Dr Vaughn Koops  
The Executive Officer  
Law Reform Committee  
Parliament of Victoria  
Spring Street  
EAST MELBOURNE 3002

Dear Dr Koops,

Thank you for the opportunity to contribute to the Law Reform Committee’s Inquiry into sexting. I understand the Committee has been asked to inquire into the creating, sharing, sending or posting of sexually explicit messages or images via the internet, mobile phones or other electronic devices (sexting). I note the inquiry is seeking submissions on the incidence of sexting, the effectiveness of education campaigns and the appropriateness and adequacy of existing laws on sexting, with a particular focus on young people.

Under the Child Wellbeing and Safety Act 2005, I am required to promote child-friendly and child-safe practices in Victoria. Advocating for law reform is an important part of the way in which I undertake this function. This submission focuses primarily on the need for legislative reform to better protect the safety and wellbeing of children and young people.

I support the focus on young people in this inquiry, but note that sexting is not an activity limited to young people; there have been many examples of high profile adults who have engaged in sexting. In addition, children and young people in Australia live in a society in which they are regularly exposed to sexualised images, including sexualised images of young people. The Australian Senate Standing Committee on Environment, Communications and the Arts in its report on Sexualisation of children in the contemporary media in June 2008 found that sexualisation ‘has become much more visible in our society in recent decades. Sexualised images and actions are more openly discussed and portrayed in the media and used explicitly as a marketing device’.

They also noted:

> Material directed at children, whether it be advertising or products designed specifically for them or unsolicited material, increasingly presents them with a limited range of stereotyped images, particularly of girls, and promotes sexualised images, attitudes and concepts which may be inappropriate to younger age groups. There is emerging evidence that this licence is having negative impacts on child development. (p.2)

As a community we are giving our young people quite mixed messages. On the one hand, we are permitting adults to engage in sexting and in the production and dissemination of sexualised images in a wide range of media and advertising aimed at, or available to, young people. Whereas on the other hand, young people risk significant criminal penalties if they themselves produce or disseminate sexualised pictures of themselves.

The rights described in the United Nations Convention on the Rights of the Child provide an important foundation on which to consider the complex and
competing issues which may arise in relation to 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 information and education to enhance their wellbeing. In determining when and what criminal sanctions might apply to children who engage in sexting, the Committee should have particular regard to Article 40 and the right of those children accused of a criminal offence to:

be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

These principles are also reflected in part in the Victorian Charter of Human Rights and Responsibilities Act 2006. In particular:

- Section 17(2) which provides that: “Every child has the right, without discrimination, to such protection as is in his or her best interest and is needed by him or her by reason of being a child”.
- Section 23(3) which 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”.

Respect for the rights of children and young people also requires that they be given the opportunity to have their voices heard in decisions which impact upon them. Providing meaningful opportunities for children and young people to contribute to this inquiry will provide the Committee with relevant information about what children and young people in Victoria:

- are doing online
- what they understand to be the risks
- what causes them most concern
- how they keep themselves safe
- who they turn to for advice or help when things go wrong, and
- what strategies they believe would best empower children and young people to make wise decisions about whether or not they engage in sexting behaviours.

Such information will enable the Committee to develop recommendations that are informed by the concerns that young people themselves have about sexting and the solutions they believe will best address these concerns.

**Appropriateness and adequacy of existing laws on sexting**

The provisions of the criminal law which were designed to combat child pornography and child exploitation are poorly suited to addressing issues arising from sexting. The production, possession and/or distribution of child pornography or child abuse material is repugnant and should be subject to significant criminal sanctions. Such conduct should however be distinguished from the voluntary, consensual and private exchange of images between young people, which occurred in previous times through photographic images.

Recent media has highlighted the disproportionate impact on young people who have engaged in sexting and found themselves subject to significant criminal sanctions under child pornography offences. Of particular concern is the risk that young people who engage in such behaviour could find themselves included on the sex offenders register even when they pose no real risk of harm to children. The use of the sex offender register in these cases is not only contrary to the wellbeing of the young person, but it also undermines the effectiveness of the register in addressing those offenders who do present a risk to community safety.
When should sexting be a criminal offence?

