedy that could be of some importance in sexting cases – should also be included within the ambit of injunction orders.

Recommendation 12: That the Victorian Government consider introducing legislation to create a statutory cause of action for invasion of privacy by the misuse of private information, following recommendations 23, 25, 27, and 29 to 33 of the Victorian Law Reform Commission's *Surveillance in Public Places: Final Report 18* (2010).

7.3 Administrative mechanisms

A statutory cause of action for serious invasion of privacy will provide an important mechanism for people to prevent non-consensual sexting, and to send a strong message to the community that non-consensual sexting is not appropriate. However, civil action will not always provide the most effective means to prevent the distribution of intimate images, particularly for young people, who will generally have limited resources and be unable to pursue legal action.

For example, if an intimate photograph of a person was published on a website without the person's consent, it would be in that person's interest

⁷⁵⁶ Victorian Law Reform Commission, *Surveillance in public places*, Melbourne, Final Report 18, 2010, pp. 163, recommendation 29.

⁷⁵⁷ *ibid.*, 161.

to have a prompt and efficacious means of removing that material from the website before the images were distributed more widely (through copying and sharing). Ideally, such a mechanism should not be dependent on criminal or civil proceedings, which can be lengthy and, in the case of civil proceedings, expensive for the plaintiff.

A recent example of the publication of embarrassing photographs on a public website occurred in Victoria during the 2012 'schoolies' celebrations. A number of students attended an event at a nightclub in Melbourne, celebrating the end of year 12. According to a news report, the event promoter posted many photographs of the event on the event's Facebook page, including about 30 images of schoolgirls posing provocatively, exposing their bras and kissing each other (which were taken with the girls' consent).⁷⁵⁸ Some of the girls were embarrassed by the photographs, and requested that the event promoter delete them. Upon receiving these requests, the event promoter reportedly posted the following response on Facebook:

I just love how these year 12s are happy to get their tits out for photos, then send threatening messages if they're not deleted off our Facebook page. Kill Yourself.⁷⁵⁹

Although the event promoter did eventually take down the photographs that he was requested to remove,⁷⁶⁰ there may be situations where a person who has posted images refuses to do so, and the persons depicted in the photographs or footage will have little recourse to compel their removal.

7.3.1 Current administrative mechanisms

In its recent report on harmful digital communications, the NZLC argued that user empowerment is an important means for tackling harmful electronic communications, and that turning to the law should be a last resort:

For reasons of principle and practicality, recourse to the law should be the last resort for those who have suffered serious harm. We endorse the views expressed by Google and Facebook in their submissions that user empowerment, digital citizenship and self-regulatory solutions must be the first line of defence in tackling harmful communication in cyberspace.⁷⁶¹

Mobile phone providers and social networking sites generally require users to adhere to their terms of use when using their service. The Committee reviews below the extent to which these terms of service allow action to be taken when a service is used inappropriately.

⁷⁵⁸ Cameron Houston, 'Kill yourself, club owner tells schoolgirls', *The Age*, 4 November 2012, viewed 1 January 2013, <www.theage.com.au>.

⁷⁵⁹ *ibid.*

⁷⁶⁰ *ibid.*

⁷⁶¹ New Zealand Law Commission, *Harmful digital communications: the adequacy of the current sanctions and remedies*, Wellington, Ministerial briefing paper, 2012, p. 27.

7.3.1.1 Mobile phone providers

In general, when consumers sign up to a mobile phone contract, or when they purchase a pre-paid mobile phone, they agree to comply with conditions of use specified by the relevant mobile network operator. In Australia, the three main operators are Telstra, Optus and Vodafone. Each of these carriers has terms of use that prohibit users from using their mobile phone services to engage in illegal conduct,⁷⁶² and Optus and Vodafone also prohibit other types of conduct:

- In addition to stipulating that users must comply with all laws when using the service, Optus's mobile phone consumer terms require that users must not use or attempt to use the service "to transmit, publish or communicate material which is defamatory, offensive, abusive, indecent, menacing or unwanted",⁷⁶³ and
- Vodafone's terms of use contain a broader prohibition. Vodafone mobile users must not (and must not allow others to) use the service to send or make available material which is indecent, obscene, pornographic, offensive, racist, menacing, illegal or confidential, or material that defames another person, or material that harasses or abuses another person or violates their privacy.⁷⁶⁴

Each service provider's terms of use allow the provider to suspend or terminate a user's service in certain circumstances:

- Telstra can cancel a service at any time if the user uses the service in a way that is illegal or is likely to be found illegal.⁷⁶⁵
- Optus may request a user to stop doing something (or attempting to do something) which it believes is a non-permitted use of its service. If the user does not immediately comply with the request, then Optus "may take any steps reasonably necessary to ensure compliance" with the terms of use or the request.⁷⁶⁶ This may include suspending or cancelling the service.⁷⁶⁷

⁷⁶² Optus, 'Digital mobile service: consumer terms', viewed 1 March 2013, <www.optus.com.au>; Telstra, 'Our customer terms: general terms for consumer customers', viewed 1 March 2013, <www.telstra.com.au>; Vodafone, 'Standard terms for the supply of the Vodafone mobile telecommunications service - customers commencing/renewing on or after 1 January 2011', viewed 1 March 2013, <www.vodaphone.com.au>.

⁷⁶³ Optus, 'Digital mobile service: consumer terms', viewed 1 March 2013, <www.optus.com.au>.

⁷⁶⁴ Vodafone, 'Standard terms for the supply of the Vodafone mobile telecommunications service - customers commencing/renewing on or after 1 January 2011', viewed 1 March 2013, <www.vodaphone.com.au>.

⁷⁶⁵ Telstra, 'Our customer terms: general terms for consumer customers', viewed 1 March 2013, <www.telstra.com.au>.

⁷⁶⁶ Optus, 'Digital mobile service: consumer terms', viewed 1 March 2013, <www.optus.com.au>.

⁷⁶⁷ *ibid.*, clause 5.3(d).

