‘SEXTING’ AND THE SEX OFFENDER REGISTER: REVIEW AND RECOMMENDATIONS

A submission by the Monash Law Students’ Society’s Just Leadership Program (2011)

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I INTRODUCTION

A Definition and Terms of Reference

We welcome the opportunity to provide the Victorian Law Reform Commission (VLRC) with a submission for its inquiry into ‘sexting’. For the purpose of the submission, the following definition of ‘sexting’ proposed in the Terms of Reference is accepted.

‘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’

While sexual exploration among young people is not a new phenomenon, the use of mobile phones and the Internet can result in the permanent recording of images and their rapid dissemination to a large number of people. These new technologies can have the effect of ‘transforming fleeting youthful indiscretions into lasting mistakes’.

This submission primarily addresses issues (1) and (3) raised in the terms of reference. These are:

1. the incidence, prevalence and nature of sexting in Victoria; and

2. the appropriateness and adequacy of existing laws, especially criminal offences and the application of the Sex Offender Register, that may apply to the practice of sexting.

B An Introduction to Past Studies

In 2009, the organisation ‘Beatbullying’ conducted a 32-question cross-sectional study of 2,094 persons aged between 11 and 18 years old on sexting and sexual bullying. Surveys were distributed through secondary schools in England. 25% of participants had received offensive sexual images, 55% of which were issued via mobile phone. 85% of the participants whom had received offensive sexual images

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3 Ibid.
5 Ibid.
had received them from someone the recipient knew, most often from someone of the opposite sex.

A separate study was conducted in 2009 by three organisations: the National Campaign to Prevent Teen and Unplanned Pregnancy, Cosmogirl.com and Teenage Research Unlimited (TRU) (‘the Cosmogirl study’). The Cosmogirl study surveyed 653 teenagers, aged 13 to 19 years old, and 627 young adults, aged 20 to 26 years old, on sexting behaviours. The survey incorporated data from the United States of America Census to weight data according to the demographic composition of teens and adults. It found 20% of teenagers and 33% of young adults send or post, nude or semi-nude, pictures or video, of themselves.

However there is a void of large studies on the prevalence of sexting amongst adults. This information is important when examining the operation of the criminal law on adults found to have engaged in sexting involving minors. At the time of this submission, no studies exist that examine the opinions of the adult population on the punishment of sexting involving minors.

C Original Research and Statement of Contention

To aid this submission, original research was undertaken. The study ‘Sexting’: Prevalence and Opinion in Adults is contained in the Appendix. The results of the study support our contention that the mandatory registration of adults participating in sexting to minors is inappropriate. The findings of the study are discussed in Chapter VI.

It is submitted that the current laws, which mandate registration following a conviction for a child sexual offence should be amended. Although sexting involving minors can cause significant harm and those who perpetrate such offences may pose a continuing risk to the community, judges are in the best position to decide whether registration is an appropriate and proportionate response, based on the individual offender and the circumstances of the case. In-keeping with the orthodox role of a sentencing judge, the Judiciary should be conferred with a structured discretion in relation to the Sex Offender Register.

The danger of mandatory registration is highlighted by two recent cases, one occurring in Victoria and the other in the USA. In both cases a judge was forced to register young people engaging in sexting as sex offenders despite no evidence that they posed a continuing threat to the community. These cases are discussed in Chapter V Part B. Richards and Calvert explain the consequences of automatically grouping ‘sexting teens’ with genuine sex offenders:

‘First, and perhaps most obvious, teenagers engaged in sexting are not knowingly harming minors in the same way that traditional child pornographers do. Indeed, in many of these instances, teens are sending photographs of themselves in a

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6 The National Campaign to Prevent Teen and Unplanned Pregnancy, Sex and tech: Results from a survey of teens and young adults (2009)

playful manner—a high-tech form of flirting—using a forum that has become synonymous with their generation. Second, the draconian penalties that stem from child pornography convictions can decimate a teenager’s life—making it all but impossible for the teen to become a productive member of society... Finally, the stigma attached to being labelled a child pornographer is lasting. Few crimes carry such a pejorative marker, and members of the public often link child pornography with paedophilia and other heinous crimes—sometimes for good reason. The teens enveloped in these cases are not the only ones suffering harm. Society at large pays a hefty price. Forcing teenagers who get caught sexting and are criminally prosecuted to register as sex offenders severely dilutes the importance and utility of the sex offender registry.\(^\text{7}\)

It is therefore submitted that s 62(2) of the Sex Offenders Registration Act 2004 (Vic) should be amended so that judges have discretion to place people convicted of sexting-related offences on the Sex Offender Register.\(^\text{8}\) Recommendations for reform of s 62(2) are more fully discussed in Chapter VIII of this submission.


\(^\text{8}\) Sex Offenders Registration Act 2004 (Vic) s 62(2).
II CURRENT VICTORIAN LEGISLATIVE APPROACH

A Overview of Victorian Law

The production, procurement and possession of child pornography are punishable offences under the Crimes Act 1958 (Vic). Section 68 makes it an offence for a person to produce child pornography. It is also an offence under s 69 to invite, procure, cause or offer a minor to be ‘in any way concerned in the making or production of child pornography’. Furthermore, it is an offence under s 70 to knowingly possess child pornography. These sections are all indictable offences.

The Crimes Act 1958 (Vic) 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’. This definition encompasses sexting, specifically in regard to the creating, sharing, sending or posting of images via mobile phones or other electronic devices.

An adult who sends a sexually explicit, sexually suggestive or nude image to a minor may be deemed to have contravened s 21A of the Crimes Act 1958 (Vic). This section prohibits stalking conduct. The two-stage test in s 21A proscribes any contact with the victim via ‘text message, email or other electronic communication’, where the offender knows or ought to have known that engaging in such conduct would be likely to cause harm, or arouse such apprehension or fear. The offence carries the maximum punishment of 10 years imprisonment.

By virtue of s 47(1), an adult sending such an image to a person under 16 years old may also be guilty of committing an indecent act with a child under that age, which carries with it an imprisonment term of 10 years maximum.

It is noted that the main offences for conduct involving an adult sexting a minor are contained in Commonwealth law and are discussed in Chapter IIIA.

B Sex Offender Register

A person convicted of a child pornography related offence under either s 68, s 69 or s 70 is considered a ‘registrable offender’ and will be placed on the Sex Offender Register.

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9 Sex Offenders Registration Act 2004 (Vic) s 69.
10 Sex Offenders Registration Act 2004 (Vic) s 67A.
11 Crimes Act 1958 (Vic) s 21A(2)(b).
12 Crimes Act 1958 (Vic) ss 21A(3)(a),(b).
13 Crimes Act 1958 (Vic) s 21A(1).
14 Crimes Act 1958 (Vic) s 47(1).
15 Sex Offenders Registration Act 2004 (Vic) ss 3, 6, 7; sch 2.
16 Sex Offenders Registration Act 2004 (Vic) s 62(2).
The Chief Commissioner of Police administers the Sex Offender Register. The purpose of the Register is to reduce ‘the likelihood of... reoffending and assist in the investigation and prosecution of future [sex] offences.’

