Submission to the Victorian Parliament Law Reform Committee

on

Inquiry into Sexting

June 2012
The Privacy Commissioner wishes to acknowledge the work of Scott May (Senior Policy and Compliance Officer) in the preparation of this Submission.

Office of the Victorian Privacy Commissioner (Privacy Victoria)
GPO Box 5057
10-16 Queen Street
Melbourne Victoria 3000
Australia
Phone: 1300-666-444
Fax: +61-3-8619-8700
Email: enquiries@privacy.vic.gov.au
Website: www.privacy.vic.gov.au
1. Introduction

1. In August 2003, Victoria’s first Privacy Commissioner, Paul Chadwick, issued an information sheet about an issue which was beginning to appear on the privacy horizon – mobile phones and cameras. The Commissioner made the point at that time that these “new generation phones and other devices...undoubtedly pose privacy risks.” Images could be ‘broadcast faster, wider and by many more people’ than previously and that “many of those who adopt the technologies quickest are young and inexperienced.”

2. In 2003, mobile phones which included cameras were rare – and those that did had cameras with a low resolution (poor quality), were unable to record video and were far less able to share and send pictures. Fast forward nine years and the almost omnipresent Apple iPhone 4 (and other similar smart phones) contain an 8 megapixel camera and the ability to record footage in full high definition 1080-p video (a higher resolution than Australian television currently broadcasts at). Such images can be easily copied and duplicated, easily sent to others via the phone at a low cost, and uploaded to social networking sites for publication instantly.

3. Such technological advances are immensely beneficial to society – smart phones are undoubtedly helpful, innovative, productivity enhancing and enjoyable to use. However, as with all new and rapidly changing technology, other ramifications need to be considered - such as how the devices will be used and their interaction with existing laws.

4. We have reached a situation where technology has significantly outpaced the law. It must be remembered that mobile phones are not going away – if anything – use of mobile phones will most likely increase over time. The law must properly reflect this, and apply sensibly in accordance not only with the values of the society in which it operates, but also the reality of our society.

1.1 What is sexting?

5. ‘Sexting’ - a portmanteau of the words ‘sex’ and ‘texting’ - refers generally to the phenomenon of “communicating non-professional images or videos portraying one or more persons in a state of nudity or otherwise sexual manner.” Despite the term ‘text’, the phenomenon is not purely one limited to mobile phones; other electronic technologies can be involved (for example, webcams and digital cameras).

6. Nor is sexting a phenomenon restricted purely to young persons - adults can certainly create and send similar imagery. However, there are unique and significant concerns relating to the sexting of young persons – or “youth-produced sexual images.” As commentators have pointed out, sexting represents “the dubious combination of age-
old teenage sexual awakening and modern-day technology that opens new doors for teenagers to express such longing.”

7. This submission will attempt to focus on the nature and prevalence of youth sexting currently in Victoria, and discuss the social and legal ramifications of sexting and the existing awareness of the issue. This submission recommends that the existing legal structures are inappropriate and require significant overhaul in light of the life-altering potential consequences for young people who may be unfairly caught in their grasp, that the possibility of a statutory cause of action for serious invasions of privacy needs to be considered, and concludes that resources need to be urgently devoted to properly educate young Victorians on the potential personal and legal ramifications of engaging in sexting.

2. The incidence, prevalence and nature of sexting in Victoria

2.1 International prevalence of sexting

8. Currently, there is limited research on the actual prevalence and existence of sexting in either Australia or Victoria. Information currently available regarding prevalence is generally of an ad-hoc nature contained in media reports.

9. However, the extent of the phenomenon can be assessed by reference to overseas studies. The United States, for example, has similarly grappled with the issue and is similarly seeing the impact of US laws on the issue. US researchers have also undertaken significant surveys to try to assess the prevalence of the issue. The statistics vary – which is most likely due to definitional issues on what precisely constitutes ‘sexting’ in each survey and the particular scope of the study. For example:

a. A January 2012 study attempting to obtain national (US) estimates of youth involvement in sexting found that:
   i. between 2% of youth appeared in or created nude or nearly nude pictures of videos (but only 1% included images that were sexually explicit – i.e. genitalia);
   ii. 7.1% said they had received nude or nearly nude images of others; and
   iii. 5.9% reported receiving sexually explicit images, but few distributed them.

b. A 2008 online survey of 1280 respondents (teenagers (aged 13-19) and young adults (aged 20-26) found:
   i. 20% of teens sent or posted nude or semi-nude pictures/videos of themselves on the Internet via phone; and
   ii. A majority of teens said they sent sexually suggestive content to boyfriends or girlfriends.

c. A 2009 online weighted survey of 655 teenagers aged between 13 and 18 found:
   i. 19% engaged in sexting;

8 For example, see Nicole Brady, ‘Sexting youths placed on sex offenders register’, The Age (Melbourne), 24 July 2011.
ii. Over 1/3 knew of a friend who had sent/received such messages; and
iii. Only 12% of girls and 6% of boys had actually sent a sext, more likely to be girls (65%).

d. A 2009 survey of 1247 respondents aged 14-24 reported:
  i. Almost half sexually active young people were involved in sexting, although higher in the 18-24 age bracket;
  ii. 29% received messages with ‘sexual words or images’;
  iii. 17% of sexting recipients forwarded the messages; and
  iv. Only 1 in 10 had shared a naked image of themselves.

10. It is clear that young people are engaging in sexting. It is however difficult to determine the precise size or scope of the phenomenon. One would expect similar rates in Australia, given that the cost and availability of mobile telephones in the US is comparable to Australia.

11. Interestingly, however, researchers analysing the statistics concluded that ‘there are no consistent and reliable findings at this time to estimate the true prevalence of the problem.’

2.2 Prevalence in Australia and Victoria

12. As discussed above, there is significantly less research in Australia (and Victoria) to date on the incidence and prevalence of sexting. However, the following statistics tend to suggest that sexting in Australia is occurring and is likely comparable to US jurisdictions.

a. A 2007 Girlfriend Mazagine online poll found:
   i. 40% of 588 girls surveyed had been ‘asked to send nude pictures of themselves to others.’

b. A newspaper reported sexting leading to 32 Victorian teenagers being charged with child pornography offences in 2007.