- Similarly, Vodafone can suspend, limit or terminate the service if it reasonably believes that the service is being used to commit unauthorised, criminal or unlawful activities.⁷⁶⁸

As explored in Chapter Four, at the very least non-consensual sexting is likely to violate the Commonwealth provision that prohibits using a carriage service in a menacing, harassing or offensive way. Therefore, it appears that all of the mobile phone providers have the power to suspend or terminate a mobile phone user's service if they use their phone to disseminate sexted images without consent. Optus and Vodafone may also suspend or terminate a service where the conduct falls short of illegal activity – for example, where conduct does not satisfy the legal test for “menacing, harassing or offensive”, but is still unwelcome and potentially harmful.

The Committee is not aware of the number of users Telstra, Optus and Vodafone (and other mobile phone carriers) have issued warnings regarding the use of a mobile phone service in an illegal or unauthorised way, or how many users have subsequently had their service suspended or terminated.

Approaching the mobile phone provider to take action against someone who is misusing their phone service may provide a means to dissuade that person from engaging in such conduct, without having to take the more serious step of going to the police. Of course, if the conduct warrants more serious action, going directly to the police may be the better option.

7.3.1.2 Social networking sites

Although there are a huge number of websites to which a person can post content – including a website that the person creates themselves – the most damage is usually caused where harmful material is posted on a popular social networking site. Material posted to sites such as Facebook, Twitter and Tumblr has the potential to reach a large audience in a very short space of time.

As with mobile phone providers, most social networking sites require users to abide by terms of use in utilising their site. Global internet companies such as Google (which owns YouTube, Google+ and Blogger) and Facebook encourage and enable users to report content which is offensive and breaches their terms of use.

Facebook's Terms of use

For example, by using or accessing Facebook, users agree to Facebook's Statement of Rights and Responsibilities, which include terms requiring that users:

- will not bully, intimidate or harass any user;

⁷⁶⁸ Vodafone, 'Standard terms for the supply of the Vodafone mobile telecommunications service - customers commencing/renewing on or after 1 January 2011', viewed 1 March 2013, <www.vodafone.com.au>.

- will not post content that is hate speech, threatening or pornographic; incites violence; or contains nudity or graphic or gratuitous violence; and
- will not use Facebook to do anything unlawful, misleading, malicious or discriminatory.⁷⁶⁹

Facebook's community standards provide some clarification of the standard of behaviour required of users to ensure compliance with the Statement of Rights and Responsibilities. On bullying and harassment, the community standards provide:

Facebook does not tolerate bullying or harassment. We allow users to speak freely on matters and people of public interest, but take action on all reports of abusive behavior directed at private individuals. Repeatedly targeting other users with unwanted friend requests or messages is a form of harassment.⁷⁷⁰

And in regards to nudity and pornography:

Facebook has a strict policy against the sharing of pornographic content and any explicitly sexual content where a minor is involved. We also impose limitations on the display of nudity. We aspire to respect people's right to share content of personal importance, whether those are photos of a sculpture like Michelangelo's David or family photos of a child breastfeeding.⁷⁷¹

Facebook's community standards also explain that users must refrain from publishing the personal information of others without their consent.⁷⁷²

It seems fairly clear that posting an intimate image of another person without their consent would breach Facebook's terms – such an image may be posted maliciously or to harass another user, will almost certainly contain nudity, and may be considered personal information about the person depicted.

Facebook provides users with a quick and easy way to report inappropriate content:

Report abusive or offensive content

Tell us about any content that violates the Facebook terms. The most efficient way to report abuse is to do it right where it occurs on Facebook, using the "Report" link near the post, timeline or Page.

If you receive a harassing message from one of your Facebook friends, you can click the "Report" link next to the sender's name on the message, and remove the person as a friend. Reporting the message as harassing will

⁷⁶⁹ Facebook, 'Statement of rights and responsibilities', viewed 4 March 2013, <<http://www.facebook.com/legal/terms>>.

⁷⁷⁰ Facebook, 'Facebook community standards', viewed 4 March 2013, <<https://www.facebook.com/communitystandards>>.

⁷⁷¹ *ibid.*

⁷⁷² *ibid.*

automatically add the person to your block list. You can also use the "Report/Block" option that appears under the gear icon on the top right of every person's timeline.

Reports are confidential. People you report won't know that they've been reported. After you submit a report, we'll investigate the issue and determine whether or not the content should be removed based on the Facebook terms. We research each report to decide the appropriate course of action.⁷⁷³

If a person violates the terms or "the spirit" of Facebook's Statement of Rights and Responsibilities, Facebook may remove the content, and may stop providing the offending user with access to all or part of Facebook.⁷⁷⁴

Cooperative Arrangement for Handling Complaints on Social Networking Sites

Some social networking providers, including Facebook, have indicated their commitment to ensuring that their sites are not used inappropriately by signing up to the Cooperative Arrangement for Complaints Handling on Social Networking Sites, an initiative announced by the Prime Minister on 16 January 2013.⁷⁷⁵ This arrangement is voluntary and non-binding, and sets out a series of principles regarding the handling of complaints. The principles include that providers will:

- have in place policies for acceptable use, which provide clear information about what is inappropriate behaviour, and what the consequences will be where the acceptable use policy is breached;
- have in place mechanisms for reporting inappropriate content, contact or behaviour;
- have a process for reviewing and acting on complaints promptly. A user's non-compliance with policies for acceptable use may have consequences including removal of content, suspension or closure of their account;
- have a contact person with whom the Australian Government can discuss issues and any appropriate messaging to the community and media in response to issues as they arise; and
- meet with government officials on a bilateral basis every six months to discuss trends and emerging issues.⁷⁷⁶

⁷⁷³ Facebook, 'Safety Centre: tools', viewed 4 March 2013, <<https://www.facebook.com/safety/tools/>>.

⁷⁷⁴ Facebook, 'Statement of rights and responsibilities', viewed 4 March 2013, <<http://www.facebook.com/legal/terms>>.

⁷⁷⁵ Julia Gillard and Kim Carr, 'Social networking sites to cooperate with Government on complaint handling' (Media Release, 16 January 2013).

⁷⁷⁶ Australian Government Department of Broadband, Communications and the Digital Economy, 'Cooperative arrangement for complaints handling on social networking sites', viewed 13 March 2013, <www.dbcde.gov.au>.

