Parliament of Victoria
Inquiry into Sexting Submission

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INTRODUCTION
This research paper is a submission made to the Victorian Law Reform Commission (VLRC) regarding the inquiry in sexting. For the purposes of this submission the following definition of sexting is accepted from the terms of reference provided by the VLRC.

“Sexting” is:

“The 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.”

To date, there has been very little research into the current laws in Victoria regarding the relatively new phenomenon of sexting. Advances in technology and the rise in the use of smartphones have allowed young people to have more access to personal cameras and avenues in which they can disseminate information quickly to the public via social networks. These new technologies are having the effect of ‘transforming fleeting youthful indiscretions into lasting mistakes’. (Eraker, 2010)

This paper will be addressing all three of the terms of reference provided by the VLRC. Firstly it will look at the incidence, prevalence and nature of sexting in Victoria. Secondly it will address the effectiveness of existing awareness and education relating to the social and legal effects of sexting. Finally this paper will explain the appropriateness and adequacy of the existing laws in Victoria especially that of criminal offences and the application of the Sex Offenders Register.
For many young people sexting has become part of the flirting game. Teenagers are beginning to date at a much earlier age in the 21st century and are taking advantage of new technologies to send racy photos. (Brown, 2012) What young people are not grasping is the fact that it only takes on click of a button for their private photographs to become part of the very public domain. What starts as intimate moments between two people have proven to spread like wildfire as photos are uploaded to social networks or shared via emails. (Brown, 2012)

Susan McLean a former Victorian Police woman is now Australia’s foremost expert in the area of cyber safety and young people. Ms McLean served 27 years on the Victorian Police force before making it her mission to educate young people about how dangerous sexting can really be. In an interview with 60 minutes Ms McLean said that the youngest person sexting that she had to deal with was nine years of age. (Doherty, 2010) Ms McLean makes it clear to 60 minutes that the reasons young people do it is because they can and she has not been to any school in Australia that hasn’t dealt with the cases of sexting. (McLean, 2012) Ms McLean further states that teenagers are insecure and think that by exposing themselves in this way will give them the attention they seek but they have no regard for the serious consequences of doing so. (McLean, 2012)

Computer technology is now the pen and paper of the twentieth century and just about every teenager is wired into the internet it is inevitable and should come of know surprise to authorities that young people would be exposed to the good and bad of there technologies. (Brown, 2012) Several criminal cases have arisen as a result of sexting in Australia, 32 teenagers from Victoria have been prosecuted as a result of their sexting activity. (Battersby, 2008)

An online study conducted by Melbourne’s Monash University’s affirmed that Australia is now inline with the international trends of sexting. A third of participants admitted that they had sent a sext of themselves to another and almost half had received a sext. Thus proving the prevalence of this relatively new phenomenon in Victoria. (Pang, 2011)
Detective Sergeant Campbell Davis from the Victorian Police Internet child exploitation team explains that young girls were sexting targets. (Battersby, 2009) Mr Davis said that the third generation of mobile phone technology (3G) is to blame as it allows young people to send large, good quality images straight to the Internet making it so much easier for teens. (Battersby, 2009) Unfortunately for these young people this very powerful technology is thrusting some of them into criminal child pornography proceedings in court. Some schools in Victoria have attempted to confiscate mobile phone use but that did not stop the sexting from occurring after school and being shared that night. Victoria is facing a serious problem and new laws need to be made to deal with this serious issue of a rapidly advancing generation. (Battersby, 2009)
The Australian Government last year funded a $120 million dollar Cybersmart program aiming to educate young people about the serious dangers of sexting. (Atkin, 2011) According to the Australian Communications and Media Authority (ACMA) the lesson plans provided to Australian schools by the Cybersmart are working really well providing students with the right information about the seriousness of sexting. In one month 63,000 sexting awareness brochures were distributed and over three hundred copies of the ‘sexting’ lesson plans were downloaded by schools around the country. (Herrick, 2011) According to the ACMA the lesson plans provided to schools are easily adaptable and are helping in educating young people about the social and legal consequences of sexting. (Herrick, 2011)

The Australian Federal Police have also been doing their part visiting high schools around the country in order to warn kids of the serious existing laws that deal with the issue of sexting. (Forde, 2011) The AFP have also been educating young people about creating a good digital footprint online, this is so vital in the 21st century as employers, family and friends can access anything and everything about a person by a simple search in Google. (Brown, 2012)

It is evident that the Australian Government is aware of the sexting issue occurring amongst young people throughout the country however there are some educators that believe that the current educational initiatives are not really working as well as they could be. (Atkin, 2011) By solely focusing on the legal issues and telling students that sexting is not a smart idea is just not good enough. The Cybersmart material has failed to engage many viewers and has been labeled by some educators as dull and slow. (Atkin, 2011)

Catherine Brandon, senior psychologist at Genazzano FCJ College in Victoria believes that education will only go so far but it will never be enough to counter a young persons’ impulsive decision to send a risky photo of themselves. (Porter, 2008) In addition a study by the Federal Privacy Commissioners has produced results that show young people are concerned about their privacy but not to the same extent as older generations. (ALRC, 2008) As the generation gap continues to widen, parents are becoming more disconnected from their children. A lot of parents are not keeping
up with current technology trends and communicating with their children properly in order to identify any early signs. It is obvious that more needs to be done to engage young people by educating them and using real life case examples where teenagers that have been prosecuted. Shocking young people is the best way of educating them about how one simple text can change the rest of their lives.