1 What Personal Information Must be Reported and When

To assist in the implementation of the Sex Offender Register, registrable offenders are required to report specific personal information to the police. Reporting generally occurs at a police station. Offenders must comply with an initial report. Registrable offenders must then continue to report annually to police and must report changes in personal circumstances within 14 days after that change occurs. The registrable offender may be required to provide supporting material for any personal information required.

Personal information which must be provided to the police include the registrable offender’s name (and any previous names), date of birth, telephone number and email address, as well as:

- Details of the registrable offender’s Internet service provider (ISP), including the name and business address of that ISP;
- Any Internet user names, instant messaging user names, chat room user names or other user name or identity that the registrable offender uses;
- The names and ages of any children who generally reside in the same household as the registrable offender, or with whom the registrable offender has regular unsupervised contact;
- Details of the registrable offender’s employment, such as the nature of their employment, name of their employer and address of work premises;
- Details of the registrable offender’s affiliation with any club or organisation that has child membership or child participation in its activities;
- Details of any motor vehicle the registrable offender owns or generally drives;

17 Sex Offenders Registration Act 2004 (Vic) s 62(1).
18 Victoria, Parliamentary Debates, Legislative Assembly, 3 June 2004, 1851, (Andre Haermeyer); See also Sex Offenders Registration Act 2004 (Vic) s 1(1).
19 Sex Offenders Registration Act 2004 (Vic) s 22.
20 Sex Offenders Registration Act 2004 (Vic) s 23.
21 Sex Offenders Registration Act 2004 (Vic) ss 23, 14(1)(m), 17(1B)(a).
22 Sex Offenders Registration Act 2004 (Vic) s 26.
23 Sex Offenders Registration Act 2004 (Vic) ss 14(1)(a), (1)(b), (1)(c), (1)(d), (1)(da), (1)db).
24 Sex Offenders Registration Act 2004 (Vic) s 14(1)(dc).
26 Sex Offenders Registration Act 2004 (Vic) s 14(1)(de).
27 Sex Offenders Registration Act 2004 (Vic) s 14(1)(f).
28 Sex Offenders Registration Act 2004 (Vic) s 14(1)(g).
29 Sex Offenders Registration Act 2004 (Vic) s 14(1)(h).
● Whether the registrable offender has any tattoos or permanent distinguishing marks;30

● Whether the registrable offender has ever been placed on a corresponding sex registry in any foreign jurisdiction;31 and

● If the registrable offender has been in government custody in respect of a registrable offence, the details of when and where the government custody occurred.32

In addition to the information required under s 14, if a registrable offender intends to leave Victoria more than 14 days, the registrable offender must provide specific information to the Chief Commissioner of Police about where they intend to travel.33 Furthermore, any change to travel plans while the registrable offender is outside of Victoria must also be reported.34

2 Consequences of Breaching Reporting Obligations

If a registrable offender fails to comply with any of his or her reporting obligations and does not have a reasonable excuse, the registrable offender will be liable for level 6 imprisonment (5 years maximum).35 Furthermore, it is an offence for a registrable offender to provide information that he or she knows to be false or misleading.36

3 Period of Compliance for Reporting Obligations

Sections 68, 69 and 70 of the Crimes Act 1958 (Vic) are considered ‘Class 2 offences’.37 A registrable offender convicted of a single Class 2 offence must continue to comply with the reporting obligations for eight years.38 If the offender has been found guilty of two Class 2 offences, the reporting period will extend to 15 years.39 If the registrable offender has committed three or more Class 2 offences, the reporting obligations will continue for the remainder of his or her life.40

4 Exemptions to Reporting Obligations

The Chief Commissioner of Police may allow exemptions to reporting obligations.41 Alternatively, a registrable offender may make an application to the Supreme Court to

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30 Sex Offenders Registration Act 2004 (Vic) s 14(1)(i).
31 Sex Offenders Registration Act 2004 (Vic) s 14(1)(j).
32 Sex Offenders Registration Act 2004 (Vic) s 14(1)(k).
33 Sex Offenders Registration Act 2004 (Vic) s 18.
34 Sex Offenders Registration Act 2004 (Vic) s 19.
35 Sex Offenders Registration Act 2004 (Vic) s 46(1).
36 Sex Offenders Registration Act 2004 (Vic) s 47.
37 Sex Offenders Registration Act 2004 (Vic) sch 2.
38 Sex Offenders Registration Act 2004 (Vic) s 34(1)(a).
39 Sex Offenders Registration Act 2004 (Vic) s 34(1)(b).
40 Sex Offenders Registration Act 2004 (Vic) s 34(1)(c)(iii).
41 Sex Offenders Registration Act 2004 (Vic) s 39A.
suspend their reporting obligations. 42 However, the registrable offender must cover the costs of this application, even if ultimately successful. 43 Conversely, the Chief Commissioner of Police may also extend reporting obligations. 44

5 Other Powers Given to Police to Implement Register

Police have the power to take fingerprints and fingerscans of registrable offenders. 45 Police also have the power to take photographs of the offender. 46

6 Restrictions Placed on the Livelihood of Registrable Offenders

A significant implication of being placed on the Sex Offender Register is that registrable offenders cannot be involved in ‘child related employment’. 47 The definition of ‘child related employment’ is very broad. 48 ‘Child related employment’ includes child protection services, child care services, educational institutions, community services, remand centres, refugee facilities used by children, paediatric wards of hospitals and clubs or associations with child membership. 49

42 Sex Offenders Registration Act 2004 (Vic) ss 39(2), 40.
43 Sex Offenders Registration Act 2004 (Vic) s 42.
44 Sex Offenders Registration Act 2004 (Vic) s 43.
45 Sex Offenders Registration Act 2004 (Vic) s 27.
46 Sex Offenders Registration Act 2004 (Vic) s 27A.
47 Sex Offenders Registration Act 2004 (Vic) s 68.
48 Sex Offenders Registration Act 2004 (Vic) s 67.
49 Sex Offenders Registration Act 2004 (Vic) s 67.
III JURISDICTIONAL COMPARISONS

Each Australian state and territory has separate legislation that regulates sexting. The approaches vary between jurisdictions. Since 2005, no two Australian jurisdictions have had the same pornography laws. Fundamental differences exist in relation to the definitions, interpretations, elements of the offences and age of the relevant child contained in each jurisdiction’s legislation.

A set of Commonwealth pornography laws designed to pickup Internet use and telecommunication service situations add further complexity to the schemes. The following is an overview of each jurisdiction’s approach to child pornography laws and application to sexting.

A Commonwealth

Sections 474.14-25 of the Commonwealth Criminal Code make it a crime to:

- Use an Internet service; or
- Any other telecommunication services to access, obtain, transmit, make available, publish or otherwise distribute, supply or produce.\(^{50}\)
  - Child pornography material; or
  - Child abuse material.