To date, Facebook, Google, Microsoft, and Yahoo! have agreed to abide by the Arrangement.⁷⁷⁷ The Prime Minister has reportedly also called on Twitter to sign up to the Arrangement.⁷⁷⁸

Limits to the effectiveness of self-regulation

It is clear that the operators of social networking sites intend to dissuade users from misusing their services, and that reporting offensive or inappropriate content to the social network provider is a good first step to take in seeking to address such content.

However, reporting content to the host social networking site may not always result in content being removed quickly and offending users being sanctioned. It is not clear how often and how quickly social networking sites act upon complaints. The sheer number of users makes following up on all complaints a daunting task; Facebook has more than one billion monthly active users.⁷⁷⁹

A recent example in which Facebook did not remove offensive content until an online petition demanded action arguably illustrates a failure of Facebook to react as quickly as desirable to offensive content:

A racist Facebook page targeting Aboriginal people has been removed after a barrage of criticism and an online campaign urging the social media giant to respond.

Overnight the Facebook page, which gained national attention for its public portrayal of Aborigines as petrol sniffing, welfare collectors has been deactivated, after a number of the racist images were removed. It is unclear as to whether Facebook has acted to have the site removed after an online petition, which has attracted over 15,000 signatures in 24 hours, urged the social media giant to step in.

The Facebook page allowed users to post 'memes' depicting Aboriginal people with derogatory text over the top.

The Communications Minister Stephen Conroy told ABC's Lateline on Wednesday night that the page was "absolutely inappropriate" stating Facebook were "not doing the right thing" in leaving the page active.

The page, which was started on June 4 according to the site, was reportedly removed briefly on Tuesday night, but re-emerged with the title '[Controversial Humour] Aboriginal memes'.

Senator Conroy said he understood the reason Facebook had not responded to reports of the page as "hate speech" was due to the changed

⁷⁷⁷ The self-declarations made by each of these companies under the Arrangement are available from Australian Government Department of Broadband, Communications and the Digital Economy, 'Cybersafety plan', viewed 13 March 2013, <www.dbcde.gov.au>.

⁷⁷⁸ Judith Ireland, 'Twitter urged to sign up to cyberbullying guidelines', *Sydney Morning Herald*, 16 January 2013, viewed 13 March 2013, <www.smh.com.au>.

⁷⁷⁹ Facebook, 'One billion fact sheet', viewed 22 January 2013, <<http://newsroom.fb.com/download-media/4227>>.

classification of the page, and because Facebook operates under US law.⁷⁸⁰

It was reported that hundreds of people reported the page to Facebook as “hate speech” prior to its removal. A number of these people received a response from Facebook stating: “After reviewing your report, we were not able to confirm that the specific page you reported violates Facebook’s statement of rights and responsibilities”, despite the prohibition on hate speech in Facebook’s Statement of Rights and Responsibilities.⁷⁸¹ Further, Australia’s Race Discrimination Commissioner, Helen Szoke, reportedly stated that the page could breach the *Racial Discrimination Act 1975* (Cth), and could therefore be illegal content.⁷⁸²

This illustrates that there is some subjectivity in Facebook’s assessment of reported content, and that it may not always be easy to have inappropriate content quickly removed. This may particularly be the case where only one person or a small number of people submit reports to Facebook about the content, as opposed to the hundreds who reported the ‘Aboriginal memes’ page.

7.3.1.3 Australian Communications and Media Authority

The Australian Communications and Media Authority (ACMA) is the Commonwealth agency responsible for regulating broadcasting, the internet, radio communications and telecommunications. Since 2000, one of the ACMA’s roles has been to investigate complaints about prohibited and potentially prohibited material posted online.⁷⁸³ The ACMA has investigated more than 21 000 complaints about such online material.⁷⁸⁴

The ACMA is required by law to ensure that prohibited and potentially prohibited content is not hosted within or made available from Australia.⁷⁸⁵ “Prohibited content” is determined with reference to Australia’s National Classification Scheme (which also applies to traditional media such as movies screened in cinemas, DVDs, computer games and publications), and includes material which is rated RC (refused classification), X 18+ and, in some circumstances, material that is rated R 18+ and MA 15+.⁷⁸⁶

Prohibited content has been officially classified by the Classification Board, whereas potentially prohibited content has not been classified by the Classification Board, but has been assessed by the ACMA as likely to be

⁷⁸⁰ Emma Sykes, 'Racist Facebook page deactivated after outcry', *ABC News*, 9 August 2012, viewed 13 March 2013, <www.abc.net.au>.

⁷⁸¹ *ibid.*

⁷⁸² *ibid.*

⁷⁸³ Under the *Broadcasting Services Act 1992* (Cth), sections schedules 5, 7.

⁷⁸⁴ Andree Wright, Acting General Manager, Digital Economy Division, Australian Communications and Media Authority, *Transcript of evidence*, Melbourne, 10 December 2012, p. 9.

⁷⁸⁵ Australian Communications and Media Authority, 'Prohibited online content', viewed 8 April 2013, <www.acma.gov.au>.

⁷⁸⁶ Requirements for a Restricted Access System apply to R 18+ content, and in some circumstances, to MA 15+ content. For R 18+ content, an age verification access control is required, and for MA 15+ content, in some circumstances, an age declaration is required.

prohibited content.⁷⁸⁷ The National Classification Scheme requires assessment of the material based on the impact of six elements – themes, violence, sex, language, drug use and nudity.⁷⁸⁸

How the ACMA handles complaints received

Complaints about offensive online content can be submitted to the ACMA via its website.⁷⁸⁹ Once a complaint is received, staff of the ACMA will commence an investigation into the specific URL or content details provided, and will make an assessment of the content based on the National Classification Scheme. If the content is assessed as being potentially prohibited, the ACMA will run a trace to identify where the content is hosted.⁷⁹⁰

If the content is hosted overseas, the ACMA will refer the content to the Internet Industry Association (IIA) accredited user opt-in Family Friendly Filters, in accordance with the industry codes of practice.⁷⁹¹ In addition, if the content is child abuse material, the ACMA will also refer it to the International Association of Internet Hotlines, for referral to the hotline available in the country where the content is hosted.⁷⁹²

If the content is hosted in Australia, the ACMA will submit the content to the Classification Board for classification. The Classification Board will determine the appropriate classification for the content; if the classification means that the content is prohibited content, the ACMA will issue a final take-down notice, and will direct the content host or the service provider to remove the content.⁷⁹³

If the content is classified as consisting of child abuse material or other illegal material such as terrorist material, the ACMA will refer the matter to the relevant state or territory law enforcement agency before taking any action. The ACMA investigation will proceed if the enforcement agency advises that doing so will not compromise a police investigation.⁷⁹⁴

Limits to the ACMA's reach

The ACMA's role with respect to online content is limited to material that is prohibited or potentially prohibited under the Australian National Classification Scheme. There will be a range of material that is offensive or inappropriate, but is not prohibited or potentially prohibited content. For

⁷⁸⁷ Australian Communications and Media Authority, 'Prohibited online content', viewed 8 April 2013, <www.acma.gov.au>.

