

Submission: from Civil Liberties Australia 

Introduction

Civil Liberties Australia (CLA) thanks the Victorian Parliamentary Law Reform Committee (the Committee) for the opportunity to make this submission. CLA is concerned with the implications the practice of sexting has given rise to, and the inadequacy and inappropriateness of existing laws to deal with sexting, especially by young people. One concern that CLA holds is that media reporting could potentially construct moral panic. We advocate for considered and rational debate and deliberation of the issues involved and the proposed policy changes. It would be undesirable for policy and law reform to be a consequence of a media frenzy whipping up hysteria in the community.

CLA takes this opportunity to engage with the Committee and participate in the development of legal policy that balances privacy, sexual expression and sexual assertiveness with the protection of children.

The practice of sexting requires legislators to balance right to privacy, sexual self expression and sexual assertiveness with the need to protect children. CLA's view is that the existing law is not appropriate, nor is it adequate as it conflates consensual sexting between partners with the malicious distribution of sexts ('sexualised' text messages). We recognise that the *Crimes Act* is appropriate and adequate for protecting children from being manipulated by adults and forced to participate in graphic sexual activity. Any amendments to the law must retain this aspect.

However, we submit that young people, who may be exploring their sexuality in a risky manner by sexting, should be distinguished in law from adult producers and distributors of child pornography. The law should also distinguish between the culpability of a person who receives a sext and maintains the confidentiality of the sender by comparison with a person who distributes the sext to a third party without consent. Checks and balances must be included in any proposed amendments that capture situations where aggravating factors are present. Furthermore, CLA agrees with the Victorian Law Reform Commission's (the Commission) recommendation that the sex offender register should more closely align with the risk of harm to children and that automatic inclusion should be replaced by a process which allows for individual assessment of the offender.¹

CLA submits that the *Crimes Act* should be amended to create two new offences, one summary and one indictable. The summary offence should apply in two situations. Firstly, where a person 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 where aggravating factors are present. Secondly, where a person 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. Where aggravating factors are present in this situation, the indictable offence should apply.

¹ Victorian Law Reform Commission (2012) [Sex offenders registration: Final report](http://www.lawreform.vic.gov.au/.../SOR_Final%20Report_Overview.pdf)
www.lawreform.vic.gov.au/.../SOR_Final%20Report_Overview.pdf

Appropriateness and adequacy of existing legislation.

The provisions of the Victorian legislation relevant to the creating, sharing, sending or posting of sexually explicit messages or images of minors, via the internet, mobile phones or other electronic devices are ss. 69 and 70 of the *Crimes Act 1958*.² These provisions reflect community standards and are appropriate and adequate for protecting children from being manipulated by adults and forced to participate in graphic sexual activity.

The practice of sexting however, highlights the inadequacy of the existing provisions to deal with the situation where teens who send sexting messages often occupy the role of both victim and perpetrator. The application of laws prohibiting adult behaviour is not proportionate to the agency of minors and highlights the inappropriateness of the existing provisions.³

Furthermore, the existing provisions do not appropriately balance privacy, sexual expression and sexual assertiveness in circumstances where a person 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. The existing legislation categorises young people who may be exploring their sexuality in a risky manner by sexting in the same way as adult producers and distributors of child pornography,⁴ and is not appropriate or adequate for contemporary Victorian society.

The legislation relevant to the sex offender register is the *Sex Offenders Registration Act 2004*.⁵ During the second reading, the Minister stated that the purposes of the sex offender register were to:

- “provide a deterrent to reoffending by assisting in monitoring the location and movements of serious sex offenders;
- assist in the investigation and prosecution of sex offences committed by recidivist offenders, some of whom refuse treatment for their offending behaviour within the correctional system;
- assist Victoria Police and police from other jurisdictions in monitoring high risk sex offenders - particularly important given the notoriously predatory behaviour exhibited by this group of offenders; and
- provide victims, their families and the wider Victorian community with an increased sense of security”.⁶

² *Crimes Act 1958* (http://www.austlii.edu.au/au/legis/vic/consol_act/ca195882/)

³ Potter, A. (2011) *Sexting and Louisiana's Punishment for the Children the Law Intends to protect from Prosecution Under Child Pornography Statutes*, *Family Law Quarterly*, 45.