A child is considered to be anyone under 18 years old and the fault element required is intention or recklessness.\(^{51}\) The maximum term of imprisonment is 15 years.\(^{52}\)

‘Child pornography material’ is material that depicts, represents or describes a person under 18 years old who is engaged in, appears to be engaged in, or is in the presence of someone who is engaged in, or appears to be engaged in, a sexual pose or sexual activity and that activity is also offensive.\(^{53}\) It also includes material that depicts, represents or describes a sexual organ or anal region of such a person in a way that is offensive.\(^{54}\) ‘Child abuse’ material is also defined.\(^{55}\)

Section 473.4 contains a list of matters to be taken into account when deciding whether a reasonable person would regard the material, or the use of carriage service,

\(^{50}\) Criminal Code Act 1995 (Cth).
\(^{52}\) Criminal Code Act 1995 (Cth) s 474.19.
\(^{53}\) Criminal Code Act 1995 (Cth) s 473.1.
\(^{54}\) Criminal Code Act 1995 (Cth) s 473.1.
\(^{55}\) Criminal Code Act 1995 (Cth) s 473.1.
as being ‘offensive’. The list includes whether it accords with social standards, whether it has literary merit, artistic merit, educational merit and whether it is of a medical, legal or a scientific nature. Defences also exist for conduct done for the public benefit in enforcing and monitoring compliance with the law, for the administration of justice and for conducting approved scientific, medical or educational research. Of note is the Explanatory Memorandum to the Act stating that s 474.4 is intended to import community standards and common sense into a decision on whether the material is offensive.

There are several ways in which a person over 18 years old can be found to have sent a sexually explicit, sexually suggestive or nude image of himself or herself to a person under 16 years old.

Sections 474.26(1) and 474.27(1) provide that it is an offence for a person 18 years old or over to use a carriage service to transmit a communication to a person under 16 years old, with the intent of procuring sexual activity, or with the intent of making it easier to procure sexual activity. The offences carry sentences of 15 years and 12 years, respectively.

It is an offence for a person 18 years old or over to use a carriage service to communicate material to a person under 16 years old that is indecent, as a matter of fact, according to the standards of a reasonable person. The penalty is seven years imprisonment. A carriage service is defined as a service for carrying communications by means of electromagnetic energy. This includes mobile phones.

Section 474.15(2) states that a person is guilty of an offence if they use equipment connected to a telecommunications network in order to commit a serious offence under any Australian law. This section could be read together with other sections to create the offence of an adult sexting to a minor.

Section 474.17(1) makes it an offence to use a carriage service in a way, whether by method of use or content, that is menacing, harassing or offensive. The maximum sentence is imprisonment for three years. It is presumed that an adult sexting a minor is a form of harassment, or at a minimum, is offensive in accordance with s 473.4.

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56 ‘Offensive’ is to be determined with reference to morality, decency and general social norms: Criminal Code Act 1995 (Cth) s 473.4.
57 Criminal Code Act 1995 (Cth) s 473.4.
60 Criminal Code Act 1995 (Cth) ss 474.26(1), 474.27(1).
61 Criminal Code Act 1995 (Cth) ss 474.26(1), 474.27(1).
62 Criminal Code Act 1995 (Cth) s 474.27A.
63 Telecommunications Act 1997 (Cth) s 7.
64 Criminal Code Act 1995 (Cth) s 474.15(2).
Section 91H criminalises the production, dissemination or possession of ‘child abuse material’.\textsuperscript{67} ‘Child abuse material’ is defined widely as:

- Torture, cruelty or physical abuse; or
- A sexual pose or sexual activity; or
- As a witness to sexual activity; or
- The private parts of a person who is, appears to be, or implied to be a child.\textsuperscript{68}

The terms dissemination, possession and production are also defined widely under s 91H to capture transfer of pictures by a mobile phone. A child is someone under 16 years old.\textsuperscript{69}

The maximum term of imprisonment is 10 years, under s 91H.\textsuperscript{70}

The NSW case of \textit{Eades} involved an 18 year old sexting with a 13 year old.\textsuperscript{71} The 18 year old was charged with inciting a person under 16 years old to commit an act of indecency and with possession of child pornography. The magistrate initially dismissed both charges, however the prosecution successfully appealed the indecency charge. No conviction was recorded. Interestingly, the Magistrate struck down the charge under s 91H because the photograph lacked ‘depiction of sexual activity’.\textsuperscript{72}

NSW law has demonstrated the capacity of the Criminal Code to capture sexting amongst teens. It has been tested in the courts and only judicial intervention has prevented convictions from occurring against young people.

\textbf{C Queensland}

Sections 228A-H of the \textit{ Criminal Code 1899} (Qld) address the making, distributing and possessing ‘child exploitation material’. ‘Child exploitation material’ is defined as material that depicts or describes:

- A sexual context or activity; or
- Offensive of demeaning conduct; or
- Abuse, cruelty or torture.\textsuperscript{73}

\textsuperscript{67} \textit{Crimes Act 1900} (NSW) s 91H.
\textsuperscript{68} \textit{Crimes Act 1900} (NSW) s 91FB.
\textsuperscript{69} \textit{Crimes Act 1900} (NSW) s 91FA.
\textsuperscript{70} \textit{Crimes Act 1900} (NSW) s 91H(2).
\textsuperscript{71} Director of Public Prosecutions \textit{v Eades} [2009] NSWSC 1352.
\textsuperscript{72} Director of Public Prosecutions \textit{v Eades} [2009] NSWSC 1352 at 1358.
\textsuperscript{73} \textit{Criminal Code 1899} (Qld) s 207A.
A child is someone under 16 years old.\textsuperscript{74}

Distributing and making child exploitation material attracts 10 years imprisonment.\textsuperscript{75} Possession carries five years of imprisonment. Section 228E contains the following defences:

- That the person engaged in the alleged conduct for genuine artistic, educational, legal, medical, scientific or public benefit purpose;\textsuperscript{76} and
- The person’s conduct was in the circumstances reasonable for that purpose.\textsuperscript{77}

Law enforcement officers are exempt from being prosecuted under child pornography laws if they are required to breach these laws to carry out their duties.\textsuperscript{78}

The Queensland provisions cast a wide net capturing sexting because the definition of ‘material’ is wide, the threshold for ‘child’ is low and the general crime of ‘possession’ and ‘distribution’ are drafted widely.

D South Australia

Sections 62 to 63C of the \textit{Criminal Law Consolidation Act 1935} (SA) make it an offence to produce, disseminate and possess child pornography. A child is defined as anyone under the age of 16 years.\textsuperscript{79}

Child pornography is defined as material that:

- Depicts sexual activity; or
- Depicts bodily parts of a child.\textsuperscript{80}

and is intended to:

- Excite or gratify sexual interest, sadistic or other perverted interest in violence or cruelty.\textsuperscript{81}

The production or dissemination of child pornography attracts a maximum term of imprisonment of 10 to 12 years, depending on the severity of the offence. Possession is scaled depending on whether it is a first time or repeat offender. First time offenders can receive imprisonment of up to seven years\textsuperscript{82} and repeat offenders can

\textsuperscript{74} \textit{Criminal Code 1899} (Qld) s 207A.
\textsuperscript{75} \textit{Criminal Code 1899} (Qld) s 228B.
\textsuperscript{76} \textit{Criminal Code 1899} (Qld) s 228E(2).
\textsuperscript{77} \textit{Criminal Code 1899} (Qld) s 228E(2).
\textsuperscript{78} \textit{Criminal Code 1899} (Qld) s228H.
\textsuperscript{79} \textit{Criminal Law Consolidation Act 1935} (SA) s 62.
\textsuperscript{80} \textit{Criminal Law Consolidation Act 1935} (SA) s 62.
\textsuperscript{81} \textit{Criminal Law Consolidation Act 1935} (SA) s 62.
\textsuperscript{82} \textit{Criminal Law Consolidation Act 1935} (SA) s 63A(1)(a).
receive up to ten years imprisonment. This scaling in South Australia reflects a possible concern about sentencing of first time low severity offenders.