2.3 The Victorian Privacy Commissioner's Youth Advisory Group (YAG) Survey

Background to the Youth Advisory Group (YAG) Survey

13. In late 2011, and in recognising the lack of research into the actual incidence of sexting in Victoria, the previous Victorian Privacy Commissioner instructed her ‘Youth Advisory Group’ (a group formed in October 2009 to advise the Commissioner on privacy issues impacting on youth) to undertake an anonymous, online survey to garner the prevalence and attitudes towards sexting amongst Victorian young persons. No verification was undertaken or required to establish the bona-fides of respondents, and therefore strict conclusions cannot be drawn from the data. However, the survey results are at least illuminative as to the extent of the problem and issues in Victoria. It should be noted that the survey focussed primarily on mobile phones rather than other devices which would allow sexting to occur (e.g. webcams). It should also be noted that the survey referred to ‘nude or semi-clothed photos’, including ‘photos of people in underwear and/or swimwear.’

---

Results of the YAG Survey

14. The YAG survey was well received with 1101 responses. Approximately 60% of respondents were female. The survey had a youth focus, with 49.90% of respondents aged between 10 and 15 years. There was also a genuinely mixed locational spread; whilst the majority of respondents were in either Melbourne’s CBD or suburbs (54.78%), a significant amount of rural or country Victorians responded (40.77%) (See Table 1 and 2, below).

Tables 1 and 2 – Age of Respondents and where they live

<table>
<thead>
<tr>
<th>2. What is your age?</th>
<th>% of Respondents</th>
<th>Number of Respondents</th>
</tr>
</thead>
<tbody>
<tr>
<td>Under 10</td>
<td>0.00%</td>
<td>0</td>
</tr>
<tr>
<td>10-15</td>
<td>49.90%</td>
<td>506</td>
</tr>
<tr>
<td>16-20</td>
<td>18.15%</td>
<td>184</td>
</tr>
<tr>
<td>21-25</td>
<td>12.72%</td>
<td>129</td>
</tr>
<tr>
<td>26+</td>
<td>19.23%</td>
<td>195</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>3. Where do you live?</th>
<th>% of Respondents</th>
<th>Number of Respondents</th>
</tr>
</thead>
<tbody>
<tr>
<td>Melbourne CBD</td>
<td>6.61%</td>
<td>67</td>
</tr>
<tr>
<td>Melbourne Suburbs</td>
<td>48.17%</td>
<td>480</td>
</tr>
<tr>
<td>Rural/Country Victoria</td>
<td>40.77%</td>
<td>413</td>
</tr>
<tr>
<td>Other Australia</td>
<td>3.95%</td>
<td>40</td>
</tr>
<tr>
<td>Outside Australia</td>
<td>0.49%</td>
<td>5</td>
</tr>
</tbody>
</table>

Incidence of Sexting – Taking pictures of oneself

15. Question 5 of the survey asked respondents whether they had ever ‘taken and/or sent a nude or semi-clothed photo of yourself or someone else on your mobile phone’ (including photos in underwear or swimwear) – defined hereafter as a ‘sexting image’. 268 respondents (28.21%) responded ‘yes’, with 728 (71.79%) answering ‘no’ (with 87 abstentions). This is somewhat comparable to the above US surveys (see paragraph 9) and suggests that Victorian young persons are engaging in sexting behaviour at not insignificant levels.

Taking sexting images of oneself - breakdown by location

16. Incidence of sexting appeared slightly higher for respondents in the Melbourne CBD area (44.78%) as compared with Rural/Country Victoria (22.52%).

---

12 It should be noted that despite the options for where respondents lived in question 3, some respondents answered ‘other Australia’ but then nominated either towns or regional cities in Victoria (7), or Victoria generally (8).
Taking sexting images of oneself - breakdown by age:

17. Generally, the prevalence of individuals taking images of themselves was highest in the 21-25 and 26+ age brackets, with 48.84% of 21-25 year olds, and 34.87% of 26+ year olds, reporting that they had taken a sexting image of themselves. Of 16-20 year olds, which conceivably includes both adults and minors, 33.70% reported taking such an image.

18. Of particular alarm was the 10-15 age bracket. Although lower than other age brackets, 93 respondents (18.42%) aged between 10-15 still reported taking a sexting image of themselves, suggesting quite young persons are engaging in sexting.

Incidence of Sexting – Knowing someone who has taken a ‘sexting image’

19. Question 6 of the survey focused on whether individuals knew someone else who had taken a sexting image of themselves. This result was far higher – 690 respondents (68.11%) knew of someone who had done so, with only 323 (31.89%) unaware of someone who had taken such an image. Older respondents tended to be more aware of others sending images for example, 21-25 year olds answered ‘yes’ 76.74% compared with 60.91% for 10-15 year olds. There was little difference between males and females for this response.

Incidence of Sexting – Receiving an image

20. Receipt of a sexting image can generally be categorised as either solicited or unsolicited. 335 respondents (33.07%) reported having received a ‘nude or semi-clothed photo of someone on [their] mobile phone’. Receipt of images was generally higher amongst older respondents than younger respondents (for example, 54.26% of 21-25 year olds had received such an image compared with 21.43% of 10-15 year olds).

Dealing with the images – what did respondents do with an image?

21. Question 8 asked respondents that if they had received an image, what they did with that image. 24.87% of respondents deleted the image. However, 16.68% saved it, 4.81% told the sender not to send the image, and 21 respondents (2.15%) reported forwarding the image on.

22. Older respondents tended more to save images (27.42% of those aged 21-25 saved the image, compared with only 9.13% of 10-15 year olds). Younger individuals were also slightly more likely to tell the sender not to send such images (5.6% of 10-15 year olds and 6.38% of 16-20 year olds reported doing so, compared with only 3 (2.42%) 21-25 year olds and 5 (2.75%) of those aged over 26.

Who to talk to – Complaining/talking about receiving images

23. Question 9 asked respondents who they would talk to or complain to if they were to receive a sexting image. Generally, respondents were most likely to talk to friends about the issue (29.55%), followed by the sender of the image (19.82%). Other parties reported would be ‘parents/guardians’ at 15.53%. 10.88% reported they would talk to ‘no one’ about the issue, with 8.94% stating they would contact the Police and 7.67% stated they did not know.
24. In terms of age, younger respondents were more likely to report sexting to both their teachers and their parents (for example, 29.56% of 10-15 year olds would report to a parent/guardian or teacher, compared with only 5.95% of 21-25 year olds). This is not particularly surprising given that younger respondents are more likely to live at home and be studying in a formalised educational system. Older respondents were more likely to talk to the person sending the image or potentially report it to Police compared with younger persons.