⁴ Corbet, D. (2009) *Let's Talk About Sext: The challenge of finding the right legal response to the teenage practice of "sexting"*, *Journal of Internet Law*, December, 2009.

⁵ *Sex Offenders Registration Act 2004* http://www.austlii.edu.au/au/legis/vic/consol_act/sora2004292/

⁶ Mr HAERMEYER (Minister for Police and Emergency Services) 3 June 2004 Second Reading speech to the Assembly

[http://tex.parliament.vic.gov.au/bin/texhtml?form=jVicHansard.dumpall&startpage=1850&origquery=true+and+\(+data+contains+%5C'sex%5C'+and+data+contains+%5C'offender%5C'+and+data+contains+%5C'registratio n%5C'+\)&query=true+and+\(+data+contains+'sex'+and+data+contains+'offender'+and+data+contains+'registrati on'+\)&db=hansard91&dodraft=0&speech=32422&mem_selected=HAERMEYER&activity=Second+Reading&title=SEX+OFFENDERS+REGISTRATION+BILL&date1=3&date2=June&date3=2004](http://tex.parliament.vic.gov.au/bin/texhtml?form=jVicHansard.dumpall&startpage=1850&origquery=true+and+(+data+contains+%5C'sex%5C'+and+data+contains+%5C'offender%5C'+and+data+contains+%5C'registratio n%5C'+)&query=true+and+(+data+contains+'sex'+and+data+contains+'offender'+and+data+contains+'registrati on'+)&db=hansard91&dodraft=0&speech=32422&mem_selected=HAERMEYER&activity=Second+Reading&title=SEX+OFFENDERS+REGISTRATION+BILL&date1=3&date2=June&date3=2004)

Since the introduction of the register, the purpose has evolved. The Ombudsman observed that “one of its primary functions is to operate as a source of information for child protection authorities about children who may be at risk of harm”.⁷

CLA recognises that the Act is based on two premises: firstly, that the incidence of child sexual abuse in the community requires the existence of a regime to monitor people who have prior convictions for child sexual offences and, secondly, that a registration scheme deters and reduces re-offending by those people. We concur with the Commission’s view that the registration scheme should be refined and strengthened in order to concentrate upon those people who pose the most risk to children.⁸

CLA supports the distinction drawn by the Commission in revising the character and categorising of offences giving rise to registration orders. As discussed below, CLA submits that the existing laws should be amended and that the *Community Protection (Offender Reporting) Act 2005 (Tas)* is an appropriate model to follow.

In making decisions regarding sentencing, the court must have discretion to apply proportionate punishment and CLA supports the recommendation made by the Commission that courts should consider a risk assessment report from a suitably qualified psychiatrist or psychologist unless there are exceptional circumstances that justify making an order without a report. CLA concurs with the Commission that young people should only be included on the register in exceptional circumstances. We agree that the court should “not make a registration order for a child or young person unless it is satisfied that it would serve a useful purpose and all other reasonable protective responses have been exhausted”.⁹

We agree with the Commission’s statement that

“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.”¹⁰

CLA supports distinction between Category 2 and Category 3 offences made by the Commission in its review of sex offenders.¹¹ CLA submits that the *Crimes Act* should be amended to create two new offences, one summary (equivalent to Category 3) and one indictable (equivalent to Category 2). Both offences should apply in circumstances where a person 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. The indictable offence should be an alternative option available where aggravating circumstances exist. CLA strongly supports the check mechanisms identified by the Commission and contained in Recommendation 10 as an appropriate means of enabling the courts to distinguish the graduation in behaviour between offenders.¹² The distinctions are further discussed below.

⁷ Victorian Law Reform Commission (2012) *Sex offenders registration: Final report* www.lawreform.vic.gov.au/.../SOR_Final%20Report_Overview.pdf

⁸ *ibid*

⁹ Victorian Law Reform Commission (2012) *Sex offenders registration: Final report* www.lawreform.vic.gov.au/.../SOR_Final%20Report_Overview.pdf

¹⁰ *ibid*

¹¹ *ibid*

¹² *ibid*

Circumstances where a person 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.