Defences are contained in s 63C and range from taking into account the circumstances of production, to the good faith use for advancement in legal, medical or scientific knowledge. Artistic merit and the nature of the work can also be used as a defence.

The definition of child pornography, which requires a degree of gratification or sexual interest, may more readily implicate teenagers who engage in sexting, due to the fact that sexting takes place in a sexual context.

E Australian Capital Territory

Sections 64 to 66 of the Crimes Act 1900 (ACT) make it an offence to produce, trade or possess child pornography. A child is defined as someone under 18 years old.

Child pornography is defined as:

- The sexual parts of a child; or
- An activity that is sexual in nature; or
- A third party engaged in an act of a sexual nature in the presence of a child.

Possession of child pornography attracts a maximum seven years imprisonment. Those convicted of trading child pornography face 12 years imprisonment, while those who engage in producing the material may be imprisoned for a maximum of 15 years, depending on the age of the child.

F Western Australia

Chapter XXV of the Criminal Code Compilation Act 1913 (WA) contains the child pornography offences of possession, production and distribution of ‘child exploitation material’. Child exploitation material includes child pornography. Child pornography is defined as a child:

- Engaging in sexual activity; or

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83 Criminal Law Consolidation Act 1935 (SA) s 63A(1)(b).
84 Criminal Law Consolidation Act 1935 (SA) s.63C(1).
85 Criminal Law Consolidation Act 1935 (SA) s.63C(2).
86 Criminal Law Consolidation Act 1935 (SA) s.63C(3).
87 ‘Child’ is defined in the dictionary section of the Crimes Act 1900 (ACT) as ‘a person who has not attained the age of 18 years’.
88 Crimes Act 1900 (ACT), s 64(5).
89 Crimes Act 1900 (ACT), s 64(1), (2).
90 Criminal Code Compilation Act 1913 (WA) s.217A
• In a sexual context.\(^{91}\)

Material is defined broadly as:

• Any object, picture, film, data or other thing.\(^{92}\)

Production and distribution is punishable by up to 10 years imprisonment, whilst those convicted of possession may be imprisoned for a maximum of seven years.\(^{93}\)

Section 221A contains various defences including:

• Material being recognised literary, artistic or scientific merit;\(^{94}\) or

• Material of a genuine medical character.\(^{95}\)

Section 221A(1)(d) also provides a defence where the accused is acting for genuine child protection or legal purpose. The West Australian defence also extends to those who unintentionally come into possession of child exploitation material\(^{96}\) and ‘took all reasonable steps to get rid of it’.\(^{97}\)

The West Australian defence provisions provide greater scope for people who unintentionally receive sexts – for example a student who receives a sext forward from another student’s mobile phone. However to fall under the operation of s.221A(2) the student who unintentionally receives also has to take all reasonable steps to delete that sext from their own mobile phone.

**Northern Territory**

Under the *Criminal Code*\(^ {98}\) publishing, possessing and producing child abuse material is an offence. A child is anyone under 18 years old.\(^ {99}\)

Child abuse material is defined as material that is likely to cause offence to a reasonable adult where the child:

• Engages in sexual activity; or

• Is placed in a sexual, offensive or demeaning context; or

• Is subjected to cruelty, torture or abuse.\(^ {100}\)

\(^{91}\) *Criminal Code Complication Act 1913* (WA) s 217A.

\(^{92}\) *Criminal Code Complication Act 1913* (WA), s 217A.

\(^{93}\) *Criminal Code Complication Act 1913* (WA), s 219, 220.

\(^{94}\) *Criminal Code Complication Act 1913* (WA), s 221A(c)(i).

\(^{95}\) *Criminal Code Complication Act 1913* (WA), s 221A(c)(ii).

\(^{96}\) *Criminal Code Complication Act 1913* (WA), s 221A(2)(a).

\(^{97}\) *Criminal Code Complication Act 1913* (WA), s 221A(2)(b).

\(^{98}\) *Criminal Code Act 1983* (NT).

\(^{99}\) This was raised from 16 years in 2004 by the *Criminal Code Amendment (Child Abuse Material) Act 2004*. ‘child’ is now defined under s. 1 of the *Criminal Code Act 1983* (NT) as ‘a person who is not an adult’.

\(^{100}\)
Possession carries a maximum 10 years imprisonment,\textsuperscript{101} production up to 14 years\textsuperscript{102} and publishing up to two years.\textsuperscript{103}

Law protection officers are conferred with an exception to the offence of possession, for the purposes of their investigations.\textsuperscript{104} Further, defences are limited to ‘legitimate medical or health research purposes’.\textsuperscript{105}

**H Tasmania**

Sections 130-130G of the *Criminal Code Act 1924*\textsuperscript{106} makes it an offence to produce, distribute, possess or access child exploitation material. A child is defined as someone under 18 years old.\textsuperscript{107}

Child exploitation material is defined as material that a reasonable person would regard as, being in all the circumstances offensive of a child:

- Engaged in sexual activity; or
- In a sexual context; or
- The subject of torture, cruelty or abuse.\textsuperscript{108}

Tasmania has no statutory maximum penalty for its child pornography provisions; instead it is at the discretion of the court. Section 389(3) of the code provides a maximum sentence of 21 years in any of the s.130 offences from above.

Tasmania provides defences under section 130E. Subsection 130E(1) provides a defence if the child exploitation material was for genuine child protection, scientific, medical, legal, artistic or public benefit purpose. Section 130E(3) provides a defence if someone comes into unintentional possession and takes reasonable steps to dispose of the material.

**I Summary of the Differences Between States**

- The Commonwealth provisions capture use of the Internet or other telecommunication services where State laws fail to capture various types of conduct;

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\textsuperscript{100} *Criminal Code Act 1983* (NT) s 125A.
\textsuperscript{101} *Criminal Code Act 1983* (NT) s125B.
\textsuperscript{102} *Criminal Code Act 1983* (NT) s 125E.
\textsuperscript{103} *Criminal Code Act 1983* (NT) s 125C.
\textsuperscript{104} *Criminal Code Act 1983* (NT) s 125B(2).
\textsuperscript{105} *Criminal Code Act 1983* (NT) s 125B(4).
\textsuperscript{106} *Criminal Code Act 1924* (Tas).
\textsuperscript{107} *Criminal Code Act 1924* (Tas) s 1A.
\textsuperscript{108} *Criminal Code Act 1924* (Tas) s 1A.
Four states (the Australian Capital Territory, Northern Territory, Tasmania and Victoria) since 2004/2005, have increased the age of ‘child’ for their respective provisions from 16 years old to 18 years. The increased threshold results in more sexts (of 16-18 year olds) falling into child pornography offence provisions and thus more potential prosecutions.

