

CHAPTER 1

Introduction and background

Introduction

1.1 On 27 June 2013, the Senate appointed the Select Committee on Cyber Safety to inquire into and report, by 30 August 2013, on options for addressing the issue of sexting by minors.¹

Conduct of the inquiry

1.2 The committee's inquiry was advertised on its website and government agencies and interested stakeholders were invited to make a submission. The committee received 25 submissions. A list of submissions authorised for publication by the committee is provided in Appendix 1.

1.3 The committee held a private briefing in Melbourne on 1 August 2013. The committee agreed to make public the *Hansard* transcript of the briefing, which is available on the committee's website. A list of witnesses who gave evidence at the briefing is provided in Appendix 2.

Acknowledgments

1.4 The committee thanks all those who contributed to the inquiry by making submissions, providing additional information or appearing before it to give evidence. In particular, the committee thanks the chair of the Victorian Parliamentary Law Reform Committee, Mr Clem Newton-Brown, MP, for briefing the committee on the work undertaken by the Law Reform Committee for its inquiry into sexting.

Context of the inquiry

1.5 The issue of cyber safety has received close scrutiny as the use of new technologies has brought not only great benefits but also risks particularly for young people. The Parliament recognised the need to explore issues of cyber safety and established the Joint Select Committee on Cyber-Safety (Joint Select Committee) in March 2010. The Joint Select Committee was reappointed in the 43rd Parliament in September 2010.² In June 2011, the Joint Select Committee tabled its interim report *High-Wire Act: Cyber-Safety and the Young*. The report included an examination of the issue of sexting by minors in the context of cyber bullying among young people.

1.6 The report highlighted that sexting can pose significant risks for young people, and that further research is needed to understand the motives behind this behaviour and develop effective intervention strategies.³ While the Joint Select

1 *Journals of the Senate*, No. 154, 27 June 2013, p. 4245.

2 *House of Representatives Votes and Proceedings*, No. 2, 29 September 2010, pp 47–49; *Journals of the Senate*, No. 3, 30 September 2010, pp 126–127 and 143.

3 Joint Select Committee on Cyber-Safety, Interim Report, *High-Wire Act: Cyber-Safety and the Young*, June 2011, pp 136–145.

Committee made recommendations relating to cyber bullying and cyber safety generally, including enforcement and educational strategies, no recommendations were made specifically in relation to sexting.

1.7 In May 2013, the Victorian Parliament Law Reform Committee tabled the final report for its *Inquiry into Sexting* (Victorian Parliament Report).⁴ The report noted that sexting, particularly by young people, has become an issue of national, and international, interest and concern. In addition, media reports in Victoria in 2011 had highlighted the prevalence of sexting in high schools in Victoria and the serious potential consequences both for young persons photographed, and for those who receive or disseminate such photographs.⁵

1.8 The report examined the incidence, prevalence and nature of sexting in Victoria, the extent and effectiveness of existing awareness and education campaigns in relation to sexting, and the appropriateness of existing laws that may apply to the practice of sexting.

1.9 The Victorian Parliament Report made 14 recommendations in relation to the legal and policy framework around sexting in Victoria.⁶ In particular, the report recommended (Recommendation 6) that the *Crimes Act 1958* (Vic) and the *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* (Vic) be amended to provide defences for child pornography offences in those Acts to cover age-appropriate sexting.⁷ It was also recommended (Recommendation 7) that once amending legislation was introduced in the Victorian Parliament to give effect to Recommendation 6, that the Victorian Government advocate to the Standing Council on Law and Justice that the Commonwealth, states and territories amend their criminal legislation to provide similar defences to child pornography offences.⁸

1.10 In addition, the Law Reform Committee recommended that a specific non-consensual sexting offence be introduced into the *Summary Offences Act 1966* (Vic) (Recommendation 9).⁹

What is sexting?

1.11 The term 'sexting' refers to a range of behaviours involving the creation and transmission of sexual content through electronic media. There is no single accepted definition of sexting, and various definitions have been proposed in recent times. The Attorney-General's Department (AGD) and the Department of Broadband, Communications and the Digital Economy (DBCDE) adopted a definition used by the

4 Victorian Parliament Law Reform Committee, *Inquiry into Sexting*, 29 May 2013, <http://www.parliament.vic.gov.au/lawreform/article/944> (accessed 29 July 2013).

