Parliament of Victoria

Law Reform Committee

Inquiry into 'sexting'.

Susan McLean

Member of Victoria Police 27 years
Certificate in Child Safety on the internet – UCLAN UK
Protecting Children Online Certificate – NCMEC/ICAC USA
Member National Centre Against Bullying (NCAB) Cybersafety Committee
Member of Expert Data Base – Safer Internet Programme Europe
Certificate IV Workplace Training and Assessment

Contents:-

Introduction Page 2,3
Adolescent Brain Development Page 3,4
International Research Page 5,6,7,8
Sexting in context Page 9,10,11,12
Safe Schools Framework Page 12
Conclusion and Recommendations Page 12,13,14
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An October 2006 study tour to the United States of America as well as subsequent research conducted in Australia and the completion of a university course in the UK have highlighted the growth in popularity of internet technology, especially with youth, which has seen cyber bullying, sexting and harassment emerging as the number one issue confronting the safety and well being of young people and the wider community. Together with associated technology including 3G/4G mobile telephones, webcams, Skype, live' gaming sites, virtual worlds and the explosion of social networking sites such as Facebook and Twitter, today's youth have access to and are accessible by many millions of people worldwide.

Australians love their smartphones with nearly 10 million more to be in use by 2015, taking the total number of smartphone users to 18.5 million, according to new research from Telsyte. In 2015 nearly 90% of all mobile phone users will have a smartphone as their primary mobile device, up from just under 50% in 2011. A study released in September 2011 has found that Australia has the second highest smartphone usage by population density in the world, ahead of the US, the UK and Japan, and second only to the city/state of Singapore. (IPSOS Research on behalf of Google). Two in five Australian smartphone owners use their device to search daily, which exceeds the equivalent usage in the UK and Germany.

Whilst Australian research on the issue of 'sexting' or sending a 'sext text' is scant, anecdotal evidence suggests that there are a significant number of young people under the age of 18 years engaging in this 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 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, all of which can be categorised as 'sexting'.

**Adolescent Brain Development**

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. The US National Institute of Mental Health (2001) reports that MRI studies are shedding light on how teens may process emotions differently than adults. These studies have shown the remarkable changes that occur in the brain during the teen years, and also demonstrate that the teenage brain is a very complicated and dynamic arena, one that is not easily understood.

The American Bar Association (ABA, 2004), Juvenile Justice Centre released a report that considered the new understanding of adolescent brain development to explore the issue of criminal culpability.

The article quotes Jay Giedd, a researcher at the National Institute of Mental Health, who explains that during adolescence the:

*part of the brain that is helping organization, planning and strategizing is not done being built yet… It’s sort of unfair to expect [adolescents] have adult levels of organizational skills or decision making before their brain is finished being built.*

Dr. Deborah Yurgelun-Todd of Harvard Medical School has studied the relation between these new findings and teen behaviour and concluded that adolescents often rely on emotional parts of the brain, rather than the frontal lobe. She explains, “one of the things that teenagers seem to do is to respond more strongly with gut response than they do with
evaluating the consequences of what they’re doing.” Also, appearances may be deceiving:

Just because they’re physically mature, they may not appreciate the consequences or weigh information the same way as adults do. So we may be mistaken if we think that [although] somebody looks physically mature, their brain may in fact not be mature.

This discovery gives us a new understanding into juvenile delinquency. The frontal lobe is “involved in behavioral facets germane to many aspects of criminal culpability,” explains Dr. Ruben C. Gur, neuropsychologist and Director of the Brain Behavior Laboratory at the University of Pennsylvania.