Complaining to ‘others’

25. Question 9 asked those who had responded ‘others’ to specify who they would talk and complain to about sexting. Of the 38 respondents, many nominated siblings or their partners as individuals they would speak to about the manner. Many respondents also stated that it would ‘depend on the circumstances’ surrounding the picture such as whether it was ‘serious’ or ‘consensual’.

3. Extent and effectiveness of existing awareness and education about the social ramifications of sexting

3.1 What are the social effects?

26. As a general rule, it is difficult to quantify the precise social effects of ‘sexting’ due to the breadth of the topic and the variety of different situations and circumstances which are encompassed by the phenomenon. For example, an adult taking a sexual image of themselves and sending it to their adult partner without further use or disclosure of the image is unlikely to raise significant social effects, as contrasted with an explicit image of a youth being taken and distributed across the individual’s peer group via social networking sites, which is likely to have a significant effect.

27. This can range from anxiety and mental anguish all the way through to depression and even suicide. In 2009, an American 18-year-old was reported as having committed suicide after her ex-boyfriend circulated a nude photo she had sent him around her school. Sexting images can be used and misused in a variety of ways: for furtherance of bullying, extortion and harassment and are often disclosed as ‘revenge’ following the breakdown of a relationship. This submission attempts to detail some of the more generally known types of societal effects but given the breadth of the topic it should not be considered at all exhaustive.

3.2 Creation of the Images

28. A common conception is that creation of a sexting image alone has little or no effect in a wider societal impact. Some commentators have stated that the act of simply taking a picture (i.e. by a teenager of themselves) is “not very likely to cause some of the longstanding psychological damage that results when a teenager’s nude picture is….made widely (and permanently) available for others to see”.14


14 Above n 7, p 181
29. However, the very taking of pictures and perhaps distribution to a partner or similar can have societal effects even without wider distribution. Some commentators argue that such behavior (of simply taking photographs) can lead to early sexualisation of young persons and alter their sexual development. As Theodore argues, the “sexting can lead to early sexualisation of juveniles, resulting in lower self-esteem and other mental health problems, especially in young girls” with early sexualisation linked to “mental health problems...low self-esteem and depression,” stating that the “psychological effects of viewing pornography should not be disregarded simply because juveniles voluntarily create the sexually explicit material.”

30. Additionally, creation of the image often occurs under a level of coercion or pressure from a partner or others. Tallon argues that “‘many teens that take and share sexually explicit or nude photos have been pressured to do so. This pressure varies in intensity, ranging from persistent requests to blackmail….what may appear to be voluntary behavior may actually be the product of coercion,’” 16 We must therefore be careful not to carelessly assume that all sexting is therefore voluntarily created. As Theodore posits, “‘threats and the pressure from significant others lead juveniles to send sexually explicit material that, normally, they would not send.”’

31. There are also strong arguments that youth lack an understanding of what they are doing, and are unable due to their youth to foresee the potential harm and permanency of their actions. 18 Thus, young people are creating sexting images without a true understanding of the potential consequences. As Haase comments, “‘high and middle school students do not have the maturity or foresight to see the dangers inherent in sexting.”’ 19 It may be that not yet fully developed teenage brains limit ‘‘a teenager’s ability to reason’ and may be unable to fully grasp ‘the potential harm to victims or themselves.”’ 20 Simply put, “‘High school and middle school students do not have the maturity or foresight to see the dangers inherent in sexting”’. 21

32. Finally, creation of the images can also be a potential opportunity for grooming or exploitation of minors. Mujahid outlines the possibility for predatory behavior by reference to the case in the United States where an 18 year old perpetrator obtained sexualised images of 31 male teenagers (some as young as 15) via Facebook by impersonating a female and soliciting the images from the young men. Following receipt, the perpetrator then threatened the males with publication unless they had sex with the perpetrator, with some seven teenage boys acquiescing. Many of the victims required hospitalisation due to suicidal ideations or required treatment including medication and therapy. 22

3.3 Distribution, disclosure and mass dissemination

33. While mere creation of sexting images may have some deleterious effects, by far and above the most significant damage comes from subsequent disclosure of images. It is this ‘mass-sexting’ or sending of others’ images that is of most concern.

---

17 Above n 15, p 375.
18 Above n 16, p 2.
20 Above n 7, p 198
21 Above n 19.
22 Above n 7, p 184
3.3.1 - Online distribution

34. Publication online via either the internet or social media websites greatly exacerbates the potential audience and ramifications - the consequences of release of a sexting image online is “greater” given that “once a picture has been released into cyberspace, it can never really go away”.\(^{23}\) Control of the image is effectively lost. “Once the picture has been sent, the sender can do little to stop the picture from being circulated.”\(^{24}\) Sometimes a victim may be even completely unaware for a significant amount of time that a photograph circulating via the internet or social networking sites.\(^{25}\)

3.3.2 - Psychological effects

35. Disclosure of a young person’s sexting image can lead to significant negative psychological effects. Discomfort, coercion, harassment, intimidation, depression and even suicide are all reported as effects.\(^{26}\) Particularly galling and disturbing are reports emanating from the US. One such example, ‘Jessica’s case’, illustrates the seriousness of potential harm:

“Eighteen-year-old Jessica Logan’s case provides an equally sobering example of teenage mass-sexting. While a senior in high school, Jessica sent her boyfriend a digital photograph of her nude body from the neck down. Shortly thereafter, Jessica and her boyfriend broke up and he showed the picture to a group of other students. These students then passed the picture around to students in Jessica’s school and in a nearby high school.”

Despite complaints to school authorities and even an anonymous complaint to a local television station,

“Though she was disguised by a blurred face and an altered voice, her classmates identified her…Jessica received harassing calls and text messages and was labeled a ‘whore’ and ‘slut’. Jessica began to miss school and her grades suffered; when she finally graduated from high school, she was ‘bombarded with objects’ during the ceremony. On the day that Jessica attended the funeral of a friend who committed suicide, Jessica, as if inspired, hanged herself in her bedroom.”\(^{27}\)

36. Whilst Jessica’s case is a saddening and extremely concerning example, it is by no means isolated - a number of suicides being reported resulting either partially or directly from dissemination of sexting images.\(^{28}\) Additionally, research suggests that ‘teenagers may suffer more severe psychological damage than adults by having their nude pictures exposed’\(^{29}\) potentially due to the fact teenagers are attempting to deal with their often changing bodies and image.