Most of the States have defences involving artistic, legal, medical and scientific merit. However, the defences vary in their inclusion. For example only the Northern Territory includes a specific defence in relation to ‘medical or health research’. The Commonwealth provisions instead refer to ‘matters’ to be taken into account in deciding whether a reasonable person would find the material offensive;

The definition of ‘material’ varies greatly. Whilst some states make it more specific, others make the definition broader. Broader definitions increase the likelihood of sexting prosecutions.

J State Comparisons of Sex Offender Registration

All states and territories remain responsible for monitoring the movement of individual sex offenders within each jurisdiction. Additionally sex offenders are registered on the Australian National Child Offender Register (ANCOR). CrimTrac administers this register. This ensures that sex offender information can be readily shared between different jurisdictional police agencies.109

As stated in the Victoria Law Reform Commission’s Sex Offender Registration Information Paper,110 Tasmania is the only State that permits judicial discretion in the registration of sex offenders. Section 6 of the Community Protection (Offender Reporting) Act 2005 (Tas) provides that the court is to make an order requiring the registration of the sex offender ‘unless the court is satisfied that person does not pose a risk of committing a reportable offence in the future’.111 All other states mandate the registration of adult sex offenders.

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110 Parliament of Victoria, above n 1.

111 Community Protection (Offender Reporting) Act 2005 (Tas) s 6.
IV UNITED STATES OF AMERICA – AN INTERNATIONAL COMPARISON

A Introduction

The United States of America has produced the greatest quantity of academic research surrounding sexting as well as a significant amount of legislative reform in a number of states. Sexting has become a major issue in America due to the increasing prevalence of technology, such as camera phones, and the availability of this technology to minors. Similar to Victoria, sexting has become criminalised under child pornography laws, as there has been no separate legislation that addresses sexting.112 In the United States there is no minimum age requirement for charging a person with child pornography offences, consequently, anyone who creates, possesses or distributes explicit images of minors can be prosecuted.113

Due to the previous and current void in various state’s law specifically providing for sexting, many young people have been convicted of child pornography as a result of sexting. Individuals have been prosecuted in states such as Alabama, Connecticut, Florida, Michigan, New Jersey, New York, Ohio, Pennsylvania, Texas, Utah and Wisconsin.114 Under this approach, sexting victims, receivers, forwarders and savers can all be equally prosecuted.115

Sex Offender Registration will occur in cases of child pornography cases, including sexting cases where minors are involved. Under the Wetterling Act, all individuals convicted of a sexual crime in relation to a minor must register with appropriate state sex-offender agencies.116 After registration, Megan’s Law legislation (which varies in name in each state) allows states to release relevant information on these individuals for community protection.117

In recent years, some states have implemented changes to their legislation in an attempt to reform this area of law so as to address sexting more adequately.

115 Shah, above n 113.
117 Ibid.
B Examples of Reform

1 Vermont

In 2009, Vermont created new laws that directly address the issue of sexting. This new offence applies only to people under 18 years old.\(^{118}\) In creating this new offence, Vermont has removed sexting from pornography legislation, which means that mandatory registration on the Sex Offender Register is avoided.\(^{119}\) The major discretionary factor used by judges in deciding whether the offence is dealt with more harshly under child pornography legislation, or more leniently under the new legislation, is whether the images were taken voluntarily and without coercion.\(^{120}\)

2 Nebraska

In 2009, Nebraska enacted new laws that create defences that are available to young people who engage in sexting.

Before an individual is able to access a defence, one or more of these factors must be satisfied:\(^{121}\)

- The defendant must be 19 years old or younger
- The individual in the image must be 15 years old or older
- The images must have been created knowingly and voluntarily
- The images must be of one minor only
- The image must not have been forwarded to others by the defendant
- The defendant must not have used coercion in the creation or sending of the image

If all of these elements are satisfied, the young person will not be found guilty of committing a criminal act and will not receive punishment. These factors allow judges to distinguish between individuals who have engaged in sexting within consensual relationships from young people who send out images to many people outside of consenting relationships.\(^{122}\) Under these amendments, a defence is available where the image is of the defendant, the defendant has created the image and the defendant is either 18 years old or younger.\(^{123}\)

\(^{118}\) Hiffà, above n 112, 499, 513.
\(^{120}\) Hiffà, above n 112, 499, 513.
\(^{121}\) Arcabascio, above n 119, 1, 37.
\(^{123}\) Arcabascio, above n 119, 1, 38-39.
New Jersey

In 2009, amendments were made whereby Prosecutors could choose to send minors to a Diversionary Program rather than sending them to court.

The Diversionary Program is only open to minors who were: 124

- Committing this offence for the first time
- Did not realize that sexting was a criminal offence
- Were likely to be deterred by the diversionary program

C Discussion

Although the amendments largely apply to those under 18 years old, the reforms acknowledge that sexting is an issue that relates to young people in general. Nebraska takes this a step further by recognising that adults who are 18 or 19 years old and engage in sexting can be distinguished from individuals who are involved in child pornography.

Arcabiasco argues that it is important for people aged 18 and 19 years old to be treated differently to older adults, as relationships regularly and legally occur between those aged 18 or 19 years old and those aged 16 or 17 years old. 125 For example, it is not uncommon for a 17 year old and an 18 year old to be in a consensual and legal relationship (particularly if they are in the same year level at high school). However under the current law in Victoria, an 18 year old would have to be placed on the Sex Offender Register if they engaged in sexting with their boyfriend or girlfriend.

Amendments such as the ones in Vermont acknowledge that placing young people on the Sex Offender Register for sexting is not appropriate. This can be seen in the way that Vermont has created a separate offence to mandatory application of the register and the attempt by New Jersey to implement diversionary options.

Discretionary factors similar to the ones implemented by certain states in the United States can be employed within Victoria to determine whether an individual over 18 years old should be placed on a register for sexting. Factors such as consent, the age of the individuals involved, whether the images have been forwarded and the circumstances of how the sexting was committed can be reviewed to determine whether to place an individual on the register.

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124 Shah, above n 113, 193, 214.
125 Arcabascio, above n 119, 1, 34-35.
VEVIDENCE OF NEED

This Chapter discusses academic perspectives on sexting and two recent cases in which mandatory registration has caused an unjust outcome.

A Reasons People Engage in ‘Sexting’

As indicated by the definition of sexting proposed by the VLRC, the phenomenon is largely confined to young people. Although motivations are obviously varied and depend on the particular circumstances,126 Zhang has argued that sexting is ordinarily a contemporary manifestation of youthful sexual exploration and experimentation.127 The motivations for sexting are likely to be found in romance and socialisation.128 An American study has found that sexting usually occurs in one of three scenarios, all related to relationships:

‘[i]…the exchange of images solely between two romantic partners; [ii] exchanges between partners that are shared with others outside the relationship; and [iii] exchanges between people who are not yet in a relationship, but where at least one person hopes to be’.129

This suggests that sexting is basically a form of ‘high-tech flirting’130 which is clearly distinguishable from behaviour typically associated with child sex offences. Eraker has made the point that:

‘Although social norms affecting adult behavior may warn against sharing revealing images over cell phones or uploading them to public profiles on social networking sites, teens’ online behaviors reflect a different set of norms developed in their online communities. Sometimes these social norms, influenced by an entertainment industry glamorizing outrageous online personalities and the public disclosure of titillating personal information, support brash behavior such as sexting’.131

Nevertheless, it is important to recognise the potentially harmful consequences of sexting motivated not by flirtation or exploration but an intention to ‘hurt, upset,

129 Ibid.
130 Elizabeth Eraker, above n 2.
131 Ibid, 561.
threaten or humiliate’. The varied nature of sexting requires flexible judicial responses which are made difficult by current laws that mandate registration.

