Submission

on

Sexting

to the

Law Reform Committee
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1. Introduction

On 1 September 2011 the Legislative Assembly of the Parliament of Victoria referred to the Law Reform Committee 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')”. The terms of reference specify that the following matters are to be considered:

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.

Public submissions have been invited by the Committee and these are due by 15 June 2012. The Committee is due to report by 30 December 2012.

2. Sexting

The ready availability of technologies such as mobile phones which function as cameras, and the internet, have certainly created a situation in which sexual images and messages can be more rapidly and widely disseminated.

Adolescents may give little thought to the consequences of creating and sharing a naked picture of themselves with another person using this technology. The consequences include the ease with which such an image may be widely distributed to others and the permanence of the image which once available widely cannot be recalled and deleted.

The law has role to play in protecting minors from the harms which are associated with sexting.

However, the law should operate flexibly to distinguish various offences according to their seriousness and not to disproportionately punish minor offences nor provide inappropriate defences for serious offences.

3. Sex Offenders Registration Act 2004

The Sex Offenders Registration Act 2004 requires the mandatory registration and consequent monitoring and restrictions on all persons convicted of specified offences including child pornography offences.
This appears to have led to the inclusion of persons on the register for relatively minor offences, including some involving sexting, when there is little reasonable likelihood of the person posing a risk to children.

The Law Reform Commission of Victoria reported on the Sex Offenders Registration Act 2004 in December 2011.

It noted that the offence of “possessing child pornography, can occur in a diverse range of circumstances. The offence of possessing child pornography applies to young people who take photographs of naked, underage partners with their permission, and to members of paedophile rings that collect graphic child abuse and child pornography material. Registering the former offenders might be of little benefit, while registering the latter might assist in protecting children from the risk of sexual abuse.”

It recommended that child pornography offences be classified as Category 3 offences and that for persons convicted of such offences “the prosecution should bear the burden of satisfying a court on the balance of probabilities that it is necessary to make a registration order”.

This seems to be an appropriate approach.

**Recommendation 1:**

*The Sex Offenders Registration Act 2004 should be amended so that persons convicted of child pornography offences are only placed on the register if a court is satisfied on the balance of probabilities that it is necessary to do so.*

### 4. Child pornography offences

Offences concerning child pornography are dealt with by sections 67A to 70AA of the *Crimes Act 1958*.

The offences of production of child pornography (section 68); procurement of a minor for child pornography (section 69) and possession of child pornography (section 70) are each applicable to the practice of sexting if it involves an image of a minor.

There is no reason to exclude the practice of sexting as a whole from the application of the child pornography offences. However, it is useful to consider possible defences.

There are four relevant defences provided in section 70 (2) (b) – (e) for knowingly possessing child pornography:

- (b) that the film, photograph, publication or computer game possesses artistic merit or is for a genuine medical, legal, scientific or educational purpose; or

- (c) that the accused believed on reasonable grounds that the minor was aged 18 years or older or that he or she was married to the minor; or

- (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.
Curiously these defences apply only to possession of child pornography, not to production of or procurement of a child for child pornography. However, the defence in (d) refers to the accused making the film or taking the photograph, which would involve the offence of producing child pornography. This inconsistency should be addressed.

The “artistic merit” defence in (b) makes the defence too broad and enables purveyors of child pornography to avoid conviction too easily. Possession of child pornography is sufficiently serious offence that the “artistic merit” defence in (b) should be removed.

The defences in (c) are appropriate.

The belief that a minor was aged 18 or more must be “on reasonable grounds” for the defence to succeed. A simple assertion of belief as to age is not sufficient. Some 16 or 17 year olds may easily present themselves as 18 years or older. Some may even do so maliciously in an attempt to get an older person in trouble with the law.

Marriage in Australia is lawful, under certain conditions for minors aged 16 or 17. It is appropriate that marriage be a defence.

The defence in (d) is too broad. Producing child pornography is an offence under section 68 of the Crimes Act 1958, whether the age gap is under two years or not. However, child pornography produced illegally by a person, may be legally possessed by the same person if the age gap is under two years – specifically because it was produced (illegally) by that person. This seems a glaring inconsistency.

The provision allows any 19 year old person to possess child pornography of any kind involving a 17 year old provided the 19 year old made the film or took the photograph or was given the film or photography by the minor. It would also allow a 14 year old to exploit a 12 year old child for example. The defence doesn’t even require the minor to have been a willing participant in the production of the child pornography.

Similarity of age may be relevant, along with other factors such as willing participation, in assessing the seriousness of the offence, but it shouldn’t be a complete defence to the offence.

The defence in (e) may be appropriate if the minor is the only person depicted in the film or photograph. However, as worded the defence would allow a 17 year old boy to have a defence for possessing the vilest child pornography – even involving infants – provided he was also depicted in the film or photograph.

**Recommendation 2:**

The defences provided in the Crimes Act 1958 for the offence of possessing child pornography should be revised:

(a) to remove the “artistic merit” defence;
(b) to remove the similarity of age defence; and
(c) to limit the defence that the accused is the minor depicted in a film or photograph to circumstances where the accused is the only minor depicted.

**Recommendation 3:**

The Act should be amended to specifically provide that, in considering the appropriate sentence for child pornography offences, factors such as similarity of age and willing participation of a minor aged 16 or more are relevant factors.
5. Publishing without consent

There is currently no clear offence committed by a person who disseminates by mobile phone or the internet a sexual or naked image of an adult without the consent of the person depicted.

There is a case for making this a specific offence to deter the misuse of intimate photographs which one party thinks are for private use only.

Recommendation 4:

There should be a new offence for publishing or disseminating a sexual or nude photograph or film of a person without the person’s consent.

6. Endnotes


2. Marriage Act 1961 (Commonwealth), Section 12