---

\(^{23}\) Above n 7, p 182.

\(^{24}\) Above n 15, p 377

\(^{25}\) Above n 15, p 378

\(^{26}\) Above n 7, p 185

\(^{27}\) Above n 7, p 184

\(^{28}\) See Above n 7, p 376, where an Ohio schoolgirl who similarly committed suicide following forwarding of a sexting picture to hundreds of students throughout seven high school areas. Also see Elizabeth Eracker, ‘Stemming Sexting: Sensible legal approaches to teenagers’ exchange of self-produced pornography’ (2010) Berkeley Technology Law Journal p 565, where a Floridian 13 year old girl committed suicide after facing “months of incessant bullying by her middle-school peers stemming from a topless photo of herself she sexted to a boy she liked”

\(^{29}\) Above n 7, p 175.
3.3.3 - Bullying, cyberbullying and harassment

37. The disclosure of images can be also used either as a form of, or in combination with, other types of bullying behavior. Eracker describes this as the ‘convergence of sexting and cyberbullying’, noting the ‘detrimental effects of sexting greatly compound when teenagers use sexting as a tool for online bullying’ and notes that ‘there are increasingly more examples of sext messages used as tools of coercion and harassment.’ 30 The effect is compounded by the ‘viral nature of computer-based communications and the difficulties of supervising youth activity online.’ 31

3.3.4 - Dating violence, threats and ultimatums

38. Another particularly concerning effect is the enabling of threatening behavior by the perceived ‘power’ in holding a sexting image, particularly when a relationship goes sour. One in ten teenagers has received a threat from a romantic partner, and researchers report that “sexting has become an increasingly popular method of abuse for teens in dating relationships.” Theodore notes that partners in receipt of sexually explicit material can “easily release the photo to friends, post it online, or threaten to do either.” 32

3.4 What is the awareness of such social effects?

39. The Youth Advisory Group Survey did not specifically poll respondents about whether they were aware of the potential negative social effects of sexting. However, question 15 allowed respondents to include further comments that they may have in a ‘free text’ response.

40. One respondent stated:

“Young people often don’t understand, or don’t think about the consequences of sending such an image until it comes back to hurt them.”

41. Some respondents argued that ‘coercion’ was relevant. Other respondents spoke from personal circumstances:

“I think you need to think of the teenagers perspective as some like me were peer pressured and influenced into doing such things”

“I learnt from others bad experiences. So I will never do such a thing again! EVER!”

42. However many respondents were aware of the social effects, commenting:

“I think more people should be aware of the consequences of sharing such photos”

“Because of the harm done to people when the images is forwarded to numerous others there has to be a deterrent (sic) but this should also involve support and education.”

31 Above n 30, p 565
32 Above n 15, p 375
43. On the contrary, many respondents submitted that sexting was ‘fine’ in a “consensual” relationship that the issue effectively “depends on each situation.” One respondent argued that such behavior is effectively a part of life, stating that:

“Sexual experimenting is necessary for young development and the way you develop is through doing silly things and learning from your mistakes.”

4. Extent and effectiveness of existing awareness and education about the legal ramifications of sexting

4.1 What are the Legal ramifications of sexting?

44. The phenomenon of sexting involves the intersection of an array of both potential criminal offences and potential civil liability – or as Svantesson (2010) argues a “complex matrix of partially overlapping federal and state, civil and criminal law.”

This submission does not intend to definitively list all the potential laws interacting with sexting, but to provide the Committee with an overview of some of the laws potentially impacting this area.

4.1.1 Criminal and Child Pornography Offences

45. One undoubtedly topical and greatly important area where the law intersects with sexting is that of child pornography offences.

Minor creation of sexting images

46. Section 68 of the Crimes Act 1958 (Vic) states that a ‘person who prints or otherwise makes or produces child pornography is guilty of an indictable offence,’ with a potential ten year imprisonment. Section 68 of the Crimes Act does not contain an exception for taking one’s own image, nor does it take into account the relevance (or possibility) of consent. As a result, the mere act of a minor taking a photograph of themselves (for distribution or otherwise) could potentially themselves create child pornography and be possibly subject to significant penalties.

Individuals who encourage or solicit minors to take sexting images

47. Minors (or adults) who encourage or solicit a minor to take a sexting image may also be guilty of similarly serious offences. Section 69 of the Crimes Act 1958 creates an offence for ‘procurement etc. of minor for child pornography’ stating that it is an offence for a person to ‘invite a minor to be in any way concerned with the making or production of child pornography’ or ‘causes a minor to be in any way concerned in the making of child pornography’, again with a potential punishment of up to ten years imprisonment.

Sending a sexting image and Commonwealth child pornography laws

48. Commonwealth offences may also be relevant in the transmission of sexting images (i.e. when a minor chooses to transmit a sexting image of themselves via mobile phone or other medium). Section 474.19 of the Criminal Code Act 1995 (Cth)
prohibits transmission and distribution of child pornography material (as defined in that Act) and includes recklessness as to whether or not the material is child pornography material. Similar offences apply under the Criminal Code Act for possession and production of child pornography material (s 474.20). It should also be noted that ‘child pornography material’, as defined by the Code, is similarly defined in a wide variety, including material depicting a person who appears to be under 18 and is ‘engaged in, or appears to be engaged in, a sexual pose or sexual activity (whether or not in the presence of other persons)’.

Receiving a sexting image (solicited or unsolicited)

49. There is also potential criminal liability for those who receive sexting images of minors. S 70 Crimes Act states that persons who ‘knowingly possess child pornography’ are guilty of an offence (up to 5 years maximum imprisonment). Whilst there are defences available for recipients within two years of the minor’s age (s.70(2)(d)) or the minor themselves (s 70(2)(e)), an individual who receives unsolicited information outside these specific defences could possess child pornography (although the fault requirement that a person ‘knowingly’ possess child pornography may provide a defence).

Making Threats/blackmail/harassment in a sexting situation

50. Fortunately, criminal law does attempt to protect individuals where there is an attempt to blackmail, harass or threaten individuals with disclosure of a sexting image. Such a situation could conceivably be covered by section 21 of the Crimes Act 1958 (Vic), which may prevent situations where sexting images are either disclosed (or threatened to be disclosed) in a way that is intended to cause harm to the victim. Conceivably Commonwealth law could also apply, particularly s 474.17 of the Criminal Code Act which prohibits use of a carriage service to ‘menace, harass or cause offence’.