B Case Studies

1 The Phillip Alpert Case

This case illustrates the potential absurdity of subjecting young people convicted of sexting to mandatory Sex Offender Registration. Although this case was decided in Orlando, Florida, a similar situation could arise under the Victorian legislation. In 2008, Phillip Alpert was convicted of sending child pornography after accessing his ex-girlfriend’s email account and distributing nude images of her to 70 other people. The momentary lapse of judgment, which undoubtedly caused embarrassment and harm to the victim, transformed Alpert ‘in the eyes of the law, from a foolishly behaving teenager to a child pornographer and sex offender’. After the prosecution laid charges, Alpert was warned that if he did not plead guilty, he would be likely to spend the rest of his life in prison. Ultimately, after pleading guilty, Alpert was sentenced to five years probation and registered as a sex offender, as mandated under legislation in Florida.

The sentence received by Alpert highlights the difficulties faced by judges in deciding on just and appropriate sentences. While the probation order recognises Alpert’s previous good character, the low risk of re-offending and the relatively minor character of the offences (in relation to other sex offences), registration as a sex offender results in Alpert being ‘essentially precluded from gaining an education or earning a living because he made a foolish, late-night mistake shortly after reaching the age of majority’.

2 A Recent Australian Example

In a recent Victorian case, an 18 year old male pleaded guilty to possessing and making child pornography, after receiving pictures of girls aged 15 to 18 years old from a female friend. The police discovered the images after confiscating the young man’s computer while investigating a separate, unrelated offence. The young man was advised that if he pleaded guilty, he was likely to receive a good behaviour bond without conviction. Unfortunately for the accused, it was later revealed that the

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134 Ibid, 8.

135 Ibid.

136 Alpert is still registered as a sex offender. His profile is publicly accessible <http://offender.fdle.state.fl.us/offender/flyer.do?personId=60516>.

137 Richards and Calvert, above n 133, 9.

Magistrate had no discretion as to whether or not to place him on the Sex Offender Register. Despite it being accepted that the young man posed no significant risk to the community, he was registered as a sex offender for a period of eight years.\textsuperscript{139}

VI SOCIAL THEORIES

This Chapter will explore some of the significant criminological theories informing our sexting submission. In doing so, we will maintain that criminal responses to sexting must be contextualised by judicial discretion if it is to function as law which society expects, respects and ultimately accepts.

A ‘Let the Punishment Fit the Crime’

Beccaria is one of the leading figures in the development of classical criminology and expounded the notion that all people rationally choose to obey or violate laws. 140 Criminality, according to Beccaria, occurred when the pleasure of committing the offence outweighed the pain of its punishment. 141 Beccaria believed that the prevention of crime was more important than the punishment itself and therefore advocated an ethical approach to crime in that the ‘punishment should fit the crime’. 142

Mandatory registration of adult sex offenders for eight years is a severe criminal sanction. 143 The registration imposes onerous reporting requirements on offenders to local police and restricts offenders from obtaining employment and recreational opportunities. 144 Although protective measures may be deemed appropriate for child pornography offences by persons found guilty of paedophilia and serious sex offenders, arguably sexting falls into a separate class of criminal culpability. That is, consenting teenage sexters can be readily distinguished from paedophiles and persons found guilty of rape. As such, the different classes of offenders ought to attract separate punishment.

There are two unsatisfactory consequences that result where the punishment inflicted on sexters is disproportionate to the crime. Where sexting is included in the list of registrable offences, the significance of severe crimes such as rape and sexual assault within the register is compromised and ‘the importance and utility of the sex offender registry’ is severely diluted. 145 Secondly, society risks losing focus of the underlying crime and remaining fixated on the disproportionate nature of the punishment. 146 In doing so, mandatory registration of all sexters can have the contrary effect of fostering public sympathy and compassion for all sexting cases, where it would otherwise not warrant such reaction. 147 For example, a 40 year old man who manipulates a 13 year old minor into sending a sext of herself is unlikely to receive

141 Ibid.
142 Ibid.
143 Sex Offenders Registration Act 2004 (Vic) s 34(1)(a).
144 Sex Offenders Registration Act 2004 (Vic) s 68.
146 Elizabeth Ryan, ‘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 Iowa Law Review 357, 374.
147 Ibid.
sympathy from the public if the Judiciary could differentiate his case from that of a teenager who happens to accidentally store his consensual sexting photos into his computer.

B Labelling Theory

Attributed to the work of Lemert and Becker, the labelling theory asserts that the identity of a deviant is socially conferred.\textsuperscript{148} Criminality is not attributed to the act of committing the crime, but rather attributed to the process of being labelled as a criminal.\textsuperscript{149} Labels, according to Lemert, are divided into primary and secondary deviations.\textsuperscript{150} The primary entails the act of breaking the law without the person initially identifying himself or herself as a criminal.\textsuperscript{151} At this stage, the offender is simply a ‘person’ who has engaged in a criminal act.\textsuperscript{152} The secondary deviation occurs as a result of severe public labelling.\textsuperscript{153} The person is labelled as an ‘offender’ which causes a self-fulfilling prophecy whereby he or she adopts the social role of a criminal.\textsuperscript{154}

The internalisation of labels is well established in empirical evidence:

‘In the Pygmalion Experiment (1968), a group of school students was split into two. One half of the group was publicly labelled ‘slow and stupid’ while the other half was told they were ‘brilliant’. After a while, the school grades of the two groups began to deteriorate and to improve respectively. The argument was put forward that each group had internalised the self-concepts framed for them, and had responded to the public labels by playing the role of ‘stupid’ or ‘brilliant’.\textsuperscript{155}

The ‘sex offender’ label is one of society’s most derogatory labels. Repugnance to the label is evidently universal, as the label imports some of our most feared and condemned criminal offences. In Victoria, these include the registrable offences of rape, indecent assault, incest, child abduction, child pornography, and so forth.\textsuperscript{156} Labelling theorists will stress that when sexting is integrated into the characterisation of a ‘sex offender’, society risks having sexters internalise the role of the sex offender, which can lead to the commission of more serious sexual offences. Legislators must therefore balance the safety of the community through the use of the register against the threat of encouraging future sex offending. This balance cannot be achieved through the mandatory registration of all adult sexters.

\begin{footnotesize}
\begin{itemize}
\item[149] Ibid.
\item[150] Ibid 42-43.
\item[151] Ibid.
\item[152] Ibid.
\item[153] Ibid.
\item[154] Ibid.
\item[155] White, above n 140, 84.
\item[156] \textit{Sex Offenders Registration Act 2004} (Vic) sch 1-2.
\end{itemize}
\end{footnotesize}
Based on the political movement in the late 1960’s and early 1970’s, feminism views gender as being the central focus of the social world and maintains that in both the past and present, women have encountered oppression on the basis of gender. Feminist criminology argues that female offending is not simply biologically or psychologically determined, but is rather a consequence of wider social, economic, and political oppression. Underpinning the division is the question of power, and to what extent institutions such as the criminal justice system and the law are inherently ‘androcentric’.