5 Victorian Parliament Law Reform Committee, *Inquiry into Sexting*, 29 May 2013, p. 2.

6 Victorian Parliament Law Reform Committee, *Inquiry into Sexting*, 29 May 2013, pp xxiii-xxiv.

7 Victorian Parliament Law Reform Committee, *Inquiry into Sexting*, 29 May 2013, pp 142–43.

8 Victorian Parliament Law Reform Committee, *Inquiry into Sexting*, 29 May 2013, p. 146.

9 Victorian Parliament Law Reform Committee, *Inquiry into Sexting*, 29 May 2013, p. 152.

Victorian Parliament Report, which defined sexting as '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'.¹⁰

1.12 The Australia Communications and Media Authority (ACMA) articulated a simpler understanding of sexting to mean 'the sending of sexual messages, photos or videos, online or using a mobile phone'.¹¹

Types of sexting behaviour

1.13 Sexting can occur in a variety of contexts and through a variety of media, ranging from relatively benign, consensual behaviours to situations in which sexting is coerced or exploitative. The Victorian Parliament Report noted that sexting could include behaviours as diverse as:

- a 15 year-old girl taking a topless photograph of herself and sending it via mobile phone to her 16 year-old boyfriend;
- the boyfriend showing the photograph to his friends on the screen of his mobile phone;
- romantic partners engaging in a webchat where they 'flash' one another;
- a person posting a sexually explicit image on someone else's Facebook page;
- a person recording a sexual assault using their mobile phone camera;
- a person installing a hidden camera in a swimming pool changing room to record people getting changed; and
- a person sending an 11 year-old child explicitly-worded text messages as part of 'grooming' the child.¹²

1.14 The Australian Psychological Society noted that there are a number of dimensions to different behaviours broadly categorised as sexting, which need to be considered when examining a specific behaviour. These dimensions are:

- the content of the communication (including whether the communication includes text, images or video, and the degree of sexualisation present in the content);
- the use of the communication (including the number of people depicted in the content, and the number of people with whom the content is shared);
- the role of participants (including the producer, sender(s) and receiver(s) of the material);

10 Attorney-General's Department, *Submission 5*, p. 2; Department of Broadband, Communications and the Digital Economy, *Submission 13*, [p. 2]; Victorian Parliament Law Reform Committee, *Inquiry into Sexting*, 29 May 2013, p. 1.

11 Australia Communications and Media Authority, *Submission 9*, p. 2.

12 Victorian Parliament Law Reform Committee, *Inquiry into Sexting*, 29 May 2013, p. 19.

- the intent of the communication (whether benign or harmful, and with or without the consent of the subject); and
- the age of the participants.¹³

Stages of peer-to-peer sexting

1.15 The Law Council of Australia (Law Council) noted that there are a number of aspects to sexting. These are:

- requesting an image or video;
- creating an image (often a self-portrait);
- sharing an image with an intended recipient (consensually); and
- sharing an image with others (often without the subject's permission).¹⁴

1.16 While harm may be possible at each stage of this process, submitters highlighted that the most serious potential harm arising from sexting behaviour often occurs only at the final stage, when sexting content is shared beyond its initial intended recipient(s). This is sometimes referred to as non-consensual sexting, to differentiate it from behaviour in which the subject of sexual content willingly shares that content with others.

1.17 A common scenario cited in this type of sexting could occur where intimate images are consensually created and shared between an individual and his/her partner, only for these images to be circulated more widely by one party after the relationship breaks down, in an attempt to harm the reputation of the individual depicted.¹⁵

Issues specific to sexting among minors

1.18 Although sexting can equally occur between two adults, the terms of reference for this inquiry focus on the issue of sexting by minors. Sexting by minors raises some specific concerns that do not apply in the context of peer-to-peer sexting between adults. This is because sexual content depicting minors can often constitute child pornography under existing Commonwealth, state and territory laws, leading to potentially severe consequences for minors involved in the creation, possession or communication of such content.¹⁶

1.19 In addition to legal concerns relating to child pornography offences, the ACMA noted that young people may be subject to heightened levels of peer pressure to create or forward sexual images, and that the impact of the subject's loss of

13 Australian Psychological Society, *Submission 16*, pp 8–9.

14 Law Council of Australia, *Submission 19*, p. 5.

15 Department of Broadband, Communications and the Digital Economy, *Submission 13*, [p. 3].

16 See for example, BoysTown, *Submission 14*, p. 14; National Children's and Youth Law Centre, *Submission 20*, p. 3.

control over private images may be more serious and lasting for young people than adults.¹⁷ The Australian Psychological Society observed:

Given that children and young people are still in the process of developing the ability to assess risk and manage the consequences of their decisions, they are particularly vulnerable to the risks of cyber threats and associated technologies. The instantaneous nature of such technologies only heightens such risks.¹⁸

1.20 The Alannah and Madeline Foundation highlighted that the issue of sexting among minors should be viewed in its proper cultural context:

It is easy to think of sexting as aberrant, even abhorrent and commentators from a number of discourses depict it in this way. However, commentators closer to the age of the doers tend to view this behaviour as more benign and part of an image-sharing culture in a sexually permissive society, one in which young people see sexualised images virtually everywhere they look. It is not surprising that they create their own sexual imagery, and perhaps unrealistic to expect that they live up to a higher standard than we set for the rest of society.¹⁹

