

CORRECTED VERSION

LAW REFORM COMMITTEE

Inquiry into sexting

Melbourne — 10 December 2012

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Professor D. Svantesson, Faculty of Law, Bond University.

The CHAIR — The Law Reform Committee is one of a dozen or so committees set up by Parliament that are given terms of reference to investigate. What happens is we get the terms of reference, we call for evidence, we do the inquiry within the community and then we write a report that goes to government for a response. The government may or may not pick up our recommendations. This particular inquiry has had quite a lot of publicity, as you are probably aware. It was probably the publicity in *The Age* originally that highlighted the issue, and the Attorney-General gave us these terms of reference to look at reform in this area of law.

You are covered by parliamentary privilege for anything you say here, but if you are asked questions outside the room you do not have parliamentary privilege. Be aware of that. Everything is recorded, and you will get a copy of the transcript within a week or two. If you could start by giving us your name and professional address for the transcript and then take us through your submission.

Prof. SVANTESSON — All right. My name is Dan Svantesson. I am a professor at Bond University and I am here as the immediate past vice-chair of the Australian Privacy Foundation. The address you are asking for is Bond University. I cannot even recall the postcode.

The CHAIR — All right. Can you tell me a bit about the Australian Privacy Foundation?

Prof. SVANTESSON — Yes. I have now stepped down as vice-chair and have also stepped down from the board. The organisation is aimed at looking after the privacy interests of Australians in particular, but we also do a bit of international work these days. It is a not-for-profit volunteer organisation aimed at looking after privacy in this country. While other organisations also do a bit in this field, like Electronic Frontiers Australia and so on, we are in a sense the primary organisation for that purpose.

The CHAIR — All right. Take us through your submission.

Prof. SVANTESSON — Yes. When I started speaking about this topic a bit more than three years ago I always had to start by introducing sexting — what is sexting and is it really an issue and so on. Most of the time was spent on those things rather than trying to address it as such. But obviously things have changed and we are now at a different stage, and it is good to see this inquiry bringing attention to the issue.

The CHAIR — One of the other witnesses today suggested that the epidemic of sexting is a bit of a myth. Do you have a view as to its prevalence?

Prof. SVANTESSON — Yes, I do. I think sexting is not a myth and it is not an epidemic, it is really somewhere in between. I think there is enough evidence around to show that sexting does occur and that it is an issue. We have court cases proving that it is an issue. We have passed the stage where there was doubt as to whether or not this needed to be pursued at all.

The CHAIR — Okay.

Prof. SVANTESSON — While I see some submissions focusing on how we need more research into the prevalence of sexting, I think we have seen enough. I am not against that type of research but let us focus on trying to understand sexting better.

One of the problems with sexting is trying to define what it is. I noticed the definition used in the terms of reference for this inquiry is something along the lines of ‘an inquiry into 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’. It is a good start, but in a sense that would capture almost all the online pornography that is not professionally distributed by corporations. It is an example of how difficult it is to define what it is we are dealing with.

It is a difficult task but what we need to do in a sense is map out what we are dealing with. We need to sit and think through what is covered in what we refer to as sexting and how we want to deal with it, and rather than trying to devise a rule straight away for dealing with sexting as a phenomenon, we might have to think, ‘Let’s have a situation where two consenting adults are engaging in sexting. How do we want to deal with that?’. With two consenting under-age people, how would we want to deal with it? It is a step-by-step process, asking those sorts of questions.

The starting point is basically four different scenarios. It can be between two adults, it can be between two young people, an adult sending to a young person or a young person sending to an adult. It is really just four scenarios. That sounds easy, but then in relation to each of those scenarios we need to consider a wide range of factors to decide how we want to deal with them. What is the age of the receiver? What is the age of the sender? What is the relationship between these two parties? Was there any encouragement or pressure exerted to promote the sending? That in itself is not a binary question. It is not a yes-or-no issue. What was the degree of pressure or encouragement and so on? Other questions we would ask are: is the sender depicted in the image and so forth? Was the sending intended or accidental? These types of questions can quickly mean that those four little scenarios mutate into a very broad range of possible scenarios. I will take a break soon — —

Ms GARRETT — No, no. I was just going to ask a question.