Where a female teenager engages in sexting by sending a sexually suggestive, sexually explicit or nude image of herself to another male, the feminist critique maintains that criminal liability should not focus on punishing the female teenager for the creation of the sext, but should rather aim to protect her privacy and trust in sending the sext. Indeed, technological advancement and the sheer ease at which society can share images cannot justify men disseminating intimate pictures. In this regard, the sex offender registration of male offenders who disseminate sexts would be encouraged. However, the problem of mandatory sex offender registration is that it does not discriminate between contexts. Females who produce sexts are equally liable as the males who posses or disseminate sexts. Judicial discretion can counter this by distinguishing between different levels of culpability.

157 Marshall, above n 148, 58.
159 Androcentric is defined as ‘taking the masculine as the standard of experience and ignoring the possible different experiences and perceptions of women’. Marshall, above n 148, 60.
160 White, above n 140, 127.
161 See also Katrina Fox, Redefining Masculinity is Key to Stopping Rape (2010) The Drum: Opinion <http://www.abc.net.au/unleashed/39246.html> at 2 September 2011.
VII KEY FINDINGS OF ‘‘SEXTING’: PREVALENCE AND OPINION IN ADULTS’

‘Sexting’: Prevalence and Opinion in Adults is a cross-sectional study undertaken in 2011 for the purpose of this submission.

264 participants completed a 31-question, online survey. The mean age of participants was 21 years old, with a range of 18 to 64 years old. Most were recruited through universities in Melbourne. 37.9% of participants were male, 61.7% were female and one participant was listed as other. The survey was made available in the English language only.

For a detailed description of the study, please refer to the Appendix.

A Participant Behaviours

Camera phones are now almost ubiquitous in society. A high proportion of people have sent and received images via mobile phones.

‘Sexting’ is a commonly known term and a high proportion of adults believe sexting is appropriate in some circumstances.

28.4% of adults have sent at least one sexually explicit, sexually suggestive or nude image of themselves via electronic communication to another person. 40.5% of adults have received such an image of someone else via mobile phone. Due to particulars of our method and results analysis, these percentages could in fact be higher. After receiving this image, 5.3% had sent it on to a third person.

B Sexting Involving Minors

Less than half of adults believe that retaining a sexually explicit, sexually suggestive or nude image of a person under 18 years old that has been sent to them is illegal. By contrast, 87.9% of adults believe that an adult sending a sexually explicit, sexually suggestive or nude image of themselves to a person under 16 years old is illegal.

Only 2.7% of adults believe that receiving and retaining a sexually explicit, sexually suggestive or nude image of a person less than 18 years old should include mandatory placement on the Sex Offender Register. 21.6% of adults believe that a judge should be given a choice as to register an offender or not, and 62.5% of adults believe that the legal consequences should not include the option of registration.

C Discretionary Factors and Scenarios

If a judge had discretion in deciding whether to register an adult who had sent a sexually explicit, sexually suggestive or nude image to a person under 18 years old, most adults believe that the judge should take into account favourably the fact that the adult and the minor in the image were married.
Other factors that a majority of adults believe should be taken into account include, in order of support:

- that the adult was generally of good character with no previous criminal record;
- that the minor in the image was over 16 years old;
- that the adult was under 21 years old; that the adult and the minor in the image were in a relationship;
- that the minor in the image consented to the adult receiving the image;
- that the adult did not distribute the images to other persons;
- that the images of the minor were sent by that same minor; and
- that no psychological harm was caused to the minor.

Most adults considered that any other relevant circumstances of the case could be important.

When given the details of two recent, real-life cases in which an adult was placed on the Sex Offender Register, a significant majority of adults believe that registration is too severe.¹⁶²

¹⁶² For a more detailed description of the two scenarios and the participants’ responses, please see the Appendix for the full report.
The law regarding registration of sex offenders should be reformed so that judges have discretion to decide whether an offender should be placed on the Sex Offender Register. To give effect to this recommendation the following two options are suggested. These options are proposed to modify the operation of s 62(2) of the Sex Offenders Registration Act.\textsuperscript{163}

A Option One

Where an individual is convicted under either s 68 or s 69 of the Crimes Act 1985 (Vic) that individual \textbf{shall} be placed on the Sex Offender Register, unless the sentencing judge is satisfied beyond reasonable doubt that such registration would be \textbf{unwarranted}, having regard to the following factors:

\begin{itemize}
  \item a. Whether the victim consented to the image(s) being taken without reasonable exploitative circumstances;
  \item b. Whether it was the victim who transmitted the image(s) to the offender;
  \item c. Whether the offender and victim were in a relationship;
  \item d. The age difference between the offender and victim;
  \item e. Ongoing danger to the community;
  \item f. Quantity of images; and
  \item g. Any other relevant considerations.
\end{itemize}

B Option Two

Where an individual is convicted of under either s 68 or s 69 of the Crimes Act 1985 (Vic) that individual \textbf{shall not} be placed on the Sex Offender Register, unless the sentencing judge is satisfied beyond reasonable doubt that such registration would be \textbf{warranted}, having regard to the following factors:

\begin{itemize}
  \item a. Whether the victim consented to the image(s) being taken without reasonable exploitative circumstances;
  \item b. Whether it was the victim who transmitted the image(s) to the offender;
\end{itemize}

\textsuperscript{163} Sex Offenders Registration Act 2004 (Vic).
c. Whether the offender and victim were in a relationship;
d. The age difference between the offender and victim;
e. Ongoing danger to the community;
f. Quantity of images; and
g. Any other relevant considerations.

C Comparison of Option One and Option Two

Both of our recommendations are substantially similar. The key difference being that Option One is a positive test, and Option Two is a negative test.

If a judge considers that an individual does not need to be placed on the register, Option One places a substantial burden upon the judge to show that registration is not appropriate. That is, Option One requires that an individual must be registered, unless it can be shown otherwise. The provision is similar to the Tasmanian jurisdiction, which stipulates that the court must make an order requiring the registration of the offender ‘unless the court is satisfied that person does not pose a risk of committing a reportable offence in the future’ 164

Option Two reverses this initial presumption so that only where a Judge is convinced of the merits of registration, will that registration in fact occur. There is no default mandate for registration.

The practical effect of this difference is that Option One is weighted towards placing offenders on the Register and Option Two is weighted towards not placing offenders on the Register.

Reforming the gap between mandatory registration and discretionary registration demands precision and caution. For this reason, the authors’ contend that Option One is the most suitable choice for inclusion into the Sex Offenders Registration Act.

D Explanation of Discretionary Factors

For both options, the authors’ have listed discretionary factors that the Judge must take into account when reaching his or her decision. This section explains the rationale behind these factors.

1 Whether the Victim Consented to the Image(s) Being Taken Without Reasonable Exploitative Circumstances

164 Community Protection (Offender Reporting) Act 2005 (Tas) s 6.
Consent here has been defined as: free agreement to the procurement of the image(s) with regard to reasonable exploitative circumstances.

