15 June 2012

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

Dear Dr Koops

Law Reform Committee Inquiry into Sexting

The Victorian Equal Opportunity and Human Rights Commission (the Commission) welcomes the opportunity to make a submission to the Law Reform Committee's Inquiry into Sexting.

The Commission is an independent statutory body that has functions under the Victorian Equal Opportunity Act 2010, the Racial and Religious Tolerance Act 2001 and the Charter of Human Rights and Responsibilities Act 2006 (the Charter). Our functions include dispute resolution, providing education about human rights and equality of opportunity, undertaking projects and activities aimed at eliminating discrimination and promoting human rights, conducting research, and providing advice. In addition, the Commission has a role in reporting to the Attorney-General on the operation of the Charter and, at the request of public authorities, conducting compliance reviews.

The Commission's Interest in the Inquiry

The Committee's terms of reference call for consideration of the appropriateness and adequacy of existing laws that may apply to the practice of sexting (the sending of sexually provocative images and/or text to another person through mobile phone and/or other electronic communications devices). Anti-discrimination legislation plays a part in this area. The Commission makes this submission to outline for the Committee how the laws of sexting fall within the gambit of the Equal Opportunity Act and Sex Discrimination Act 1984 (Cth).

The Committee's work should also be informed by the Charter, in particular the right children have to special protection. This is relevant because some criminal laws that apply to sexting activities are designed to protect children, particularly the creation and distribution of child pornography. However, these laws are also now capturing young people as child sex offenders when they participate in sexting amongst their peer group.
Anti-Discrimination Laws

The sending of unwelcome SMS and MMS to another person may in certain circumstances amount to sexual harassment in contravention of anti-discrimination laws. Specifically, the Equal Opportunity Act provides that a person sexually harasses another person if he or she:

(a) makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to another person, or

(b) engages in any other unwelcome conduct of a sexual nature in relation to the other person,

in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the other person would be offended, humiliated or intimidated: (s 92). Sexting can be carried out in a way that amounts to unwelcome conduct of a sexual nature that offends, humiliates or intimidates another.

The Equal Opportunity Act makes such conduct unlawful in a number of areas of public life including employment, education, the provision of goods and services, accommodation, clubs and local government.

Where a person is on the receiving end of an unwelcome ‘sext message’ by a colleague or a fellow student for example, they can make a complaint of sexual harassment to the Commission under the Equal Opportunity Act. The Commission offers a free dispute resolution service to help people resolve their complaints. Alternatively, the person may also make a direct application to have the matter heard and determined by the Victorian Civil and Administrative Tribunal.

The Sex Discrimination Act 1984 (Cth) also includes sexual harassment provisions similar to the Equal Opportunity Act (s 28A). Under federal laws, complaints of sexual harassment involving unwelcome sext messages can be made to the Australian Human Rights Commission. In such cases, the matter may be conciliated between the parties. If the matter is not resolved, the matter can then be brought before the court to have the matter determined.

In Poniatowska v Hickinbotham [2009] FCA 680 (23 June 2009), a female employee received compensation in a claim involving a range of conduct which the court found to be sexual harassment in the workplace. The conduct included receiving an unwelcome MMS of a lewd nature from a fellow employee. The court in that case found:

the lewdness of the MMS photograph, even without any implicit invitation for sexual favours, would amount to conduct of a sexual nature... and that a reasonable person in all the circumstances would have felt offended and humiliated by that conduct.

[at 298]
Charter Considerations

The Commission also notes that the practice of sexting raises considerations under the Charter of Human Rights. Most notably because the practice is prevalent amongst young people who are both protected by child pornography laws, but also increasingly captured by them as offenders. The prevalence of young people sexting within their peer group puts them at risk of being charged with child pornography offences and labelled as child sex offenders, to the detriment of their future development.

Current laws in Victoria make it an offence to produce, procure or possess child pornography.¹ Child pornography is defined 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”² and thereby capturing images on mobile phone and like communication devices. The Crimes Act 1984 (Vic) defines ‘minor’ as a person under 18 years of age³.

A young person who possesses, creates or consents to the creation of a MMS for his or her own private use or for the use of another person of similar age can be captured by these child pornography offences. If charged and convicted, they may end up with a criminal record and on the sex offender register. This can have repercussions including travel restrictions to certain countries and the denial of certain employment opportunities including working with children, and these restrictions can apply for their or their lives.

This was not the purpose of these laws which were introduced to tackle child pornography.

The Charter of Human Rights can provide a framework to help the Committee consider both the protective and punitive operation of these laws. At their foundation, these laws must support the best interests of the child.

Section 17(2) of the Charter provides that “every child has the right, without discrimination, to such protection as is in his or her best interests and is needed by him or her by reason of being a child.” Current laws involving sexting do not afford young people the protection from the stigma of being labelled a sex offender in circumstances where the nature of, and intention behind, their conduct does not necessarily warrant the label.

According to a US survey, in many cases the sending or forwarding of sexual texts amongst youth is not malicious. Most of the young people who send such messages are said to do so with someone they are involved in a relationship with or their messages are flirtatious gestures to someone they have a romantic interest in. For these reasons, any proposed changes to current criminal laws involving child pornography offences should give due consideration to section 17(2) of the Charter.

Youth sexting is a serious issue and can have unintended consequences for the young people involved as they can easily lose control of the images into the public domain having a distressing impact on the individual and falling into the hands of those who have more sinister motives.

¹ Crimes Act 1984 (Vic), ss 68, 69, 70
² Crimes Act 1984 (Vic), s 67A
³ ibid
Victoria’s criminal laws should be amended to draw a line between paedophiles and young people involved in sexting amongst their peers – a line that considers the best interests of the children involved. Education also plays a vital role here to ensure children and young people are aware of the reputational and other risks to themselves and others that can follow if they engage in sexting.

I would be happy to discuss these issues with the Committee. I can be contacted (03) 9032 3470 and karen.toohey@veohrc.vic.gov.au.

Yours sincerely

Karen Toohey
Acting Commissioner