4.1.2 Registration as a sex offender

51. One compounding and exceptionally problematic result of the above child pornography offences is the effect of the Sex Offender Registration Act 2004 (Vic) (‘SOR Act’). The SOR Act contains a mechanism by which individuals guilty of certain offences become automatically subject to the registration provisions of that Act, including child pornography offences which are ‘Class 2’ offences under the SOR Act and in the case of a single offence requires a mandatory minimum period of 8 years registration under the SOR Act.

52. Whilst there is a public interest in actual child pornographers being subject to sex offender registration, there is also a strong possibility (and which has in fact now been reported widely in the media) due to the automated provisions of the SOR Act that minor Victorians could be unfairly caught up and be required to register as sex offenders (requiring reporting to Police under that Act and for a number of years) after taking, sending or receiving sexting images.

53. Such an outcome can have significant and deleterious effects on young Victorians who are caught up in such legislation – an ongoing stain on their reputation but also preventing them from working in certain areas. This concept was extensively

---

34 See s 21A Crimes Act 1958 (Vic), particularly s 21A(2)(ba),(da),(e) and (g).
35 See s 34 Sex Offender Registration Act 2004 (Vic)
36 Above n 8.
discussed in this office’s submission to the Victorian Law Reform Commission (VLRC) review of the SOR Act (July 2011) where it was recommended the SOR Act be overhauled so that inclusion on the Register focused on the risk an offender may pose to the community and occur at the discretion of a trial judge. I note that the VLRC recommended ‘refining’ the scheme and that registration should be ‘more closely aligned with the risk of harm to children.’

4.1.3 Civil Liability and Privacy Laws

Privacy Laws unlikely to be of assistance

54. Whilst Criminal laws may provide some protection against malicious distribution of sexting images, the question arises as to whether civil remedies are available for victims of such conduct to recoup damage caused by that conduct. As discussed above, disclosure of sexting images can have serious, long-lasting consequences for victims.

55. Currently, Australian privacy legislation applies to government organisations and private sector companies, and does not generally place legal privacy obligations on individuals and is thus unlikely to be of any assistance in an archetypal sexting disclosure situation where individuals are disclosing sexting images of others.

Defamation

56. Svantesson broadly canvasses other possible torts that could potentially provide civil remedies in such a situation. One such tort is that of defamation – in Victoria the Defamation Act 2005 (Vic). However, and as Svantesson notes, defamation may be successfully defended. Use of the defence of ‘justification’ (or truthfulness) may allow a defendant to successfully defend an action of defamation, ‘even where the publication was motivated by malice.’

Breach of Confidence

57. Breach of Confidence doctrines may provide some protection in a civil arena. A breach of confidence may be found where:

- The information is of a confidential nature;
- The circumstances of the communication imposed confidentiality; and
- There must be an actual (or threat of) unauthorised use of the confidential information.

58. The Victorian case of Giller v Procopets provides an interesting case. The defendant (Mr Procopets) had filmed sexual activities during a relationship with Ms Giller. The footage was a mixture of times where Ms Giller was aware of the filming and other occasions where she was not. Following a breakdown of the relationship, Mr Procopets showed the video tapes to some people and threatened to show it to many

---


39 See Privacy Act 1988 (Cth), s 7B(1)

40 Above n 4, p 54

41 Commonwealth v John Fairfax & Sons Ltd (1980) 147 CLR 39.

Privacy Victoria – Submission to the Victorian Parliament Law Reform Committee on its Inquiry into Sexting
others (including Ms Giller’s family). Despite a decision by the trial judge (Gillard J) finding a breach of breach of confidence (as well as intentional infliction of harm), the trial judge decided not to award damages. The decision not to award damages was later reversed on appeal by the Court of Appeal, awarding Ms Giller $40,000 for injury to feelings.\[42\]

59. Thus an individual (whether adult or minor) who provides a sexting image to another individual (whether adult or minor) and that image is subsequently misused by the recipient individual (for example, mass disclosure or dissemination) may face liability for breach of confidence.

60. However, there is one significant weakness of the breach of confidence doctrine – the requirement that the circumstances impose a duty of confidentiality. An example is that of where a third party comes across (or inadvertently) finds or accesses a sexting image intended to stay between two people – for example, an error in sending or an unauthorised access. The third party was not a party to the communication, and therefore it would be difficult to establish that they owed a ‘duty of confidence’.\[43\]

4.2 What is the awareness of the existing potential legal ramifications of sexting laws?

4.2.1 Survey Results

61. Question 11 of the Youth Advisory Group Survey asked whether the ‘sending or forwarding of such photos (i.e. sexting images) of people under 18’ was against the law in their state/territory/country. Whilst 54.35% of respondents correctly identified that it would be illegal,\[44\] concerningly, 4.57% considered it would not be. Even more alarming, 41.09% of respondents indicated that they ‘did not know’ whether or not sending or forwarding of such pictures would be illegal.

62. Respondents generally thought that understanding of the legal ramifications was low. For example, one respondent stated:

“Under 18s are often unaware of the law in regards to what is essentially private interaction between friends/acquaintances/girlfriends and boyfriends”

63. Some respondents understood but expressed alarm at the current legal situation, with one respondent arguing:

“It seems ridiculous that the age of consent in Victoria is 16, yet photographing ones self doing something that they have a legal right to do is illegal. What is even more ridiculous is that the recipient of such a photograph is criminalized when they may not have even invited the image to be sent. These laws were poorly written in the first place, obviously by people who do not fully understand the issues, and they are policed in an appalling manner.”

\[42\] Giller v Procopets [2008] VSCA 236
\[43\] See Covo v AN Clark (Engineering) Ltd [1969] RPC 41.
\[44\] The YAG survey mentioned ‘such photos’ which presumably refers to question 5’s definition of ‘nude or semi-clothed photo of yourself... includ(ing) photos of people in underwear and/or swimwear’. It should be noted that it would depend on the individual photograph in question as to whether it met the definition of ‘child pornography’ (in Victoria, this generally requires an image to depict a minor engaged in sexual activity or depicted in an indecent sexual manner or context’ – see s 67A Crimes Act 1958 (Definition of ‘child pornography’).
64. Others argued that the law was ‘antiquated’ and stated:

“I think at the moment the law is quite antiquated as it stands and has been established in response to situations that are not remotely like some of the situations we are seeing today with teenage behavior.”