There are many good reasons for discouraging children and young people from engaging in sexting behaviours. Sexting (even when done voluntarily and privately between two young people) can be harmful. Images that were originally intended to be private may wind up being circulated widely, potentially causing much distress and harm to the wellbeing of all those involved. Even if distribution does not occur, young people may with time also regret having participated in the making of the photos and yet have no way to get them back. If sexting is seen as “ok” or “something everyone is doing”, at least among certain groups of young people, there will be greater pressure on other young people to engage in this behaviour, and to do so at even younger ages. It also contributes to the highly sexualised culture in which our children and youth live which as noted above, can have an adverse impact on their development and wellbeing.

Imposing significant criminal penalties on young people who engage in any type of sexting behaviours is not an effective response to sexting. Estimates on the prevalence of sexting vary, but if, as seems likely, a significant number of young people are engaged in this behaviour, it would suggest that the current legal response has been ineffective in preventing the behaviour. The risk of significant legal sanctions (particularly the risk that a child or young person may wind up being convicted of child pornography offences) may also discourage children and young people, as well as their parents and carers, from seeking help or advice for themselves or others.

The law currently takes a more balanced and graduated approach to other types of sexual conduct involving children and young people and could be useful in formulating legislation specifically designed to address sexting behaviour. As with provisions which deal with sexual offences against children, sexting legislation could for example distinguish between the consensual sexting activity of teenagers who are close in age (which would then not be a criminal offence) and sexting which involved an adult taking advantage of a young person (which would be a criminal offence).

The non-consensual taking or distributing of sexting materials should continue to be a crime, but sanctions imposed should take into account the age of the offender(s) and the usual principles which apply to offending by young people. In such cases, consideration could also be given to using restorative justice approaches where appropriate. Any new legislation could also include provisions which specify aggravating circumstances such as sexting done with the intent to harass, bully, or humiliate another person.

Under current law, sexting may breach not only state criminal law but Commonwealth criminal law as well. The value of a nationally consistent approach to sexting should be considered so that children and young people are clear about when conduct they engage in may be illegal. The Committee may wish to consider whether this is an area which could be considered by the Standing Committee of Attorneys General.

Other strategies to ensure young people are well aware of risks of sexting and supported to make wise decisions

It is important that legal responses are seen as but one part of an overall response to sexting. Empowering children and young people to make wise and ethical decisions as well as educating parents, carers and professionals on strategies to best protect and support children and young people must be part of the response to sexting. There are many resources currently available which address sexting issues including videos, information sheets, posters and postcards and resources for schools¹. What is lacking is

¹ See for example, the Australian Communications and Media Authority’s Cybersmart resources which include a package entitled Sexting—the consequences http://www.cybersmart.gov.au/Schools.aspx; information for young people available through the Kids Helpline http://www.kidshelp.com.au/teens/get-info/hot-topics/sexting.php; the short film ‘Photograph’ about sexting and cyber bullying http://www.cybersafekids.com.au; and Respect me don’t sext me postcard available
an evidence base on which to evaluate the effectiveness of these approaches. What is required is more research about which children and young people are most vulnerable to being harmed and what actually works to ensure young people are aware of risks (both legal and others), and what actually works to enable them to make good decisions.

Conclusion

As a community we all share responsibility for protecting children and young people from harm and empowering them to make wise and ethical decisions. The explosion in digital technology and the speed with which information can be shared, combined with the increasing sexualisation of the culture in which we live have combined to create a very complex world for children and young people to navigate.

Many young people do make wise decisions, are concerned about privacy and their digital footprint and keeping themselves safe, but sometimes they make mistakes and exercise poor judgment with potentially disastrous consequences. Law reform is required to ensure that sexting by young people is addressed appropriately and proportionately. At the same time, a renewed emphasis on strategies which promote respectful relationships and ethical decision-making on line is required. Of particular importance is research to enable us all to identify the strategies that work best.

If you would like to discuss any of these issues in more detail please contact Ms Megan Scannell, Senior Project Manager, from my office on Ph: 8601 5289, or via email Megan.Scannell@ocsc.vic.gov.au.

Yours sincerely

Bernie Geary OAM
Child Safety Commissioner

through the South Eastern Center Against Sexual Assault