Perhaps most relevant is the involvement of these brain regions in the control of aggression and other impulses... If the neural substrates of these behaviors have not reached maturity before adulthood, it is unreasonable to expect the behaviors themselves to reflect mature thought processes. 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.” (ABA, 2004)

It is clear from this new understanding of adolescent brain development that children, adolescents and the developmentally impaired need extra protection from the dangers present in ICT.
International Research -
The National Campaign to Prevent Teen and unplanned Pregnancy and CosmoGirl.com commissioned a survey of teens and young adults to explore electronic activity. This is the first public study of its kind to quantify the proportion of teens and young adults that are sending or posting sexually suggestive text and images. The survey had 1280 respondents of which 653 were teens (13 - 19) and was conducted between September 25th and October 3rd 2008.

How many teens say they have sent/posted nude or semi-nude pictures or video of themselves?

- 20% of teens overall
- 22% of teen girls
- 18% of teen boys
- 11% of young teen girls (ages 13-16)

Who are these sexually suggestive messages and images being sent to?

- 71% of teen girls and 67% of teen guys who have sent or posted sexually suggestive content say they have sent/posted this content to a boyfriend/girlfriend.
- 21% of teen girls and 39% of teen boys say they have sent such content to someone they wanted to date or hook up with.
- 15% of teens who have sent or posted nude/seminude images of themselves say they have done so to someone they only knew online.
Why do teens send or post sexually suggestive content?

- 51% of teen girls say pressure from a guy is a reason girls send sexy messages or images; only 18% of teen boys cited pressure from female counterparts as a reason.
- 23% of teen girls and 24% of teen boys say they were pressured by friends to send or post sexual content.

Among teens who have sent sexually suggestive content:

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

How common is it to share sexy messages and images with those other than the intended recipient?

- 44% of both teen girls and teen boys say it is common for sexually suggestive text messages to get shared with people other than the intended recipient.
- 36% of teen girls and 39% of teen boys say it is common for nude or semi-nude photos to get shared with people other than the intended recipient.
Pew Research Center’s Internet & American Life Project, Teens and Sexting December 2009

A nationally-representative phone survey of 800 minors aged 12-17 years found that 4% of cell phone owners aged 12 to 17 years had sent a sexually suggestive nude or nearly nude image of themselves to someone else on a cell phone, and 15% of cell-owning teens that age have received this kind of image of someone they know personally on their cell phone.

This exchange of suggestive images, also known as “sexting,” is most prevalent among older teens – 8% of 17-year-old cell-owners say they had sent suggestive images of themselves by text while only 4% of 12-year-olds with cell phones have done so.

The Pew Internet Project and the University of Michigan also conducted six focus groups with middle and high school students in three cities.

The focus group findings show that sexting occurs most often in one of three scenarios:

1. Exchanges of images solely between two romantic partners
2. Exchanges between partners that are then shared outside the relationship
3. Exchanges between people who are not yet in a relationship, but where often one person hopes to be.

“Teens explained to us how sexually suggestive images have become a form of relationship currency,” said Amanda Lenhart, Senior Research Specialist and author of the report.

These images are shared as a part of or instead of sexual activity, or as a way of starting or maintaining a relationship with a significant
other. And they are also passed along to friends for their entertainment value, as a joke or for fun.

Teens also described the pressure they feel to share these types of images. One high school girl wrote:

When I was about 14-15 years old, I received/sent these types of pictures. Boys usually ask for them or start that type of conversation. My boyfriend, or someone I really liked asked for them. And I felt like if I didn’t do it, they wouldn’t continue to talk to me. At the time, it was no big deal. But now looking back it was definitely inappropriate and over the line.

The report also reveals that teens who are more intense users of cell phones are more likely to receive sexually suggestive images. Teens with unlimited text messaging plans – 75% of cell-phone owning teens – are more likely to receive sexts containing images of people they know. Among this group, 18% reported receiving these images, compared with 8% of teens on limited plans and 3% of teens who pay per message. Further, teens who keep their phones on almost all the time are more likely than others to receive texts with suggestive images. For these teens, the phone has become such an important conduit for communication and content of all kinds that turning it off is nearly unthinkable.

