The Executive Officer  
Law Reform Committee  
Parliament of Victoria  
Spring Street  
EAST MELBOURNE VIC 3002

Dear Dr Koops

Inquiry into Sexting

Thank you for offering Victoria Police the opportunity to comment on this inquiry.

Please find attached our response. Unfortunately, statistics are not possible at this time as sexting is not a specific offence.

If you have further queries, please contact Senior Sergeant Geoff Maclean on 9247 3051.

Yours sincerely

Ken D Lay APM  
Chief Commissioner

15/6/2012
1) The incidence, prevalence and nature of sexting in Victoria

There is a definite increase in sexting in Victoria. This correlates to the increases in the use of technology and the changing patterns in which young people engage socially online. Prevalence of sexting is not yet clearly defined in any substantial research however it is acknowledged that due to the significant increase in the use of Smartphones’ and technology more broadly, that the prevalence and increase of sexting is of significant issue.

The number of offences of transmitting child pornography in circumstances of ‘consensual sexting’ is increasing. Circumstances involving non-consensual sexting are also increasing i.e. circumstances where an explicit photo is transmitted by consent initially from one person to another but is then forwarded to additional individuals without consent of the original sender. This view is based upon anecdotal evidence and Victoria Police does not have supporting data available at this time as sexting is not a specific offence. To identify which incidents relate to sexting, police would have to manually look up every possibly related incident and read the incident narrative; this has not been undertaken due to the resources that would be required to do so.

Unfortunately Victoria Police is unable to supply statistics as sexting is not a crime. However we can advise that despite what is portrayed in the media, there are not a large number of young people ending up on the register due to having pictures of their naked girlfriend or boyfriend on their phones.

2) The extent and effectiveness of existing awareness and education about the social and legal effect and ramifications of sexting

Based upon anecdotal evidence in plea material presented at court, there is a lack of awareness by individuals of the legal ramifications of sexting, in particular, that consensual sexting may result in charges of creating, possessing and transmitting child pornography.

Victoria Police believes that it has a role to play in the advocacy of education programs, particularly when aligned with the investigation arm of responses, such as online child exploitation. Whilst there are a number of programs operating in a cyber-safety capacity, there is a need for a coordinated response to online safety including sexting. There should be a focus on protective behaviours online and this education should occur in schools through curriculum. Ideally, it would fit within a Respectful Relationships framework as the harm and impact of sexting is long lasting and whilst Victoria Police does not believe that a punitive legislative response should be the focus, the impact of the conduct does need to be explained.

The expansion of community education and awareness raising programs is seen as a critical enabler to reducing the number of sexting incidents. Education is also important to ensure that legislation is understood, as when a legal response occurs, it can significantly impact a young persons future prospects of employment, travel and relationships.

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 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.

There are a number of issues that need to be considered in determining the appropriateness and adequacy of existing laws and the application of the sex offenders registry but Victoria Police considers that the following elements relating to sexting are critical for consideration;

- Whether the minor in the image was over the age of 16 years old;
- Whether the victim and offender were in a relationship together and the age difference of the two;
- Whether consent to having the image taken was given.

Victoria Police supports the decriminalisation of sexting as outlined in 3(a) above, where sexting has occurred and there is no child under the age of 16 and the offender is not more than two years older. An option could be to amend legislation to create a defence to the transmission of child pornography if the victim has consented to the image being created. The law would still recognise the harm caused by sexting, but remove the need to prosecute by police. A caution could be issued to an individual(s). A suggestion is that for the publication or transmission of child pornography under s 57(a) of the Classification (Publications, Films and Computer Games) (Enforcement) Act 1995 the defences could be consistent with s 70 of the Crimes Act 1958 by making a defence where:

- It is a defence to a prosecution for an offence against subsection (1) to prove—
  - 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
  - that the accused made the film or took the photograph or was given the film or photograph by the minor depicted in the film/photograph/text 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
  - that the minor or one of the minors depicted in the film or photograph is the accused; or
  - for the purposes of law enforcement.

Victoria Police requests that the Committee consider the role of policing agencies in the transmission of images through a carriage service for the purposes of law enforcement (as is shown as an example above for possible defences to s 57(a) as it is currently illegal). This can hinder police capacity to investigate child pornography nationally. As these crimes are cross-border, the need to share knowledge and images with other policing jurisdictions is becoming more critical in being able to respond to these crimes. The Classification (Publications, Films and Computer Games (Enforcement)) Act 1995, s 57(a) should also be amended to include "Bluetooth" as a transmission option and also make it a defence against s 57(a) for law enforcement in order for police to be able to investigate transmission of images using this method.

Victoria Police also suggests that the Inquiry examine national and state legislations to ensure that consistency is achieved where possible. Increasingly, Victoria Police is working with other law enforcement agencies and using a national classification system for images, so consistency in the application of the law is important.

Victoria Police submits that in regards to 3(b) above, where the transmission more broadly of images has occurred without consent, then this should remain an offence and that caution options are considered for offenders under the age of 18. The judiciary should have discretion to place individuals convicted of child pornography on the sex offenders register, which would be based on the risk of further offending towards children. This would ensure that unnecessary police resources are not being used to manage offenders that pose no significant risk to the
community. However, sexting in itself when part of a broader offending pattern of online child exploitation and possible contact offending should certainly be treated seriously by the law.