65. Some respondents thought privacy or other laws may be of assistance:

“Forwarding a ‘sext’ should be an offence if the person/persons in the picture or responsible for the text has not explicitly consented to the forwarding – I imagine it would come under similar laws as defamation or privacy laws.”

66. Respondents generally tended to focus on whether sexting ‘should’ be illegal rather than its current legal status, however.

4.2.2 Are young people aware of the legal ramifications?

64. Anecdotally, it would appear that the link between sexting and its potential legal ramifications is not well known. In Queensland, it was reported that 450 child pornography charges were laid against youths aged between 10 and 17 in the three years preceding 2011.\[45\] Child psychologist Michael Carr-Gregg stated:

“They’re ignorant of the law and no one’s ever sat them down and said ‘When you take a picture of yourself and send it, that’s child pornography.’”\[46\]

67. It is probably reasonable to assume, that the understanding of the legal ramifications of sexting, ranging from potential criminal liability under child pornography and other criminal laws to civil liability, are likely to be poorly understood. This may be because the general public view of what constitutes, for example, child pornography, does not correlate to its legal definition (which would clearly incorporate many sexting behaviours).

5. Where to from here? Why laws regarding sexting are inappropriate and in need of reform

68. It is clear from the above discussion that the interrelations of different laws impacting upon the phenomenon of sexting is creating unintended consequences and are in need of reform.

5.1 Reform of the Sex Offender Registration Act

69. The most striking and concerning outcome in relation to sexting arises out of the mandatory registration provisions of the Sex Offender Registration Act 2004 (Vic). As discussed above, mandatory registration is absolutely and entirely inappropriate for minors. The absence of a discretionary power for judicial offers to decide whether registration is appropriate for Class 1 and Class 2 offences (as discussed above) is

---

\[45\] Jason Tin, ‘More than 450 child pornography charges laid against youths aged 10 to 17 in the past three years’ The Sunday Mail (Brisbane), 9 October 2011.

\[46\] Above n 45.
disappointing and will lead to unfair outcomes, such as children being registered for sexting despite having a low risk of reoffending.

70. This creates a variety of burdens: for Victoria Police who are forced to register and monitor offenders who pose a low risk and thus waste precious police resources doing so; for individuals – those who are unfairly registered and are forced to live with the shame and stigma of being a ‘registered sex offender’ for a number of years (and arguably forever); and, finally for society at large, which itself is robbed of the potential contribution of young people in certain occupations and forms of employment.

71. In some circumstances, it could be appropriate in sexting cases for an offender to be actually registered as a sex offender – for example, cases referred to above where sexting images were used to manipulate and further other abuses, or where dissemination of an image occurs maliciously, deliberately and repeatedly with an express intention to harm.

72. However, the ‘circumstances’ are crucial – and a judicial officer is uniquely placed after hearing a case to determine the risk of reoffending and the potential harm an offender could cause, balanced against the effects on the offender and prospects for rehabilitation.

73. Question 14 of the Youth Advisory Group survey asked respondents about a desired penalty should sexting be against the law. Only a small amount of respondents (10.68%) considered registration as a sex offender appropriate. A greatly significant proportion of comments made by respondents identified the deleterious effect of sex offender registration, commenting:

“Under 18 should not be registered as a sex offender, it is just a stuff up.”

“Personally I find it very hard to justify punishing someone who has participated in this behavior, has caused no harm and is caught – therefore condemning them to a place of the register, and jeopardizing their chances of finding a job in certain areas of society.”

“It is…odd that the age of consent…is 16, so you can have as much sex as you wish, but should you take a photo of the intimate event, you will end up on the sex offenders registry. It’s nonsensical.”

“If the people involved are under 18 they should not be registered as sex offenders as this harsh penalty will affect the rest of their lives based on what was most likely a poorly thought through decision in which consequences were not even considered.”

“I feel that to be registered as a sex offender if you are under 18 is too harsh because people that young are not mature enough to comprehend the consequences of such actions.”

“The sexual offenders register is inappropriate for these actions unless there was coercion in the taking of the photographs or there is a power or age advantage involved.”

“I think there should be a punishment but I don’t think it should affect the rest of your life like being a registered sex offender.”

“Sexting between young people should definitely not result in individuals being placed on sex offender lists – this is ridiculous as the individuals are from the same age group and it is perfectly nature for them to be attracted to each other and explore different ways of expressing sexuality.”

74. A person who self-identified as a magistrate having ‘heard many sexting cases’ commented:
“I know your survey seeks answers from young people. At 66 I may be disqualified from participating. However, as a magistrate having heard many sexting cases, I am probably more qualified than many others to express an opinion.

1. Most people involved in sexting have no understanding of the speed with which the photos can be spread via electronic media. 2. Likewise, they would not appreciate that this behaviour can result in registration as a sex offender. One of the targets of your research should be to address the issue of the legislation governing registration of sex offenders. This legislation is the most draconian legislation ever passed in this state. It created an administrative “rubber stamp” approach to registration and eliminated the courts/judges/magistrates from the process. The judges and magistrates are the ones who hear the charges, hear details of any previous criminal history and hear submissions by counsel as to the background of the “offender”. They are the ones qualified to make a reasonable assessment of the likelihood of re-offending or danger to the community. Their exclusion from the decision to register or not register a person as a sex offender is a gross breach of human rights.”

75. This is a problem not unique to Australia. American commentators note that in jurisdictions with such mandatory schemes, “sex offender registration is especially problematic for juveniles” and is a “devastating collateral consequence”, arguing that sex offender registration “over penalises” even “deplorable” types of sexting. 47

76. I call on the Committee to urgently consider this area as one in need of immediate reform. It is a stain on our justice system that young people are being caught by such laws which were designed for an entirely different purpose – to monitor dangerous sex offenders and to lower the risk of recidivism.

77. I would also urge the Committee to look not only forward but also back and consider how to deal with those minors who have been registered in Victoria for sexting-related offences. As Walters (2010) argues, “meaningful reform will require…amend(ment of) existing state sex offender registration laws to relieve juveniles who were forced to register due to sexting behavior.” If the way forward is judicial discretion, then we must also consider those young persons who brought this matter to our collective attention and whose matters rightly need revisitation.