⁷⁸⁸ *ibid.*

⁷⁸⁹ See Australian Communications and Media Authority, 'Online content complaints', viewed 4 March 2013, <www.acma.gov.au>.

⁷⁹⁰ *ibid.*

⁷⁹¹ To be accredited as an IIA Family Friendly Filter, a filtering service must agree to update its filter to exclude any sites that the ACMA has identified as containing prohibited content. To be compliant with IIA Codes, internet service providers must offer a Family Friendly Filter.

⁷⁹² Australian Communications and Media Authority, 'Online content complaints', viewed 4 March 2013, <www.acma.gov.au>.

⁷⁹³ *ibid.*

⁷⁹⁴ *ibid.*

example, many intimate images that would humiliate the person depicted if posted online would not receive an assessment as being prohibited content; the ACMA would have no power to act in regards to such content, and would not refer the matter on where the content was hosted internationally.

In addition, the ACMA is only able to issue take-down notices in respect of material that is hosted in Australia. The ACMA has no power to act on material hosted overseas – which includes material posted to sites such as Facebook and YouTube – beyond alerting the International Association of Internet Hotlines of the content.

7.3.2 A body to hear complaints about online content

While the existing administrative mechanisms described above may be of some benefit to those who are affected by offensive or harmful online material, it is evident that not everyone who has a legitimate complaint will be able to have offensive material removed quickly and easily. The Committee is particularly concerned to protect the interests of those who have had an intimate image of themselves posted online, but also recognises that victims of harmful communication more broadly should have access to an effective complaint resolution mechanism.

The Committee believes that there is a need for a body that can hear and determine complaints about offensive and harmful online content quickly, inexpensively and effectively. This idea has been given some consideration by a Committee of the Australian Parliament, and by the NZLC.

7.3.2.1 Joint Select Committee report

The Australian Parliament's Joint Select Committee (JSC) on Cyber-Safety recently conducted an inquiry into issues around young people and cybersafety, and tabled its report in June 2011.⁷⁹⁵ One of the matters that the JSC was required by its Terms of Reference to inquire into and report on was "the merit of establishing an Online Ombudsman to investigate, advocate and act on cyber-safety issues".⁷⁹⁶ The JSC ultimately did not recommend that such an office should be established.⁷⁹⁷

The term 'ombudsman' is commonly understood to describe an independent, impartial office whose primary function is to handle and investigate complaints from citizens about a public authority or an institution.⁷⁹⁸ Examples of existing ombudsman offices include the Telecommunications Industry Ombudsman, which investigates and seeks to resolve complaints about telephone and internet service providers, and the Victorian Ombudsman, which deals with complaints about actions

⁷⁹⁵ Joint Select Committee on Cyber-Safety, *High-wire act: cyber-safety and the young*, Parliament of the Commonwealth of Australia, Interim report, 2011.

⁷⁹⁶ *ibid.*, xxiii, Terms of Reference clause (a)(viii).

⁷⁹⁷ See Chapter 13 of *ibid.*

⁷⁹⁸ *ibid.*, 355-356.

taken by Victorian government departments, statutory authorities and local council officers.

The JSC heard arguments both for and against the establishment of an Online Ombudsman. Among those who were in favour of an Online Ombudsman there was support for the idea of having a body with sufficient powers to deal with social networking sites and have offensive material removed quickly and efficiently, and for an agency with clear responsibility for responding to cybersafety issues.⁷⁹⁹

Comments made by those who were not in favour of creating an Online Ombudsman included:

- if the body proposed is to perform regulatory and advocacy functions, it should be called something other than an ‘ombudsman’, as the office of ombudsman does not traditionally perform such functions;⁸⁰⁰
- there are a range of existing agencies that deal with complaints about the online environment (such as the ACMA, the Australian Federal Police, and the Australian Competition and Consumer Commission), and creating another avenue may cause confusion, duplication and delay in dealing with complaints;⁸⁰¹
- an online ombudsman would have no power to enforce control over online material or proceed with any further action unless a website was registered in Australia;⁸⁰² and
- an online ombudsman may not be the most efficient administrative process by which to report incidents of cyber harm.⁸⁰³

The JSC’s Terms of Reference only required it to consider the creation of an Online Ombudsman, so the JSC did not consider whether the creation of any other type of complaint-handling body – such as a body that might be better suited than an ombudsman to determining complaints and providing remedies rapidly and efficiently – would be desirable.

7.3.2.2 New Zealand Law Commission recommendations

In August 2012, the NZLC released a Ministerial Briefing Paper titled *Harmful Digital Communications: The adequacy of the current sanctions and remedies*.

The Paper considers issues around cyberbullying and, more broadly, harmful digital communications – that is, offensive communications which can lead to serious negative consequences such as fear for physical

⁷⁹⁹ *ibid.*, 359-362.

⁸⁰⁰ *ibid.*, 356-357.

⁸⁰¹ *ibid.*, 364, 367, 368.

⁸⁰² *ibid.*, 362-363.