“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,” said Lenhart. “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.”
The issue of 'Sexting' in context

In my experience, I am seeing a replication of all of the USA research in the schools and communities I visit. Interestingly, when I was in the Police Force, the number one reason for a naked image of a young person to be 'online' or on a mobile phone, was due to coercion or threat. Looking at the results of the NationalCampaign.org survey, this reason is the least likely one at 12% of respondents with reasons such as 'to be fun or flirtatious', 'as a sexy present' and 'in response to content sent to them', being the top three reasons for engaging in 'sexting' activity.

Understanding that young people today are exposed to a wide range of sexual imagery, in the words of songs, video clips, movies, the internet and in advertising which cause many to form the opinion that this behaviour is mainstream and will always have a favourable outcome. The reality is of course the opposite and young people often only become aware of this after the event.

Current education programs deliver minimal content about the consequences of 'sexting', and many focus on the 'social and emotional' consequences only. Most teens believe if they are happy and in agreement with the action (sexting), then it is OK. They do not understand the current legislation surrounding 'sexting' and its application to Child Pornography laws. Any cybersafety education program must be delivered not from prohibition but with the theme of Respect and Responsibility; Respect for yourself and others and the responsible use of technology. This must underpin all associated programs and will result in fewer victims and fewer offenders.

If we are to look at the reason for legislation and its associated penalties, laws are designed to protect the community from harm, to keep us safe, and to provide guidelines for acceptable behaviors. Penalties are designed to provide a punitive consequence for breaking a law and are therefore a deterrent from future violations.
The current Child Pornography legislation was clearly not written for the behaviour now known as 'sexting', but due to the nature of the action and the content of the image, sexting falls within the definition of child pornography and as such, those involved can be subjected to the full range of charges and penalties. Whilst I would have no hesitation in applying the law as it stands in certain circumstances, we must ask if it is a suitable punishment for a teen, guilty of no more than a 'brain fade' moment, or one who has willingly sent an image consensually to his/her partner.

Years ago, the images being circulated were often obtained under coercion or threat. Young girls in particular were tricked into sending naked or semi-naked images of themselves to keep in favour with their boyfriend. It was often an extension of 'I'll show you mine if you show me yours.' Explicit images were often taken when the victim was not in a position to make a good decision such as at a party where large amounts of alcohol had been consumed. In these cases, where a report has been made to Police, it is correct that criminal charges would be considered. While there may be girls coerced or forced into doing this, there’s also an increasing number of teenagers spontaneously sexting photos of themselves without a thought of the consequences. Once an image is online, it’s potentially there forever and could just be the trigger for those with a predilection for paedophilia to move from viewing an image to luring a child for sex. We need to be tough on sex offenders and deter kids from inadvertently fueling their actions but we also need a measured approach that doesn’t create a new class of criminals. At the moment, in the eyes of the law, that child is on the same penalty footing as a paedophile.

Whilst it is clear that the majority of these images can be defined as child pornography, we must ask ourselves if prosecution is always the best option. Young people need the opportunity to be educated in relation to these issues, as a conviction and subsequent listing on the sex offenders register is a catastrophic outcome for a young person who often, did not know any better. Prevention is better than prosecution and if we can
prevent young people from engaging in these activities, we will as a result, have fewer offenders and fewer offences being committed.

The community as a whole must take some responsibility and blame for the actions of today’s youth. The early sexualisation of young people is promoted everywhere and in most cases, popular culture simply endorses it. Many of the females idolised by today’s children exude sex and sexuality at every opportunity. Impressionable and vulnerable young people are ‘brainwashed’ into believing that they need to copy the actions of these ‘role models’ without giving any thought to the possible consequences.

Parents too must accept some responsibility for this phenomenon as often, young people are handed the technology with little or no guidance or supervision. It is imperative that all parents embrace technology for the valuable tool that it is and engage with their children in cyberspace as well as in the real world. Parents should know where their children go and what they do online the same as in their day to day life.