Prof. SVANTESSON — I think what we need to do is identify all those. There are going to be a lot of different scenarios, but we need to map them out and see how we want to deal with them individually, then based on the picture that arises, try to devise the more general principles.

Ms GARRETT — Certainly the scenarios as you describe them can mutate very quickly. One of the major issues we have been grappling with is the dissemination of images — whether there was consensual exchange initially but the absolute ease with which these images can then be sent on to several or hundreds of thousands of people. Do you see that in your work — that dissemination is a growing issue? How is your group grappling with those issues?

Prof. SVANTESSON — It comes with the territory of digital content. As soon as we have digital content, it can spread very quickly, and of course once it is online it is hard or impossible to control. The European Union is trying to devise privacy laws — a ‘right to be forgotten’ as they call it. You should have a right to request that everything is removed. It is not entirely dissimilar to what we have here where as soon as information is no longer needed, it should be removed. But they are taking it one step further.

Those sorts of things are fine in theory, but I do not know how you would ever get stuff off the internet once it starts spreading. You do not even know exactly where it has gone and so on. As soon as it ends up overseas, enforcement is, of course, an issue too.

Ms GARRETT — Presumably you would agree that the dissemination of images without consent could be many things, but it is obviously a fundamental breach of privacy of the individual?

Prof. SVANTESSON — I would certainly think so, yes. It was very interesting that one of the submissions referred to a scenario where a boy and a girl met at a party, the girl had a video on her phone of herself in some sort of sexual conduct, the boy stole the phone, transferred the video to himself and then distributed it. I think no-one would doubt it or disagree with me if I were to say that is a violation of the girl’s privacy. The funny thing then is that Australian privacy law does nothing to protect the girl in that situation. There is no way at all that the privacy law as it stands comes into play there. It is an obvious privacy violation, but the law is failing to respond. That brings us to what the Victorian Privacy Commissioner was calling for, which is a statutory cause of action for privacy violations. That is certainly one important step. It is not going to be the sort of silver bullet that takes care of sexting as such, but it is a vitally important component in addressing this matter.

The CHAIR — Do you think the solution to addressing the matter is to have new legislation dealing particularly with sexting, or is it a matter of just using the existing laws that we have and perhaps tweaking them to fit the circumstances?

Prof. SVANTESSON — I think in the long term the most successful approach would be to create a new framework dealing with sexting, specifically, and in a sense, through that, cut it out of the many areas that are currently regulating it. That way you could really tailor the law to specific situations rather than trying to manipulate the existing laws to fit this type of conduct.

The CHAIR — Does the nature of an image change depending on who is looking at it or who possesses it? The same image could be child pornography in one person’s hands, but not child pornography in another person’s hands.

Prof. SVANTESSON — Yes.

The CHAIR — So then how should we deal with that image as lawmakers, given that the same image can have different meanings for different people?

Prof. SVANTESSON — That is of course a broader question than just the sexting issue, because it comes up in normal child pornography legislation and so on. It is a difficult one, and you end up with almost philosophical questions as to how deeply we can look into the state of mind of a viewer and so on. To some degree, you have to take account of the intentions of the holder of the image in that sense. There is a big difference between me having taken photos of my 2½-year-old daughter running around the house with no clothes on. That might be child pornography in someone else's hands, right?

Mr NORTHE — Dan, you mentioned violation of privacy in the example you just mentioned. Do you have any recommendations around those amendments or changes for that and what penalties might apply in the example that you have raised?

Prof. SVANTESSON — For the scenario I just raised about privacy?

Mr NORTHE — Yes.

Prof. SVANTESSON — The exact remedies that we would attach to a statutory cause of action of privacy violations, and of course, again it is a bigger question than just the sexting question, but obviously there is a need for injunctions so as to stop the further spread of information. In a sense maybe that is the most important one, but to give some teeth to it, there obviously also need to be penalties attached, I would think, and the possibility for damages. Then again, that takes us to the question, 'How do you assess damages in this field?'. That is a quagmire on its own.

The CHAIR — Putting aside children for a moment, just the consensual sending of specific photos between adults, which I understand is not a crime, how should we deal with that issue? Presumably you would say that there is no issue to deal with it between consenting adults, but as to the secondary dissemination of that material without approval, is that a tort or a crime, or how should it best be dealt with?