⁸⁰³ *ibid.*, 369-370.

safety, humiliation, and mental and emotional distress.⁸⁰⁴ The NZLC considered that there needs to be an appropriate mechanism to provide relief outside the traditional court system, to allow those who are affected by harmful digital communications swift and effective redress.⁸⁰⁵

The NZLC recommended, amongst other things, the establishment of a Communications Tribunal, “to provide citizens harmed by digital communications with speedy, efficient and cheap access to remedies such as takedown orders and “cease and desist” notices”.⁸⁰⁶ The NZLC’s proposed Communications Tribunal includes the following features:

- the Tribunal would be comprised of a District Court judge, supported (where necessary) by an expert internet adviser;
- the Tribunal’s jurisdiction would be protective, rather than punitive or compensatory. It would not have any powers to impose criminal sanctions. It would be limited instead to providing civil remedies, such as takedown notices and cease and desist orders;
- the Tribunal would be a solution of last resort – the complainant would have to demonstrate having attempted to resolve the matter through other avenues (such as requesting that the author of the offending website remove the material);
- an order by the Tribunal would not preclude a complainant from also pursuing a civil action or seeking criminal prosecution – the Tribunal’s role would be to provide a speedy and accessible remedy in cases of significant harm;
- in the first instance, the target of Tribunal orders would be the author of the offending communication. Where that person’s identity was unknown, the Tribunal would have the power to require Internet Service Providers and other intermediaries to reveal the person’s identity to the Tribunal. Once notified, anyone subject to an order would have the opportunity to defend the proposed action. In cases where the author could not be located, an ISP or web administrator could be required to remove or amend the offending content.⁸⁰⁷

The New Zealand Government does not yet appear to have responded to or commented on the NZLC’s proposals. Accordingly, at this point, it is unknown whether the NZLC’s proposal for a Communications Tribunal will be accepted, modified, or rejected.

7.3.3 The Committee’s view

The Committee believes that there is a gap in existing administrative mechanisms for the resolution of complaints about offensive and harmful

⁸⁰⁴ New Zealand Law Commission, *Harmful digital communications: the adequacy of the current sanctions and remedies*, Wellington, Ministerial briefing paper, 2012, p. 8.

⁸⁰⁵ *ibid.*, 107-108.

⁸⁰⁶ *ibid.*, 77.

⁸⁰⁷ *ibid.*, 16-17.

online content, and that this gap could be filled by a body empowered to hear and determine such complaints.

The Communications Tribunal proposed by the NZLC, if created, would have the jurisdiction to deal with harmful communications matters beyond simply sexting-type images that have been posted to websites. In the Committee's view, it is logical and appropriate that such a body would be empowered to deal with a range of harmful or offensive digital communications, not just those related to sexting. Accordingly, the question of creating such a body takes the Committee somewhat beyond this Inquiry's Terms of Reference, as the establishment of such a body should take account of considerations about harmful digital communications more broadly.

Nonetheless, the Committee recognises that there is merit to the NZLC's proposal for a Communications Tribunal. In the Committee's view, the Victorian Government should give serious consideration to creating a body with similar characteristics to that proposed by the NZLC, and makes the following observations for the purpose of assisting the Government in this regard.

7.3.3.1 Desirable characteristics of a body to deal with complaints

When considering the creation of a system to deal with complaints, the NZLC identified a number of characteristics that such a system should have:

- it should be well publicised;
- it should be easily accessible;
- it should operate as informally as possible;
- it should operate quickly; and
- it should be inexpensive to those using it.⁸⁰⁸

The Committee agrees with the NZLC that all of these characteristics are vital to any proposed mechanism to fill the identified gap. In addition, the Committee considers that it is critical that the body is able to effect the removal of material where appropriate. This was emphasised by those who expressed concern to the JSC in relation to a possible Online Ombudsman; it was suggested that such an office would only be effective where material was hosted by a website registered in Australia.⁸⁰⁹

The NZLC also took account of the issue of effective resolution when it considered two alternative mechanisms to deal with complaints about harmful digital communications, which were a tribunal with power to make

⁸⁰⁸ *ibid.*, 108.

⁸⁰⁹ Joint Select Committee on Cyber-Safety, *High-wire act: cyber-safety and the young*, Parliament of the Commonwealth of Australia, Interim report, 2011.

enforceable orders, and a commissioner with persuasive rather than coercive power.⁸¹⁰ As previously discussed, the NZLC ultimately recommended the tribunal option, noting that a tribunal would give a legal authority which would be useful to schools, the police and other agencies, and it would have the added value that:

... its determinations would likely be recognised as authoritative by large overseas website hosts and service providers which, even though not resident within our jurisdiction, would regard such ... determinations as sufficient reason to take the required action in respect of the offensive communications. In the current absence of such an entity it can be difficult to get such an action.⁸¹¹

As the NZLC has suggested, a body that is well-recognised and considered to be authoritative could develop respect internationally, and could potentially develop direct links to large social networking sites such as Facebook and Twitter to allow content to be removed rapidly. In addition, the Committee notes the NZLC's suggestion that the focus of the body should initially be upon the author of the offending communication, as opposed to the website that hosts it.⁸¹² In many cases, the author will be known and will be resident in Australia. In cases where the person's identity was unknown, the body could require ISPs to reveal the person's identity. If the author could not be located, an ISP or web administrator could be required to remove or amend the offending content.

The Victorian Government could consider creating a stand-alone tribunal to deal with harmful communications, or extend the functions of the VCAT. The VCAT's stated purpose – to provide Victorians with a “low cost, accessible, efficient and independent tribunal ...”⁸¹³ – is consistent with how a proposed body to deal with digital communications complaints should operate. In addition, the VCAT has a number of ‘lists’ which specialise in particular types of cases, such as a Civil Claims List, a Guardianship List, and a Legal Practice List. It would be consistent with the way that VCAT operates to add a specific, specialised “Digital Communications List” to VCAT's functions.

Recommendation 13: That the Victorian Government consider creating a Digital Communications Tribunal, either as a stand-alone body or as a ‘list’ within the Victorian Civil and Administrative Tribunal, to deal with complaints about harmful digital communications. Development of the Digital Communications Tribunal should be informed by the New Zealand Law Commission's proposal for a Communications Tribunal.

Finally, the Committee notes that it would be ideal for there to be a national body to deal with and resolve complaints about harmful digital communications, rather than state-based bodies. A national body would

⁸¹⁰ New Zealand Law Commission, *Harmful digital communications: the adequacy of the current sanctions and remedies*, Wellington, Ministerial briefing paper, 2012, p. 108.

