RESPONSE OF THE CRIMINAL BAR ASSOCIATION TO THE
PARLIAMENT OF VICTORIA INQUIRY INTO SEXTING:

1. The Criminal Bar Association has been invited to comment on the inquiry into 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].

1.1 The factual basis underlying these submissions is that as outlined in the terms of reference.

2. Our submissions are confined to:
   a. the appropriateness of existing laws especially criminal offences,
   and
   b. the application of the Sex Offenders Register.¹

3. These submissions are focused on the consequences of existing laws as they impact on young adults.  We understand that submissions with respect to children are to be made on their behalf by other specialist bodies.

Appropriateness of existing criminal offences and laws:

4. As either messages or images sent from mobile telephones fall within the various current definitions of child pornography², many young adults are charged with serious child pornography offences such as possession and production of child pornography³, and using a carrier service to transmit child pornography⁴, as a result of sexting.

¹ Pursuant to the Sex Offenders Registration Act 2004 (Vic).
² See, for example, Crimes Act 1958 (Vic), s 67A and Criminal Code Act 1995 (Cth), s 473.1.
³ Crimes Act 1958 (Vic), Sections 70(1), & 68(1).
⁴ Criminal Code Act 1995 (Cth), s 474.19(1)(iii)
5. These offences are all indictable offences with significant maximum penalties.

6. They also carry a significant social stigma that has a real and lasting capacity to prejudice employment, travel, and social opportunities. This social stigma is not tempered by the imposition of sentencing orders that do not carry terms of imprisonment.

7. Sexting is conduct that has evolved from the rapid spread and evolution of technology involving both the internet and mobile telephones. When enacted, child pornography legislation did not envisage social and cultural behaviour such as sexting.

What Charges are appropriate?

8. Should there be a need to charge an offender in these circumstances, the Criminal Bar Association considers that the better means of dealing with sexting is to lay lesser charges such as using a carriage service to cause offence. Whilst still very serious, it is perceived that such an offence does not carry the social stigma of child pornography offences.

The Magistrates’ Court Diversion Program:

8. It is submitted that the use of the criminal law to charge young adults and to proceed to the imposition of a sentence is in many cases unwarranted. In many instances, the offender does not represent a risk of further offending, whether it be of sexual offending or otherwise.

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5 Criminal Code Act 1995 (Cth), s 474.17(1)(b)
6 Criminal Procedure Act 2009 (Vic), s 59
9. The criminal law has long recognised that young adults vary in their maturity, and that many can act impulsively and spontaneously to their own detriment. In most cases of this nature, the primary principle of the criminal law ought to be the rehabilitation of the offender, as it is the community as a whole, as well as the offender, who benefit from such rehabilitation.

10. One proposal to deal with this is to specifically authorise Police to include sexting conduct within the ambit of the Diversion Program currently operating in Victoria. This would enable the Police, the accused, and the Court to determine the level of any risk of further offending.

11. Should a Magistrate assess an offender as suitable, the charges would be adjourned; and could be done so upon targeted conditions such as the completion of the person of an appropriate sexual behaviour counselling course (if deemed necessary by a Magistrate).

12. In theory, such conduct can now come within the existing Diversion Program. However, in reality, police informants are reluctant to recommend young adults for inclusion, as they are “child pornography” offences. Thus there is the need to specifically authorise Police officers to be able to take this step.

The Application of the Sex Offenders Register:
13. Since its introduction in October 2004, the Sex Offenders Registration Act 2004 has prescribed a mandatory registration scheme for adult offenders who have committed sexual offences involving a child. Offenders are obliged to comply with the Act’s obligations for terms of 8 years, 15 years, or for the balance of the person’s life, depending on the type and number of offences committed.
14. The Registration scheme was not enacted to apply to young adults who engaged in otherwise consensual sexual behaviour and who breach criminal laws when taking and transmitting images or messages.

15. The Act proceeds from the assumption that all offenders present risks of re-offending. Such an assumption is not a valid one. This means that there are existing offenders who are subject to the rigorous application of the Act who ought not be registered.

16. In cases of sexting, there will of course be cases where it is appropriate for an offender to be charged and for the matter to proceed to sentencing. Even in such cases, registration ought not to be automatic. The Act should be amended to give to Magistrates the discretion to order registration. This discretion ought to extend not only as to the fact of registration but also, where appropriate:
   i) the length of registration,
   ii) the terms of registration.

17. If it is determined that a sexting matter should proceed to sentencing, then the CBA considers that registration should only be imposed if the sentencing Court is satisfied beyond reasonable doubt that the person poses a risk to the sexual safety of one or more persons of the community. This is the standard adopted under the Act in relation to offences that do not fall within the scheduled classes of scheduled sexual offences and to sexual offences committed by children: see Sex Offender Registration Act 2004, s 11 (3).

17. Further, it is to be noted that at present, the Act has no mechanism to allow sexting offenders who are subject to 8 and 15 year registration terms, to seek either to have specific conditions suspended or deleted, or
to have their length of term varied either by way of reduction of years or varied to terminate the Order altogether.

18. The Act ought to contain such an ability to vary Orders. Initially such an application could be made to the Chief Commissioner of Police, with rights of appeal by both parties, to the Victorian Administrative Appeals Tribunal [VCAT]. Otherwise, the application could be made to the Magistrates Court, with a right of appeal to the County Court.

Dr Gregory Lyon SC
Chair,
Criminal Bar Association
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