Consent should be the primary consideration of the judge as it goes to the issue of whether the offender subjectively believed they were doing something wrong. Where an individual consents to an action, *prima facie*, it is understood that action will not attract culpability. The idea of consent has been used heavily as a mitigating factor in other areas of law and in different jurisdictions, such as the law reform amendments made by Vermont and Nebraska, as discussed above in the international comparison.

There is a divergence in the culpability of an offender who surreptitiously takes a photo of a minor, and one who obtains the consent of the minor prior to taking the photo.

This does not necessarily fit into the situation of sexting with a mobile phone (as the offender and victim would have to be in the same room). However, the issue of consent may arise where the offender and victim are communicating online with video sharing software, and the offender saves an image that appears on his screen, during that video conversation.

Where a victim takes the photo himself or herself and proceeds to distribute it, it can be assumed that subjective consent is present. However, regard must also be given to the objective circumstances by which the consent was received.

Where there are exploitative circumstances in obtaining the image, consent cannot be argued. This is to be determined according to the standards of a reasonable person.

2 *Whether it was the Victim who Transmitted the Image(s) to the Offender*

The culpability of the offender will be greater when they are not the primary (or intended) recipient of the image. Take the following example. In a situation where X transfers an image of himself or herself to A, who then distributes the image to B, B’s culpability increases because X never intended the image to reach B.

B’s culpability is determined here by his action taken after receiving the image. If B alerts the relevant authorities then culpability will obviously decrease. However, continued possession of the image will render B more culpable, than if the image he possessed was taken by a victim sending it to *him* (as opposed to A).

Two things should be noted about this example. First, it assumes X consents to the transfer of the image to A. Second, A will also be liable for production of child pornography. Universal consent cannot be given in this context.

Where possession of child pornography occurs through the electronic transfer of an image, by any other person not in that image, this should weigh in favour of the offender being placed on the Sex Offender Register.
3 Whether the Offender and Victim were in a Relationship

Whether the victim and the offender were in a relationship is relevant in determining if the victim and offender were known to each other and in what circumstances they were known to each other.

The phrase ‘in a relationship’ is used because this is the context where sexting would be most appropriate. Undoubtedly, the scope of ‘in a relationship’ is very wide. It is the authors’ intention that a relationship is self validating. That is to say, if two people consider themselves to be in a relationship, then it is usually so.

Of course, where a victim is under the age of 18, the judge must have regard to the age difference between the victim and the offender, as well as the maturity of the victim. For example, in the case of a 40 year old offender and 14 year old victim, it would not be appropriate for the court to assess the two as ‘in a relationship’ even if both professed that was the situation.

However, two people sexting may not consider themselves to be ‘in a relationship’, indeed as outlined previously in our submission, sexting often constitutes a form of flirting, which would suggest it may be seen as precursor a relationship.

Nevertheless ‘in a relationship’ is preferable to ‘whether the offender and victim are known to each other’. The latter phrase could potentially include much older offenders who have contact with very young minors (for example, those 13 years old). Additionally, the greater divergence in age, the less likely the offender and victim consider themselves to be in a relationship.

It is envisaged that sub-section (c) will operate to protect young adults (for example, those 19 years old) who are in relationships with older minors (for example, those 16 years old). If a positive response is given to sub-section (c) this will weigh against an offender being placed on the Sex Offender Register.

This is the major influential factor for the law reform in Vermont, as discussed in Chapter IV Part B1. The amendments implemented there are aimed at giving judges the ability to distinguish between sexting within a consensual relationship and transmission of images for other purposes outside of a relationship. The study ‘Sexting: Prevalence and Opinion in Adults’ suggests there is significant support for such a factor to be regarded by judges.\textsuperscript{165}

4 Age Difference Between the Offender and Victim

With regard to sexting and possession of child pornography, the offence requires the involvement of a minor to be operative.

Therefore, if the age difference between offender and victim is small, rather than large, there is a greater chance that possession has come about through regrettable social interaction rather than a dedicated effort to acquire child pornography.

\textsuperscript{165} See Chapter VII and the Appendix for more details.
Support for a factor similar to this is indicated in the study ‘Sexting: Prevalence and Opinion in Adults’, where a significant proportion of participants suggested a judge should regard whether the minor was over 16 years old, and whether the adult was under 21 years old.166

The smaller the age difference, the less likely that registration will be appropriate.

5 Ongoing Danger to the Community

The fundamental purpose of the Sex Offender Register is to facilitate protection of the community through restricting the movements and liberties of those convicted of sexual offences against children, including possession of child pornography.167 This purpose will be undermined if young offenders are placed on par with individuals who have been convicted of serious sexual offences, including rape and sexual assault.

However if sexting is indicative of wider behaviour involving child pornography, then there is a potential harm to the community and registration may be appropriate.

The judge should assess the likelihood of the offender to re-offend, especially with regard to possible escalation in the seriousness of the crime committed, when considering if registration is appropriate.

6 Quantity of Images

While a numerical quota is not suggested, two categories of offenders need to be distinguished. A person in possession of a single or a few images sent to them by a minor does not present the same risk as a person in possession of a large quantity of child pornography images. The level of culpability is different.

When confronted with an offender who had in their possession a quantity of images that suggests the images were obtained on more than one or two separate occasions, this should weigh in favour of the judge ordering registration.

In such a situation though, it would be pertinent to consider the following questions:

- Are the images of the same victim, or of multiple victims?
- If there are multiple victims, is each victim known to the offender?

The quantity of images should suggest anomalous, rather than sustained, behaviour, for the judge to incline towards not registering an offender.

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166 See Chapter VII and the Appendix for more details.
167 Victoria, Parliamentary Debates, above n 19.
7 Any other Relevant Considerations

This is included to preclude the reasoning of ‘*inclusio unius est exclusio alterius*’. That is, ‘the inclusion of one is the exclusion of another’.

94.5\%^{168} of responses from participants in the study ‘Sexting’: *Prevalence and Opinion in Adults* suggested that a judge should consider ‘any other circumstances’ when deciding whether to place an individual on the Sex Offender Register.\(^{169}\)

If a judge could have regard to the first six factors only, the central principle of our suggested reform would be undermined, that is that discretion for registration should rest in the hands of the Judiciary.

The inclusion of this final discretionary factor does not undermine the presence of the first six. It is mandated that the judge direct his attention to the first six and he or she must apply these factors when considering registration. As ‘sexting’ is a multi-faceted issue, this final discretionary factor allows the judge to take into account other relevant circumstances.

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\(^{168}\) Or 78.8\%, depending on whether a ‘per-protocol’-like analysis or an ‘intention-to-treat’-like analysis was taken. See Appendix for more details.

\(^{169}\) See Chapter VII and the Appendix for more details.
IX ACKNOWLEDGEMENTS

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Coercion to complete the survey for the study ‘Sexting’: Prevalence and Opinion in Adults was minimised as we emphasised in the Explanatory Statement that participation was voluntary, that student researchers would not have knowledge whether or not any particular person had completed the survey and that we would prefer for participants not to inform the researchers whether they completed the study.
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