5.2 Sexting and Child Pornography Laws

78. The question of legality or illegality is a far more vexed question – primarily because ‘sexting’ encompasses a wide variety of different conduct. For example, the difference between a consensual sexting exchange between two consenting minors aged over 16, compared with predatory behavior of adults in obtaining images of minors or mass dissemination of a sexting image on a social networking site.

79. There was general support for maintaining a legal prohibition on sexting according to the YAG survey. Question 12 of the survey asked respondents: “Should the sending or forwarding of such photos of people under 18 be against the law on your state/territory/country”. 5875% of respondents answered ‘yes’ (it should be against the law), with 23% responding ‘no’. 18.25% responded that they ‘don’t know’.

80. Despite that, it should be noted that the survey did not drill down into the exact types of differing conduct that constitutes ‘sexting’ as a concept, and respondents certainly made their views strongly in the ‘further comments’ section, and questions around illegality were the most popular types of comments.

81. Many respondents argued that the legal prohibition should remain but with reduced punishment, for example:


Privacy Victoria – Submission to the Victorian Parliament Law Reform Committee on its Inquiry into Sexting Page 18
“I believe it should be against the law, however depending on the age and the context of how the photo was sent, the punishment should fit the crime.”

82. Many respondents argued that there “needs to be protection” for young persons, that “consent” is of relevance, with many arguing that “sexting to/from anyone of the same age should be legal.”

83. Most respondents generally agreed, however, that forwarding on of such photos from a recipient outside should be illegal. For example, one respondent argued:

“Sexting should not be against the law where it is consensual and non-exploitative. The act of sending the sext onto someone else should be, as there is no consent.”

84. Many respondents considered that there should be a correlation with consensual sexual activity. One respondent stated:

“In Victoria, the legal age of consent is 16. By giving us the right to engage in sexual intercourse, but not send “nudes” doesn’t really make sense. I believe it SHOULD be legal the same way as of the age of consent (eg. 2 year rule).”

5.2.2 Why it is unfair to punish young persons consensually engaging in sexting

85. As discussed above, sexting is somewhat risky behavior in that there is the possibility after the image is sent that it can be misused by the recipient. However, the current Crimes Act position is to treat the issue as one of child pornography. It is doubtful that legislators at that time would have intended (or could have even foreseen) that such legislation would be used to penalise young people taking pictures of themselves – and attach significant penalties to that. As Barry argues:

“Legislatures, intent on protecting children from abuse and exploitation, created overly broad statutes that have ensnared the comparatively innocuous behavior of immature adolescents.”

86. Secondly, it is particularly harsh given the emotional vulnerability and often poor judgment displayed by teenagers with still developing brains. 48 Teens are often ‘immature risk-takers who do not fully comprehend the consequences of their actions.‘ 49 It is also likely that any ‘zero tolerance’ approach will do more harm than good. 50

87. There are a variety of potential options to ‘soften’ the effect of child pornography legislation whilst also not creating potential loopholes in those laws. Some US states have grappled with the issue, with a variety of different legislative responses such as:

- The US state of Vermont – created a new (but lower misdemeanor) offence for sexting, and exempting minors from prosecution under child pornography laws and sex offender registration laws. 51
- The US state of Nebraska – Created affirmative defences for possession of child pornography, so long as the image was ‘knowingly and voluntarily created’ and that the defendant has not made it available in a wider way. 52

88. Barry argues for a ‘sensitive solution’ to sexting, which is essentially comprised of:

48 Above n 7, pp 196 and 198
49 Above n 47, p 140
51 Above n 36, pp 574-5
52 Above n 36, p 576
- Prohibiting prosecution of minors for sexting under child pornography statutes;
- Exempting them from sex offender registration; and
- Crafting statutes that differentiate amongst the various categories of potential offenders – juvenile creators of sexting images; innocent recipients, those that forward images, those that maliciously distribute them and teenage recipients only slightly past the age of majority.

89. The precise way forward is one for the Committee to carefully consider. I would however consider it reasonable that young people are provided with some leniency and protection when consensually sending sexting images to one another. It is an extreme measure to submit them to prosecution as child pornographers and unlikely to accord with the intention of child pornography offences. The legal means and mechanisms to effect this change are open for debate – and could include either actual defences, legal presumptions, shields from prosecution, diversionary programs or cautioning. However, in my view the current legal position – of treating consensual young adults who choose to sext as child pornographers – is not a defensible one.

90. In the same vein, however, I consider that there should be no leniency for those offenders who maliciously and deliberately distribute sexting images for bullying/revenge or with intent to cause deliberate harm to other individuals. As discussed above, these have caused significant and long-lasting devastating impacts to victims. Such behavior should not be tolerated.

5.2.3 A lower punishment?

91. One other alternative is to go down the path of partial decriminalisation by reducing penalties. This approach was one significantly supported by the Youth Advisory Group survey. Question 14 asked about potential penalties should sexting be against the law. 23.49% considered a fine was appropriate, with only 4.81% considering a prison term appropriate. The most significant response was that punishment should ‘depend on the age of the people involved’ (40.50%).

92. Survey responses similarly indicated that the circumstances and age of the person should be relevant in determining punishment, for example respondents variously gave examples of alternative punishments such as ‘fines’, ‘sexual health counselling’ or a ‘police warning’. One responded stated:

“I think that the punishment should be depending (sic) on the photo who it is from, how often it is and age.”

5.3 A statutory cause of action for serious invasions of privacy

93. Whilst reform of criminal laws is important, the impact of civil laws should not be forgotten. For an individual who has suffered significant loss or damage as a result of having a naked or explicit image of themselves either forwarded on or uploaded to a social networking site, the criminal law will provide scant redress for such damage. This is essentially a privacy issue – a disclosure of one’s information (in this case, quite sensitive information) in a way not anticipated by that individual. It also constitutes an invasion into the most personal and private of spaces – one’s own body.

94. As discussed above, doctrines of breach of confidence may be of some assistance but only in certain circumstances – one key requirement being the imposition of a duty of
confidence. As in the example given above – an individual who comes across an Sexting image by chance, or is forwarded that image will generally bear no obligation to the original creator of the Sexting image. Forwarding ‘on’ of that image may fall through the cracks of the breach of confidence doctrine, which was not developed for this purpose.

95. In November 2011, the former Victorian Privacy Commissioner (Ms Helen Versey) provided a submission to the Commonwealth Department of Prime Minister and Cabinet which had released an issues paper discussing the possibility of a statutory cause of action for serious invasions of privacy. The former Commissioner noted that “other common law actions (defamation, breach of confidence, nuisance and trespass)…may be used to partially protect privacy rights, but the ability of the common law or equity to address such action is limited.”