Prof. SVANTESSON — I think it needs to be both, really. There is a danger in relying exclusively on civil implications, because — —

Ms GARRETT — Because it falls to the victim to get the remedy.

Prof SVANTESSON — Exactly, and it is a serious invasion for that person. So I think it needs to have both criminal and civil implications. Looking at the law as it stands, you could bring up things like defamation, breach of confidentiality, as we have seen in some cases, and of course copyright, in that if I have taken an image of myself and it gets distributed further, it is arguably a breach of my copyright. They are all partly artificial manipulations of the law as it stands to fit that type of scenario. That is where it might be beneficial to have some clearer laws dealing directly with that topic.

The CHAIR — Going back to the issue of a photo of an under-age person — a consensual one between two children — when that is distributed in a secondary scenario, is the nature of that a sexual offence or is it a bullying, harassing and intimidating sort of offence?

Prof. SVANTESSON — In the end I think it would depend on the circumstances to a degree. We are really getting to where things are very difficult to come to a clear decision on how we should deal with that, because clearly there needs to be implications and consequences for that type of conduct. Do we want the kids engaging in that sort of activity to end up on sex offenders registers and so on, and be sentenced as engaging in child pornography? To that, most people would probably say, 'No, we do not foresee it going in that direction', not least because it means that we have a category of, possibly, child pornography-type offences that many people would not see as very serious. We should never have to ask the question, 'Was the crime of child pornography a serious one or not?'. There is a risk of diluting the crime by bringing in this sort of risky behaviour by teenagers into that field.

The CHAIR — There have been suggestions from other witnesses that having the big stick of the child pornography offence is useful to scare kids from engaging in this behaviour. Do you think, first of all, it is

effective, or would the potential for another crime be just as effective? If it is effective, is it appropriate to be using that crime, which seems to be in essence not really what is being engaged in being, as a big stick?

Prof. SVANTESSON — It might be useful to keep the big stick around in the sense that we can have serious violations occurring between young people, so I am not saying that there can never be an instance where children or under-age people can be engaged in something that deserves to be treated quite severely. We should not have a situation where there is mandatory listing on a child offender register and stuff like that. Possibly keep the big stick around in some sense, but keep it for where it is actually really needed, and where it is akin to what those big sticks were meant to deal with.

The CHAIR — At the moment there is judicial discretion about the sex offenders register for children charged with child pornography offences. Do you think that there should be similar discretion for adults? Apparently in Victoria there is not if they are charged with a child pornography offence. If they are found guilty, it is mandatory that they go on the sex offenders register.

Prof. SVANTESSON — Possibly if you think of a sexting scenario, where we could have someone who has just reached adulthood, who is in a long-term relationship with someone who is just a few years younger, and there is a consensual sending of images. In that situation, it might be better if there is discretion. Bringing in the discretion, as long as it is used properly, is a good approach, I think.

The CHAIR — What is an appropriate age gap between children for it to be not seen as an exploitative relationship? Do you have a view as to what that age gap might be?

Prof. SVANTESSON — No, but I think we have to have a presumption that it is exploitative, then we have to look at all the circumstances of the case at hand to see whether or not that presumption is rebutted.

Ms GARRETT — On that point, we have heard a significant amount of evidence, and you have raised the issue, on bullying and harassment initially, that they often go hand in hand. Obviously if you have photos of somebody naked, the power imbalance can be pretty immediate and inherent. We have heard evidence about several circumstances of that being used to elicit further material or to extort things from the individual. In all of those scenarios that you paint and in your work, do you think that adds a certain weight — that power imbalance — if you have those images?

Prof. SVANTESSON — Absolutely. I mean, in that sort of situation we would look at perhaps the second disclosure of materials, if that is prompted by a fear of a first lot of images being shown, that adds a higher degree of severity, of course, to the second situation.

The CHAIR — On the issue of privacy longer term, when you consent to an exchange of images, should there be a right to withdraw that consent such that the person cannot hold that image, despite them being given it consensually?

Prof. SVANTESSON — Yes, I think that might be necessary. The Europeans talk about the right to be forgotten, in a sense. It is possibly hard to enforce but I mean we see it in other fields, so yes, absolutely.

Ms GARRETT — Could you tell me a bit more about that right to be forgotten and what is going on over there?