⁸¹¹ *ibid.*, 109.

⁸¹² *ibid.*, 17.

⁸¹³ Victorian Civil and Administrative Tribunal, 'Service charter', viewed 14 March 2013, <www.vcat.vic.gov.au>.

provide consistency across the country, make it easier to enforce orders across states and territories, and be likely to gain international recognition and respect from international companies more quickly and easily than a state-based tribunal. The power in the Australian Constitution to legislate with respect to “postal, telegraphic, telephonic, and other like services”⁸¹⁴ would appear to allow the Federal Parliament to create such a tribunal.

The Committee suggests that the Victorian Government need not necessarily wait for the Commonwealth Government to act in this regard, but could proceed to establish a state-based tribunal. Should the state-based tribunal operate successfully, it could provide a model for a national tribunal and would be a compelling precedent in favour of the creation of a national body.

Whether or not the Victorian Government decides to create a state based tribunal, the Committee considers that it would be beneficial to advocate for a Federal Digital Communications Tribunal.

Recommendation 14: That the Victorian Government advocate that the Standing Council on Law and Justice consider issues surrounding the creation of a national Digital Communications Tribunal.

**Adopted by the Law Reform Committee
13 May 2013**

⁸¹⁴ *Australian Constitution*, section 51(v).

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- Rogers v Television New Zealand Ltd* [2008] 2 NZLR 78 (SC).
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Legislation

Victoria

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Classification (Publications, Films and Computer Games) (Enforcement) Act 1995 (Vic)

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Classification (Publications, Films and Computer Games) (Enforcement) (Amendment) Act 2005 (Vic)

Classification of Films and Publications Act 1990 (Vic)

Crimes (Amendment) Act 2000 (Vic)

Crimes Act 1958 (Vic)

Criminal Procedure Act 2009 (Vic)

Defamation Act 2005 (Vic)

Equal Opportunity Act 2010 (Vic)

Films (Classification) Act 1984 (Vic)

Films Act 1971 (Vic)

Justice Legislation (Sexual Offences and Bail) Act 2004 (Vic)

Monetary Units Act 2004 (Vic)

Police Offences Act 1958 (Vic)

Public Prosecutions Act 1994 (Vic)

Sentencing Act 1991 (Vic)

Sentencing and Other Acts (Amendment) Act 1997 (Vic)

Sex Offenders Registration Act 2004 (Vic)

Summary Offences Act 1966 (Vic)

Surveillance Devices Act 1999 (Vic)

Working With Children Act 2005 (Vic)

Commonwealth

Australian Constitution

Broadcasting Services Act 1992 (Cth)

Copyright Act 1968 (Cth)

Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Act (No. 2) 2004 (Cth)

Criminal Code Act 1995 (Cth)

Telecommunications Act 1997 (Cth)

Australian Capital Territory

Crimes (Child Sex Offenders) Act 2005 (ACT)

New South Wales

Child Protection (Offenders Registration) Act 2000 (NSW)

Northern Territory

Child Protection (Offender Reporting and Registration) Act 2004 (NT)

Queensland

Child Protection (Offender Reporting) Act 2004 (Qld)

South Australia

Child Sex Offenders Registration Act 2006 (SA)

Tasmania

Community Protection (Offender Reporting) Act 2005 (Tas)

Criminal Code Act 1924 (Tas)

Western Australia

Community Protection (Offender Reporting) Act 2004 (WA)

Treaties

Worst Forms of Child Labour Convention, opened for signature 17 June 1999, 2133 UNTS 161 (entered into force 19 November 2000).

Appendix One:

List of submissions

	Name of individual or organisation	Date received
1	Mr James Pearce	8 May 2012
2	Dr Giselle Solinski	10 May 2012
3	Name withheld	15 May 2012
4	Family Voice Australia	19 May 2012
5	Mrs Lesley-Anne Ey	30 May 2012
6	Australian Government Attorney-General's Department	30 May 2012
7	Salvation Army Oasis Hunter	30 May 2012
8	Australian Privacy Foundation	8 June 2012
9	BoysTown	12 June 2012
10	Dr June Kane	12 June 2012
11	Criminal Bar Association (Vic)	13 June 2012
12	Ms Susan McLean	13 June 2012
13	Royal Australian and New Zealand College of Psychiatrists (RANZCP) (Victorian Branch)	14 June 2012
14	Women's Health Grampians	14 June 2012
15	Victorian Catholic Schools Parent Body	14 June 2012
16	South Eastern Centre Against Sexual Assault (SECASA)	14 June 2012
17	Gippsland Community Legal Service	14 June 2012
18	Family Planning Victoria	14 June 2012
19	Castan Centre for Human Rights Law	14 June 2012
20	Youthlaw	14 June 2012
21	Women's Health West	15 June 2012
22	headspace	15 June 2012
23	Eastern Community Legal Centre	15 June 2012
24	Victoria Police	15 June 2012
24A	Victoria Police* <i>* Supplementary submission</i>	18 September 2012
25	Office of the Child Safety Commissioner	15 June 2012
26	VicHealth	15 June 2012
27	Civil Liberties Australia	15 June 2012
28	Liberty Victoria	15 June 2012
29	Ms Ella Keogh and others	15 June 2012
30	Ms Maree Crabbe	15 June 2012