96. Sexting is one area where there is such a limitation, and currently, there is no general right or common law action for ‘breach of privacy’. Whilst there was a possible suggestion of such a right by the High Court, a finding in Queensland and award of damages for breach of privacy, and a finding in Victoria of a breach of privacy the right of privacy or a cause of action remains unconfirmed by higher courts.

97. I would strongly support incorporation of a statutory cause of action for breach of privacy and believe that it would go a long way to creating alternate non-criminal protections for individuals who have their own Sexting images maliciously distributed. Such a tort could conceivably include the possibility of restraining orders and injunctions for threatened disclosures as well. I note that this has now been recommended by the Australian Law Reform Commission (ALRC), the Victorian Law Reform Commission (VLRC) and the New South Wales Law Reform Commission (NSWLRC). I urge the Committee to consider, should the Commonwealth not progress with a cause of action at a federal level, whether Victoria should proceed with the creation of a state statutory cause of action for privacy.

5.4 The urgent need for education

98. In any event, and irrespective of the recommendations of the Committee, it is clear that enhanced educational emphasis is required in relation to Sexting. Young people will often be quite unaware of the potential consequences – social and legal – of taking such pictures and sending them, either to someone they know and trust or to strangers or unknown individuals.

99. Given the significant consequences involved, the possibility of mass dissemination, and the tragic outcomes that have occurred in the past, it is imperative that students are educated on the potential risks involved in engaging in Sexting. It is only then that


54 See Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd [2001] HCA 63, and Grosse v Purvis [2003] QDC 151 where a Queensland district judge awarded $178,000.00 after finding a breach of privacy and formulated a test for a tort of privacy.

55 See Doe v Australian Broadcasting Corporation & Ors [2007] VCC 281, where Hampel J found a breach of the tort of invasion of privacy (para 164). It should be noted, however, that the case (which involved the ABC publishing the name of a rape victim who had a judicial order suppressing her identity under the Judicial Proceedings Reports Act 1958) was also run on the basis of breach of statutory duty and breach of confidence, which were also upheld.

Privacy Victoria – Submission to the Victorian Parliament Law Reform Committee on its Inquiry into Sexting
young people can make proper informed decisions about whether they wish to engage in this conduct, and if they do, hopefully in a way that minimises the potential risks.

100. Currently, there appears to be little education directed towards young teens on the issue of sexting. I note that the Australian Government’s Cybersmart website, managed by the Australian Communications and Media Authority, is designed to inform young people (amongst others) about cybersafety issues and that it does discuss sexting.\(^56\) However, it is questionable as to whether approaches such as telling students to ‘just say no’\(^57\) will actually work or whether a more realistic, comprehensive method of education could be more effective.

101. Survey responses generally supported an emphasis of educational programs to inform students of their rights, responsibilities and the risks in sexting. Responses stated:

―A greater education in this area should be stressed, especially during this age when technology is rapidly more available, and becoming to easier to exploit and exploit others.”

―I think more people should be aware of the consequences of sharing such photos. An education campaign would help.”

―Education about making sure you are only sending it to people you know and trust is the key here.”

―Education to people in early high school to think – media, phones, facebook are PERMANENT forms of communication.”

―Education to be included in the sex ed (sexual education) programs at school.”

6. Conclusion

102. Technology often raises new and interesting challenges for societies. With the explosion of mobile phone and other communication technologies, individuals can send and share personal information like never before. Most developments are positive but all have risks when not used carefully and correctly. The internet now allows dissemination of information in a way unimaginable twenty years ago.

103. As in most other areas, a knee-jerk reaction is almost always the wrong one. Attempting to ‘ban’ sexting, or maintaining the current existing penalties will not work. Young people will most likely continue to send sexting images of themselves to others. Worse still, some will get caught up in child pornography charges which were designed to capture sexual predators, not young persons exploring their sexuality.

104. This submission sets out a relatively tentative path for some early reform. Of urgency is the effect of the Sex Offenders Registration Act 2004 (Vic) – mandatory registration is inappropriate and should be reviewed as an immediate first step. More discussion and debate around the interaction between child pornography legislation and sexting is required. The current laws are somewhat draconian – child pornography laws treat children sexting as perpetrators despite the very purpose of those laws being to protect children. The exact regulatory approach is difficult – but any proposed laws should seek to balance freedom of expression and consensual exchanges with the risk involved, the need to prevent exploitation and the need to protect against abuse and intentional infliction of harm.

\(^56\) Australian Communications and Media Authority, ‘CyberSmart Website’, accessible at http://www.cybersmart.gov.au

105. A cause of action in privacy is also an important inclusion in any proposed protections – to provide a corresponding civil action to address loss and damage potentially suffered by victims, particularly in the case of a mass disclosure of a sexting image. Our laws need to both reflect the reality of our society and build in appropriate protections against misuse.

106. However, the most essential reform may well be a non-legal one – enhanced education. We need our youth to properly understand the technologies they are using and to make educated and informed decisions on how they interact with that technology.

DR ANTHONY BENDALL
Acting Victorian Privacy Commissioner
BIBLIOGRAPHY

[http://www.abc.net.au/lateline/content/2011/s3193279.htm](http://www.abc.net.au/lateline/content/2011/s3193279.htm), as at 28 June 2012.


Brady, Nicole, ‘Sexting Youths Placed on Sex Offender Register’, *The Age* (Melbourne) 24 July 2011.


Ryan, Elizabeth M, ‘Sexting: How the State can Prevent a Moment of Indiscretion from Leading to a Lifetime of Unintended Consequences for Minors and Young Adults’ (2010) 96(1) Iowa Law Review, 357.

Sacco, Dena, Rebecca Argudin and James Maguire, Sexting: Youth Practices and Legal Implications, Research Publication No. 2010-8, Berkman Centre for Internet and Society, Harvard University (2010).


Tin, Jason, ‘More Than 450 Child Pornography Charges Laid Against Youths Aged 10 to 17 In the Past Three Years’ The Sunday Mail (Brisbane), 9 October 2011.


Case Law

Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd [2001] HCA 63

Covo v AN Clark (Engineering) Ltd [1969] RPC 41

Giller v Procopets [2008] VSCA 236

Grosse v Purvis [2003] QDC 151