Communication is the key and rules and boundaries about acceptable online behaviours must be put in place. Never threaten total disconnection or removal of technology as punishment for a problem that might arise online. International and Australian research clearly shows that the majority of young people will not tell a parent if they are bullied or harassed online for fear of losing access. You must encourage your child to tell you about any problems they are having online, or mistakes they have made without fear of further punishment in the form of removal of access.

All adults entrusted with the care of our children, such as parents, teachers and other professionals must be educated and empowered so that they are able to guide and assist the children in their care. More importantly, young people must be given the opportunity to gain the knowledge and skills to safely navigate cyberspace, to identify risk and
take appropriate steps to keep themselves safe. Arrest and prosecution is not always the correct answer, nor should we see it as an acceptable solution to this problem.

**The National Safe Schools Framework**

The National Safe Schools Framework was developed by the Ministerial Council on Education, Employment, Training and Youth Affairs. It incorporates existing good practice and provides an agreed national approach to help schools and their communities address issues of bullying, harassment, violence, and child abuse and neglect. It is a collaborative effort by the Australian Government and State and Territory government and non-government school authorities and other key stakeholders. It presents a way of achieving a shared vision of physical and emotional safety and wellbeing for all students in all Australian schools and is the perfect vehicle for ensuring the inclusion of comprehensive cybersafety education.

**Conclusion and Recommendations**

In cases such as when the sexting image is not obtained in a consensual manner, the person featured was unable to consent (under the influence of alcohol/drugs or having an intellectual impairment) or the image was circulated without the persons consent then involvement by Police is correct. What is not correct however, is that on conviction for an offence of manufacture, transmit or possess Child Pornography, the defendant is automatically placed on the sex offenders register. This impost upon the defendant in a case of 'sexting' is substantially greater than what the legislation was written for, and subsequently the punishment is far and above the intention of the law which is to ensure the protection of vulnerable young people and the community from convicted paedophiles.
Young people who engage in 'sexting' type behaviors, consensually and with no criminal intent should not be caught up in a law that clearly was not intended for them, but what we don't want to occur is for people who are engaging in 'sexting' behavior that is clearly non consensual and/or with criminal intent are permitted to 'slip through' an amendment to the current legislation.

Whilst there will be a case for the decriminalisation of all 'sexting' behaviors, especially those that are consensual, we must take into account that vulnerable young people do not, nor can they always make good decisions about their own welfare, and legal consequences can assist with being a deterring factor. This will only be true however, if a comprehensive education program is provided to teens and those who care for them i.e. teachers, parents, youth workers etc.

Consideration must be given to ensuring consistency and we should avoid any amendments to Victorian Legislation, which will put the Victorian Statute in conflict with Commonwealth Legislation. Ideally, all States and Territories in Australia should adopt the same guiding principles in relation to this legislation otherwise you run the risk of a young person potentially being charged in one state for an act that is not criminal in another. The issue of consent must also be considered and the definition of consent currently applicable to sexual penetration offences could be applied to these offences (sexting) to ensure that those coerced to participate could still seek recourse under legislation.

Clearly this is a complex issue and one that can have grave consequences for young people engaging in it. Automatic inclusion on the Sex Offenders Register is clearly not the intention of the legislation under which young people who are 'sexting' are currently charged. We must ensure that this anomaly in the law is addressed and amended so that judicial discretion can be applied to each individual case without creating a loop-holer which true paedophiles can exploit for their own benefit.
**Recommendations:-**

That an amendment to the Act be made to include the offences of "Manufacture, possess and/or transmit child pornography (sexting)," which would be the applicable offence for 'criminal and/or non consensual' sexting involving images of person under the age of 18 years.

That the mandatory inclusion on the sex offenders register for a young person who has been convicted of Child pornography offences under current legislation for 'sexting' be amended to allow for judicial discretion to be applied.