	Name of individual or organisation	Date received
31	Dr Katherine Albury, Dr Kate Crawford, Mr Paul Byron (UNSW Journalism and Media Research Centre)	15 June 2012
32	CASA Forum	15 June 2012
33	Parents Victoria	15 June 2012
34	Dr Amy Shields Dobson, Dr Mary Lou Rasmussen, Dr Danielle Tyson (Monash University)	15 June 2012
35	Australian Council of Educational Research (ACER)	15 June 2012
36	National Children's and Youth Law Centre	15 June 2012
37	Surf Coast Secondary College	15 June 2012
38	Electronic Frontiers Australia	15 June 2012
39	Ms Emilia Kostovski	15 June 2012
40	Gatehouse Centre, Royal Children's Hospital	18 June 2012
41	Victorian Equal Opportunity and Human Rights Commission	18 June 2012
42	The Alannah and Madeline Foundation	18 June 2012
43	Catholic Education Commission of Victoria	19 June 2012
44	Western Australia Police	20 June 2012
45	South Australia Police	21 June 2012
46	Law Institute of Victoria	22 June 2012
47	Australian Christian Lobby	22 June 2012
48	Tasmania Police	25 June 2012
49	Association of Heads of Independent Schools of Australia	25 June 2012
50	Children's Legal Service, Legal Aid New South Wales	27 June 2012
51	Office of the Victorian Privacy Commissioner	29 June 2012
52	Youth Advisory Group to the Office of the Victorian Privacy Commissioner	29 June 2012
53	Children's Court of Victoria	3 July 2012
54	Macedon Ranges Local Safety Committee	3 July 2012
55	Ms Shelley Walker	6 July 2012
56	Name withheld	10 July 2012
57	Australian Federal Police	11 July 2012
58	Victoria Legal Aid	17 July 2012
59	Just Leadership Program, Monash Law Students' Society	17 July 2012
60	Department of Education and Early Childhood Development (DEECD)	19 July 2012

Appendix Two: List of witnesses

Public hearing, 27 July 2012 Room G2, 55 St Andrews Place, East Melbourne

Witness(es)	Organisation
Ms Karen Hogan, Manager Ms Caroline Whitehouse, Senior Clinician	Gatehouse Centre, Royal Children's Hospital
Ms Elly Taylor, Sexual and Reproductive Health Co-ordinator Ms Lucy Forwood, Health Promoting Schools Co-ordinator Ms Stephanie Rich, Health Promotion Worker	Women's Health West
Dr Gregory Lyon SC, Chair Mr Tony Trood	Criminal Bar Association (Vic)

Public hearing, 7 August 2012 Room G2, 55 St Andrews Place, East Melbourne

Witness(es)	Organisation
Dr Anthony Bendall, Acting Victorian Privacy Commissioner Mr David Taylor, Director, Privacy Awareness Mr Scott May, Senior Policy and Compliance Officer	Office of the Victorian Privacy Commissioner
Ms Megan Glyde Mr Marcel Boulat Mr Aishwarya Hatwal Ms Eloise Zoppos	Youth Advisory Group to the Office of the Victorian Privacy Commissioner
Ms Jill Karena, Manager, Community Development, Macedon Ranges Shire Council Ms Pauline Neil, Team Leader, Youth Development, Macedon Ranges Shire Council Detective Sergeant Shane Brundell, Macedon Ranges Crime Investigation Unit, Victoria Police Leading Senior Constable Joe Grbac, Macedon Ranges Youth Resource Officer, Victoria Police Ms Darlene Cole, Youth Partnerships Officer, Macedon Ranges Shire Council	Macedon Ranges Local Safety Committee
Ms Susan McLean	Cyber Safety Solutions

**Public hearing, 27 August 2012
Room G2, 55 St Andrews Place, East Melbourne**

Witness(es)	Organisation
Mr Michael Stanton, Member, Policy Committee	Liberty Victoria
Ms Michelle Hunt, Project Worker: webWise Initiative Ms Emma Mahoney, Program Manager	Women's Health Grampians
Mr Daniel Flynn, Victorian State Director	Australian Christian Lobby

**Public hearing, 18 September 2012
Room G2, 55 St Andrews Place, East Melbourne**

Witness(es)	Organisation
Mr John Dalgliesh, Manager, Strategy and Research Ms Megan Price, Senior Researcher	BoysTown
Acting Commander Neil Paterson, Intelligence and Covert Support Department Detective Senior Sergeant Scott Colson, Officer In Charge, Sex Offenders Registry	Victoria Police
Ms Shelley Walker	Individual
Ms Belinda Lo, Principal Lawyer	Eastern Community Legal Centre

**Public hearing, 8 October 2012
Room G2, 55 St Andrews Place, East Melbourne**

Witness(es)	Organisation
Mr Nicholas Pole, Deputy Secretary, Regional Support Ms Kris Arcaro, Director, Student Wellbeing and Engagement Division Ms Patricia Brophy, Manager, Student Critical Incident Advisory Unit	Department of Education and Early Childhood Development

**Public hearing, 10 December 2012
Room G3, 55 St Andrews Place, East Melbourne**

Witness(es)	Organisation
Dr Dan Svantesson, Immediate Past Vice-Chair	Australian Privacy Foundation
Mr Greg Gebhart, Senior Trainer, Cybersmart Outreach Ms Andree Wright, Acting General Manager, Digital Economy Division Ms Jonquil Ritter, Executive Manager, Citizen and Community Branch Mr Dominic Byrne, Acting Executive Manager, Security, Safety and e-Education Branch Ms Sharon Trotter, Manager, Cybersmart Programs Section	Australian Communications and Media Authority (ACMA)
Judge Paul Grant, President	Children's Court of Victoria
Dr Amy Shields Dobson Dr Mary Lou Rasmussen Dr Danielle Tyson	Academics from Monash University
Mr Matthew Keeley, Director Ms Kelly Tallon, Project Officer	National Children's and Youth Law Centre

Appendix Three: List of briefings

Toronto, 29 October 2012

Dr Andrea Slane, Associate Professor and Director, Legal Studies Program, Faculty of Social Science and Humanities	University of Ontario Institute of Technology
Detective Staff Sergeant Frank Goldschmidt Detective Sergeant Paul Thompson Detective Sergeant Terry Paddon	Ontario Provincial Police, Child Exploitation Unit
Detective Susan Burke Detective Michelle Bond	Toronto Police Service
Detective Randy Norton	Durham Region Police Service
Lisa Henderson, Crown Counsel Catherine Cooper, Counsel	Ontario Crown Law Office (Toronto)
Abby Dushman, Director, Public Safety Program Danielle S McLaughlin, Director, Education and Administration	Canadian Civil Liberties Association

Toronto, 30 October 2012

Dave Fraser, Director of Special Projects & Social Media	Canadian Safe School Network
Bill Byrd, Safe Schools Administrator	Toronto District School Board
Constable Scott Mills, Social Media Relations Officer	Toronto Police Service
Sharon Wood, President and CEO Carolyn Mak, Director, Knowledge Mobilization & Program Development Alisa Simon, Vice President, Counselling Services & Programs	Kids Help Phone