Prevalence of sexting behaviour by minors in Australia

1.21 It is unclear exactly how prevalent sexting behaviours are among Australian young people. However, the Law Council noted:

Notwithstanding the absence of large scale data about the prevalence of sexting amongst young people in Australia, a number of commentators and youth organisations have found sexting by young people to be taking place with some frequency.²⁰

1.22 Several recent studies provide additional information on this issue. In a survey conducted in 2012 by the ACMA, 13 per cent of respondents aged 16–17 years reported that either they or someone within their group of friends has sent sexually suggestive nude or nearly nude photos or videos of themselves to someone else, while 18 per cent of respondents aged 16–17 years reported that they or someone in their group of friends had received such images or videos of someone else.²¹

1.23 Other surveys conducted in Australia over the past several years have reported varying results in relation to the percentage of Australian teenagers engaging in sexting behaviour, with findings ranging between seven and 20 per cent.²²

17 Australian Communications and Media Authority, *Submission 9*, p. 2.

18 Australian Psychological Society, *Submission 16*, p. 10.

19 The Alannah and Madeline Foundation, *Submission 7*, p. 5.

20 Law Council of Australia, *Submission 19*, p. 7.

21 Australian Communications and Media Authority, *Submission 9*, pp 3–4. The sample size for these survey questions was 241 individuals aged 16–17 years.

22 See Joint Select Committee on Cyber-Safety, Interim Report, *High-Wire Act: Cyber-Safety and the Young*, June 2011, pp 137–41.

1.24 The committee notes that a study is currently being conducted by researchers from the Sydney Institute of Criminology, the University of NSW and the University of Western Sydney about the sexting experiences of young people aged between 13 and 18 years of age. Once completed this study may provide more rigorous prevalence data and insights into sexting activities.²³

Possible negative consequences of sexting behaviour by minors

1.25 In addition to possible legal consequences of sexting by minors (discussed below), the social impacts of sexting, particularly non-consensual sexting, can be serious and long-lasting. BoysTown commented:

When 'sext' images become public, the impacts can be multi-faceted and significant. Young people can find themselves the victims of humiliation, bullying, harassment, threat, punishment (from school and/or parents) and criminalisation. The flow on from these events can also be severe, impacting on young people's wellbeing, health, school, employment, family and peer relationships.²⁴

1.26 The permanence of digital content is a pressing concern in relation to sexting. Once digital images are shared, and particularly if they are posted on the internet, it can be almost impossible to retrieve and destroy that content. The potential for content posted online to be widely circulated in a very short period of time compounds this problem.²⁵

Current legal framework in respect of sexting by minors

1.27 The Law Council noted that there are currently no legislative provisions at the Commonwealth and state and territory levels that specifically deal with an offence of sexting.²⁶ However, several criminal and civil laws may apply to sexting behaviours, depending on the circumstances. The committee notes that these laws were designed to deal with activities associated with child pornography.

Child pornography offences

1.28 AGD noted that responsibility for combating child sexual exploitation is shared between the Commonwealth, states and territories, and all jurisdictions have enacted offences relating to child pornography. It is possible that sexting behaviour could be captured within the scope of these offences, at both the Commonwealth and state and territory level.²⁷

1.29 Commonwealth offences in relation to child pornography are found in the *Criminal Code Act 1995* (Criminal Code). AGD noted that while these offences do not directly criminalise sexting, the practice may be captured by offences contained in

23 Law Council of Australia, *Submission 19*, p. 7.

24 BoysTown, *Submission 14*, p. 12.

25 Australian Psychological Society, *Submission 16*, p. 10.

26 Law Council of Australia, *Submission 19*, p. 7.

27 Attorney-General's Department, *Submission 5*, p. 2.

Subdivision D of Division 474 of the Criminal Code, which criminalise a range of conduct relating to the use of a 'carriage service' such as the internet or mobile telephone for child pornography.²⁸

1.30 Section 474.19 of the Criminal Code provides that it is an offence to use a carriage service for child pornography material (by accessing, transmitting, publishing, distributing, advertising, promoting or soliciting such material). Section 474.20 of the Criminal Code provides that it is an offence to possess, control, produce, supply or obtain child pornography material for use through a carriage service.

1.31 For the purposes of the Criminal Code, child pornography is material that depicts a person under 18 engaged in a sexual pose or sexual activity, or that has as its dominant characteristic the depiction for a sexual purpose of a sexual organ of a person under 18, and which reasonable persons would regard as being, in all the circumstances, offensive.²⁹ The offences in sections 474.19–20 of the Criminal Code carry maximum penalties of 15 years imprisonment.³⁰

1.32 AGD stated that while these offences may be applicable to some sexting behaviours between minors, they are rarely used in such cases:

...the offences are subject to a range of protections to ensure that behaviour such as sexting, which is not exploitative of or harmful to children, is not inappropriately captured by the Criminal Code. There is scope for law enforcement to take the circumstances of the particular case into account before proceeding to investigate or prosecute such offences. Similarly, prosecution agencies are required to consider whether the prosecution of a young person is, in all the circumstances, in the public interest, before proceeding with the case.