Prof. SVANTESSON — Their thinking is that generally after a while things disappear but nothing disappears, really, from the internet. So if I do something today it will stay forever online, really. Their thinking is that that is wrong and that we need to deal with that in some sense. The approach they are looking at, at least, would be to give a right to individuals to request that content be removed. That raises a lot of issues in its own right, because if you are operating something like your Facebook or Google, it is getting these sorts of requests. There is a lot of work involved, first of all, because content spreads very quickly from place to place. There is also a risk that intermediaries become prepared to remove information online out of a fear of being sued for breach of this right if they do not do so. So there is still a healthy debate in Europe about —

Ms GARRETT — It becomes a freedom of speech issue, certainly.

Prof. SVANTESSON — Absolutely, yes.

Ms GARRETT — Coming out of the US, too. They would be very loath to go down that path.

Prof. SVANTESSON — Yes.

Mr NORTHE — From a technology point of view, obviously a lot of this material is available on the internet and so forth. From previous submissions that we have heard, and just looking at ways that we might tackle that, one of the views on the relatively easy access to pornographic websites is that there is an opt-in system, rather than having open slather. Do you have an opinion on that and how effective it might be in tackling our younger generation viewing such material?

Prof. SVANTESSON — I do not favour some sort of general filtering on a national level. I think that there are more problems and risks associated with that than the good results that you are going to get from it. I would not be in favour of that direction.

Mr NORTHE — What would be the challenges that you would see from such a system?

Prof. SVANTESSON — We have seen filtering that has been tested in situations where, let us say, breast cancer information and that sort of stuff gets blocked. As soon as you start allowing a system of blocking, you have all sorts of issues with what transparency we need in relation to the blocking of such. Should people know what content is being blocked? How do I know that information that is relevant for me to get access to is not being blocked and so on? So there are some serious issues there, I think.

The CHAIR — Do you have anything else? Did you get through it all?

Prof. SVANTESSON — No. There is one thing I want to bring up. The inquiry raises the issue of education and I think that is an important one. In the end we always need to bring in education, regulation and technology solutions to issues such as this and perhaps education is the most important one of all those three for this area. In education it is a broader issue. It is not just a sexting issue; it is about equipping young people to act in a safe manner online. I think that needs to be remembered — that it is a bigger question as such.

We also need to ensure that young people develop a sort of healthy respect for both their own and other people's privacy. I think it will have long-term, positive implications, if we can do that. Some submissions — and I have seen this elsewhere, too — raise the point that kids of today do not care about privacy anyway. That is certainly not my experience in talking about these sorts of matters with my students both here and overseas. Just earlier this year I attended an internet governance forum in Stockholm. There was a youth group presenting what they saw as youth's big issues with the internet at the moment. They listed three things. One was education online, making it easier to use online resources, and privacy was the third matter that they brought up. So I think we should not start thinking that privacy is something that we are concerned about but the younger generation is not. It is and it remains a big issue.

Ms GARRETT — On that and with your expertise, in terms of educating young people about that issue and the precious nature of privacy, have you got a view on what is the most effective language or what resonates the most? Say you have a group of 12-year-olds who are embarking on their teenage years, what speaks to them? I think it is critical. There is a lot of framework around respect and there is education around those issues, but fundamentally I think that that concept of privacy absolutely needs to be taught to the kids. Do you have a view?

Prof. SVANTESSON — No, I have not done any research in that area or anything as such. I think the key thing is to keep talking to the kids about privacy. That should be done in the schools, it should be done in the homes, and so on. Because kids have an understanding of privacy, they have a desire for privacy — not least in relation to their parents sometimes, right?

Ms GARRETT — Now that is true.

Prof. SVANTESSON — So they have a concept of privacy and they think it is an important matter. Keeping the dialogue going about that is an important thing. On details as to how best to phrase it, someone else would be better placed to answer than I am.

Ms GARRETT — We heard evidence about the importance of the concept of empathy from a very young age, teaching kids about ‘How would you feel if this happened to you?’. I wonder if that might be a nice mix with the ‘How would you feel’?

Prof. SVANTESSON — Yes, that seems sensible.

The CHAIR — Thank you very much for coming to present to us. We greatly appreciate your travelling to Melbourne to see us. We will provide you with a copy of the completed report once it is done, probably sometime early in the new year.

Prof. SVANTESSON — Excellent. Thank you very much.

Witness withdrew.