CLA submits that, generally, statutory provisions should not address the situation where a person consensually sends a sext to a recipient for their private use. Certain exceptions should apply. Our view is that where there is consensual distribution of a sext and privacy has been maintained, the interests of privacy, sexual self-expression and sexual assertiveness outweigh the interests of protection of minors from sexual exploitation.

Where minors are depicted in the sext, CLA submits that the *Crimes Act* should be amended to create a summary offence, if aggravating factors are found to be present. The court should take into account the relative age of the sender and recipient and whether there are aggravating factors present. CLA suggests that the relative age difference of 2 years found in s.70(2)(d) of the *Crimes Act* reflects community standards. The aggravating factors currently found in the *Crimes Act* for sexual offences against young people would be appropriate model to follow. We submit that the court should be required to make a registration order for a person found guilty of a this offence if it is satisfied on the balance of probabilities that it is necessary to do so to protect children from the risk of harm from sexual abuse.

The prosecution should bear the burden of proving that a registration order should be made. In considering whether to make an order, the court should be required to consider a risk assessment report from a psychiatrist or psychologist with expertise in assessing an offender's risk of committing further sexual offences against children unless there are exceptional circumstances that cause a report to be unavailable or unnecessary. There should be a rebuttable presumption that the media (including bloggers), should be restrained from publishing sexts (still or video) which were initially legal unless a judicial officer authorises publication.

Circumstances where a person 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.

CLA submits that statutory provisions should address the situation where a recipient distributes a sext to a third party without the sender's consent. We submit that intentionally distributing a sext beyond the intended recipient(s) tips the balance in favour of the protection of minors from sexual exploitation and should constitute an offence.

CLA submits that there should be a general summary offence and an indictable offence where aggravating circumstances exist. The aggravating factors currently found in the *Crimes Act* for sexual offences against young people would be appropriate model to follow. We submit that the court should be required to make a registration order for a person found guilty of a the summary offence if it is satisfied on the balance of probabilities that it is necessary to do so to protect children from the risk of harm from sexual abuse. CLA agrees with the Commission that offenders who commit the aggravated offence should be monitored for a reasonable time because they might pose an ongoing risk to children. We submit that there should be a presumption that a person found guilty of the indictable offence will be included in the Register unless the offender can satisfy the court on the balance of probabilities that making an order would serve no useful protective purpose. For both offences, the prosecution should bear the burden of proving that a registration order should be made.

In considering whether to make an order, the court should be required to consider a risk assessment report from a psychiatrist or psychologist with expertise in assessing an offender's risk of committing further sexual offences against children unless there are exceptional circumstances that cause a report to be unavailable or unnecessary. There should be a rebuttable presumption that the media (including bloggers), should be restrained from publishing sexts (still or video) which were initially legal unless a judicial officer authorises publication.

An education program aimed at raising awareness of sexting sexual health and the law would be welcomed by CLA. Recent research into sexting is developing the body of reliable and accurate data from which policy can be based. The work of Hudson on the factors affecting sexting behaviours makes recommendations for the field of health education that are supported by CLA regards it as important that an education program minimally cover:¹³

- Addressing sexting in sexuality education curricula
- Health educators should develop practices and programs that will help reduce persons engaging in sexting behaviours as a result of being pressured or coerced
- Health educators should address positive consequences associated with sexting
- Health educators should address negative consequences associated with sexting
- Health educators could encourage students to use communication technologies as a way to initiate or discuss topics they might avoid face-to-face
- A curriculum that addresses sexting as a part of sexuality education needs to equip students with knowledge and skills necessary to make informed decisions about whether or not to engage in sexting, and to avoid being pressured or coerced into sexting
- Issues involving cyber bullying should also be addresses in the schools and in health classes
- Provide training and continuing education for health educators on issues involving sexting
- Health educators could use the opportunity to provide parents with helpful ways to comfortably talk to their child about sexting as well as sexual behaviours.

Civil Liberties Australia thanks the Committee for the invitation to contribute this submission. We express our willingness to work with the Victorian Government in the development of legal policy regarding sexting in the future, and are willing to provide more information, either orally or in document form, upon request.

Please contact Dr Kris Klugman President@cla.asn.au

¹³ Hudson, H. (2011) *Factors affecting sexting behaviours among selected undergraduate students*. <http://opensiuc.lib.siu.edu/dissertations/383/>

References

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