As an additional safeguard, under section 474.24C of the Criminal Code, the consent of the Attorney-General is required prior to the commencement of proceedings for an offence against Subdivision D of Part 10.6 of the Code (which includes Commonwealth online child pornography offences) if the person was under 18 years of age at the time he or she allegedly engaged in the conduct constituting the offence.

To date, the Attorney-General's consent has only been sought in circumstances where a young person's conduct was clearly malicious or exploitative.³¹

1.33 Each state and territory has separate criminal legislation that may be used to regulate sexting, with the Victorian Parliament Report noting that 'since 2005, no two jurisdictions in Australia have had the same child pornography laws'. As a

28 Attorney-General's Department, *Submission 5*, p. 3.

29 Attorney-General's Department, *Submission 5*, p. 3. See section 473.1, *Criminal Code Act 1995* (Cth).

30 Australian Federal Police, *Submission 4*, p. 7.

31 Attorney-General's Department, *Submission 5*, p. 3.

consequence, there are significant differences in relation to the definitions, interpretations, elements of the offences and age of the relevant child contained in each jurisdiction's legislation.³²

1.34 The committee has not examined the relevant legislation of each state and territory in relation to sexting. However, submissions provided by the Law Council of Australia and the National Children's and Youth Law Centre contain information on the current law in the states and territories.³³ The Victorian Parliamentary Report also provides a list of the relevant legislation in all jurisdictions.³⁴

Sex Offender Registration

1.35 Each state and territory jurisdiction in Australia has legislation providing for the establishment and maintenance of a register for child sex offenders, based on national model legislation agreed to by the Australasian Police Ministers Council in 2004.³⁵ A national database of information about offenders registered under each of the state and territory schemes, the Australian National Child Offender Register, is managed at a Commonwealth level by CrimTrac, and is accessible by the registrars of the sex offender registries in each jurisdiction.³⁶

1.36 In almost all Australian jurisdictions, individuals over 18 years of age who are convicted of specified offences, including child pornography offences, must automatically be registered on the relevant sex offender registry, while the registration of offenders who are under 18 years of age is generally at the discretion of the courts. Registration on a sex offenders registry requires the individual to undertake mandatory reporting for a period of up to eight years (depending on the jurisdiction), as well as limiting the individual's ability to take up employment in areas involving young people.

Other Commonwealth offences which may be applicable

1.37 Section 474.17 of the Criminal Code provides that it is an offence for an individual to use a carriage service to menace, harass or cause offence. This offence carries a maximum sentence of three years imprisonment. Tasmania Police indicated in its submission that, in circumstances where sexting images (whether of adults or children) are maliciously forwarded to others by an individual without the consent of the subject, Tasmania Police may seek prosecution under this offence.³⁷

32 Victorian Parliament Law Reform Committee, *Inquiry into Sexting*, 29 May 2013, p. 86.

33 Law Council of Australia, *Submission 19*, pp 11–13; National Children's and Youth Law Centre, *Submission 20*, Attachment.

34 Victorian Parliament Law Reform Committee, *Inquiry into Sexting*, 29 May 2013, pp 210–11.

35 Law Council of Australia, *Policy Statement on Registration and Reporting Obligations for Child Sex Offenders*, 2010, pp 1–2, <http://www1.lawcouncil.asn.au/lawcouncil/index.php/library/policies-and-guidelines> (accessed 30 July 2013).

36 Victorian Parliament Law Reform Committee, *Inquiry into Sexting*, 29 May 2013, p. 97.

37 Tasmania Police, *Submission 3*, p. 2.

Civil offences

1.38 In addition to criminal offences, sexting behaviour may constitute breaches of civil law, depending on the circumstances.

1.39 The Australian Federal Police noted in its submission that certain sexting behaviours may constitute sexual harassment under the *Sex Discrimination Act 1984* (Cth).³⁸ The Victorian Parliament Report noted that two common law torts, breach of confidence and intentional infliction of harm, may potentially apply where intimate images of an individual are distributed without consent.³⁹ Copyright and defamation laws may also be applicable in certain circumstances.⁴⁰

38 Australian Federal Police, *Submission 4*, pp 7–8.

39 Victorian Parliament Law Reform Committee, *Inquiry into Sexting*, 29 May 2013, pp 165 and 168–69.

40 Victorian Parliament Law Reform Committee, *Inquiry into Sexting*, 29 May 2013, pp 164–65 and 170–73.