THE VICTORIAN LEGISLATION
The act of sexting in Victoria is prosecuted under child pornography legislation. For many young people already prosecuted this has resulted in devastating consequences. If an individual produces or possesses child pornography then that individual may be liable under the *Crimes Act 1958* (Vic). (Crimes Act, 1958) Section 68 of that legislation makes it an offence for someone to make or produce child pornography and it carries with it a 10 year maximum prison term. Section 69 makes it an offence to invite, procure, cause or offer a minor to be involved in the making or production of the child pornography. (Crimes Act, 1958) Finally it is also a serious offence to knowingly possess child pornography. Section 67A clearly defines child pornography as a ‘film, photograph, publication or computer game that describes or depicts a person who is, or appears to be, a minor engaging in sexual activity or depicted in an indecent sexual manner or context.’ (Crimes Act, 1958) Clearly this broad definition includes sexting especially where it mentions the creating, sharing, sending or posting of photos via mobile phones or other electronic means. For the purposes of all these sections just mentioned a minor is a person under the age of 16 years old. (Crimes Act, 1958)

The main issue with the Victorian legislation as is stands is that if a person is convicted under section 68 or 69 then that person is considered to be a ‘registrable’ offender. This person is then placed on the Sex Offenders Register among child molesters and pedophiles. In a 2011 Victorian case, an 18 year old man pleaded guilty to the possession of child pornography after receiving revealing pictures from his female friend. The pictures were of girls aged between 15-16. (The Black Letter, 2011) The police searched the boy’s computer and mobile phone while investigating a completely unrelated matter. Despite the young man posing no threat to the community the Magistrate was forced to register his name on the Sex Offenders Register for the period of eight years as is mandatory in Victoria. (Monash Law Society, 2011)

The Victorian Legislation must change as the technology changes. Having young children being place on the Sex Offenders Register is just wrong. There is a clear disconnect between the laws and the reality. (The Black Letter, 2011) Victoria must amend its current laws and embrace the fact that childhood sexual exploration is
occurring more often then before and aim to differentiate the production of child pornography from the more often than not consensual sext.

Victorian Law Institute President Michael Holcroft said that it should be at the courts discretion whether or not someone is placed on the Sex Offenders Register and it needs to be dealt with on a case-by-case basis. (Thomsen, 2012) Mr Holcroft made the point that the magistrate hearing the case is in the best position to decide whether or not that person could be a serious risk to the community if he/she is not on the register. (Thomsen, 2012)

According to the Victorian Law Institute the Sex Offenders Register is flooded with offenders that are no risk to the community. (Young, 2011) The number of people registered is staggering. As of June 2011 3933 people were included on the register since it had began and it is estimated that another 6500 will be added by 2014. (Young, 2011) These figures would not be an issue if everyone on the register actually posed a risk to society but these numbers do become a problem when police have to monitor even those who pose no risk. In his report to the Ombudsman the Director of Police Integrity, Michael Strong, said that it may be possible because of the staggering numbers on the register that dangerous offenders are overlooked. (Young, 2011) It is evident from the findings that mandatory registration is jeopardising and undermining the true purpose of the register and many that operate it have lost faith in it.

When a judge is to decide whether an individual shall be place an individual on the Sex Offenders Register, the judge should be satisfied beyond reasonable doubt that registration would be unjustified by looking to the particular cases circumstances. (Monash Law Society, 2011) The judge should take into account the consent of the victim, the relationship between the victim and the other person, the quantity of images sent, the age difference and whether or not that person poses a serious threat to society to label that person a sex offender. In this day and age the law cannot differentiate between the victim only wanting specific persons to see the image as opposed to a broad audience. The victim should know that once that image is sent there is a possibility it will be passed around or appear on the Internet years later. Technology has now become too powerful and young people need to also take
responsibility for their actions and deal with what may arise if they send a nude photo to someone they think they can trust. The point is that even the most well-thought-out legislation will always have grey areas and it cannot cater for every situation however there needs to be a serious amendment to the legislation to relieve the court from having to hand down mandatory registration orders.

In conclusion it must be said that sexting is a serious issue and the current law in Victoria does little to protect young people engaging in this relatively new phenomenon. Technology has come along way and the State Parliament should be applauded for recognizing it and attempting to better how the laws deal with it. Currently there are injustices at play for young people in Victoria and it is now time to make the law reflect reality. Sexting will always occur between young people and educating them about the consequences is a good temporary deterrent, but it will not stop most of them that will take the chance and send an explicit photo to the one they ‘trust’.

Bibliography