Ottawa, 31 October 2012

Ottawa, 31 October 2012	
Jane Bailey, Associate Professor, Faculty of Law, Common Law Section Valerie Steeves, Associate Professor, Department of Criminology	University of Ottawa
Sgt Heather Lachine, Supervisor, School Resource Officers Sgt Maureen Hunt, District Directorate Cst Amy Haggerty, School Resource Officer Cst Carrie Archibald, School Resource Officer Det Michael Pelletier, Internet Child Exploitation	Ottawa Police
Mr Brett Reynolds, Principal - Safe Schools Network	Safe Schools
Lisa Miles, Assistant Crown Attorney	Crown Attorney's Office

Ottawa, 1 November 2012

Ottawa, 1 November 2012	
Lara Karaian, Assistant Professor, Institute of Criminology and Criminal Justice	Carleton University

New York, 5 November 2012

New York, 5 November 2012	
Johanna Miller, Assistant Advocacy Director	American Civil Liberties Union
Amy Adler, Professor of Law	New York University School of Law

Washington D.C., 6 November 2012

Eliot Imse, Policy and Public Affairs Officer Jennifer Stoff, Deputy Director	District of Columbia Office of Human Rights
Shawn Gaylord, Director of Public Policy	Gay Lesbian and Straight Education Network
Lauren Jones, Ph.D., School Mental Health Provider	
Kristie Brackens, ICAC Taskforce Management	United States Department of Justice
Carrie Mulford, Ph.D.	National Institute of Justice
Lyndsay Olsen Carolyn	Cybertipline
Captain Kirk Marlowe NOVA ICAC Special Agent Johnny Hall	Virginia State Police
Lt John Wilhelm, ICAC Matthew	Maryland State Police
Jennifer Hanley, Director, Legal & Policy Emma Morris, International Policy Manager	Family Online Safety Institute

Los Angeles, 8 November 2012

Lieutenant Andrea Grossman, LA Regional ICAC Commander Detective Gil Escontrias	Los Angeles Police Department
Rob Abrams, Group Supervisor	Department of Homeland Security
Lisa Feldman, Assistant U.S. Attorney	United States Attorney's Office
Tracie Webb, Los Angeles City Attorney	Los Angeles City Attorney's Office
Marc Beaart, Los Angeles Deputy District Attorney	Los Angeles District Attorney's Office
Sergeant Pete Hahn Detective Bernell E. Trapp	County of Los Angeles Sheriff's Department
Maureen Pacheco, Associate Clinical Professor of Law, Clinical Director, Center for Juvenile Law and Policy Susan G. Poehls, Director, Trial Advocacy Programs, William C. Hobbs Professor of Trial Advocacy Emily Shaaya, Graduate	Loyola Law School
Melissa Sherman, Executive Director	Beyond Bullies

Appendix Four: Recommendations from the VLRC report *Surveillance in public places*

The Committee refers to the following recommendations, excerpted from the report of the Victorian Law Reform Commission (VLRC) entitled *Surveillance in public places: Final Report 18*.

The Committee endorses the below recommendations, insofar as they relate to creating a statutory cause of action for a serious invasion of privacy by misuse of private information. The recommendations regarding the VLRC's other proposed cause of action – serious invasion of privacy by intrusion upon seclusion – are not endorsed by the Committee, but are included for the sake of completeness.

CREATING STATUTORY CAUSES OF ACTION

22. There should be two statutory causes of action dealing with serious invasion of privacy caused by misuse of surveillance in a public place.
23. The first cause of action should deal with serious invasion of privacy by misuse of private information.
24. The second cause of action should deal with serious invasion of privacy by intrusion upon seclusion.
25. The elements of the cause of action for serious invasion of privacy caused by misuse of private information should be:
 - a. D misused, by publication or otherwise, information about P in respect of which he/she had a reasonable expectation of privacy; and
 - b. a reasonable person would consider D's misuse of that information highly offensive.
26. The elements of the cause of action for serious invasion of privacy caused by intrusion upon seclusion should be:
 - a. D intruded upon the seclusion of P when he/she had a reasonable expectation of privacy; and
 - b. a reasonable person would consider D's intrusion upon P's seclusion highly offensive.
27. The defences to the cause of action for serious invasion of privacy caused by misuse of private information should be:
 - a. P consented to the use of the information
 - b. D's conduct was incidental to the exercise of a lawful right of defence of person or property, and was a reasonable and proportionate response to the threatened harm
 - c. D's conduct was authorised or required by law
 - d. D is a police or public officer who was engaged in his/her duty and the D's conduct was neither disproportionate to the matter being investigated nor committed in the course of a trespass

- e. if D's conduct involved publication, the publication was privileged or fair comment
 - f. D's conduct was in the public interest, where public interest is a limited concept and not any matter the public may be interested in.
28. The defences to the cause of action for serious invasion of privacy caused by intrusion upon seclusion should be:
- a. P consented to the conduct
 - b. D's conduct was incidental to the exercise of a lawful right of defence of person or property, and was a reasonable and proportionate response to the threatened harm
 - c. D's conduct was authorised or required by law
 - d. D is a police or public officer who was engaged in his/her duty and the D's conduct was neither disproportionate to the matter being investigated nor committed in the course of a trespass
 - e. D's conduct was in the public interest, where public interest is a limited concept and not any matter the public may be interested in.
29. The remedies for both causes of action should be:
- a. compensatory damages
 - b. injunctions
 - c. declarations.
30. Costs should be dealt with in accordance with section 109 of the VCAT Act.
31. Jurisdiction to hear and determine the causes of action for serious invasion of privacy by misuse of private information and by intrusion upon seclusion should be vested exclusively in the Victorian Civil and Administrative Tribunal.
32. These causes of action should be restricted to natural persons. Corporations and the estates of deceased persons should not have the capacity to take proceedings for these causes of action.
33. Proceedings must be commenced within three years of the date upon which the cause of action arose.⁸¹⁵

⁸¹⁵ Victorian Law Reform Commission, *Surveillance in public places*, Melbourne, Final Report 18, 2010, pp. 17-18.