



Australian Government

Attorney-General's Department
Criminal Justice Division

Senate Select Committee on Cyber-Safety

Inquiry into Sexting by Minors

Australian Government Attorney-General's Department submission

July 2013

Introduction

1. The Attorney-General's Department welcomes the opportunity to provide the Senate Select Committee on Cyber-Safety with this submission as part of the Committee's inquiry into options for addressing the issue of 'sexting' by minors.
2. For the purposes of this submission, the Department is using the definition of sexting used by the Victorian Law Reform Committee in its recent inquiry into sexting, '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'.¹ The Department understands this definition has also been adopted by the Department of Broadband, Communications and the Digital Economy in its submission to the Committee.
3. The Department has limited its views and discussion to sexting undertaken by children under the age of 18. In particular, the Department's submission is directed to the appropriateness and adequacy of existing laws, especially criminal offences, which may apply to the practice of sexting by minors.

Current legal framework

4. Under Australia's federal system of government, responsibility for combating child sexual exploitation is shared between the Commonwealth and States or 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. This submission is limited to a discussion of the relevant Commonwealth laws, noting that these laws may also be enforced by State and Territory police.

Commonwealth legislative reform

5. Commonwealth child sex-related offences are contained in the *Criminal Code Act 1995* (Cth). In March 2010, the Commonwealth Parliament passed the *Crimes Legislation Amendment (Sexual Offences Against Children Act 2010* (the Sexual Offences Against Children Act). The reforms strengthened existing measures to combat child sexual exploitation, including by:
 - enhancing existing offence regimes for child sex tourism and online child pornography, including by increasing existing penalties
 - introducing new offences for using a carriage service for indecent communications or sexual activity with a child
 - introducing a scheme for the forfeiture of online child pornography and child abuse material
 - introducing a new suite of child sex-related postal service offences, and
 - introducing new offences of dealing in child pornography and child abuse material overseas.
6. The measures were designed to ensure that child sex-related offences in areas of Commonwealth responsibility remain comprehensive and able to deal with contemporary forms of offending. Accordingly, the amendments took into account a range of factors including the need to remain responsive to emerging trends in the use of technology to sexually exploit children, law enforcement agencies' operational experience with existing offences and best practice domestically and internationally in legislating to combat child sexual exploitation. The reforms were also informed by submissions to a

¹ Victorian Law Reform Committee, *Inquiry into Sexting*, (May 2013).

consultation paper, which was released to the public and sent to relevant State and Territory agencies and non-government organisations in October 2009.

Overview of Commonwealth online child pornography offences

7. Commonwealth legislation does not directly criminalise sexting. However, the practice may be captured by offences contained in 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.

8. These offences apply if a person 'uses' a carriage service for child pornography material (ie, accesses, solicits or transmits such material or causes such material to be transmitted to himself or herself), or possesses, controls, produces, supplies or obtains child pornography for use through a carriage service. The relevant provisions are included at Attachment A. The Sexual Offences Against Children Act increased the maximum penalty for these offences from 10 to 15 years imprisonment.

9. For the purposes of the Criminal Code, child pornography involves material that depicts a person under 18 engaged in a sexual pose or sexual activity or that have as their 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.

10. The Department notes that the definition of 'child' for the purposes of the child pornography offences in the Criminal Code imposes a higher age threshold than child pornography offences in some States and Territories (see for example section 91FA of the Crimes Act 1900 (NSW), which applies to children under the age of 16 years). The threshold of 18 years of age for child pornography offences is in line with the majority of States and Territories and international standards. The Commonwealth considers an age threshold of 18 years is appropriate on the basis that child pornography involves the exploitation (often for commercial purposes) of children.

Application of Commonwealth child pornography laws to sexting

11. As indicated above, the offences in Subdivision D of Division 474 are designed to combat a broad range of serious sexual offences against children committed via a carriage service, and are not designed to target young people engaged in sexting and similar behaviours. However, persons under 18 years of age are not excluded from the operation of the provisions. As explained in the Explanatory Memorandum to the Sexual Offences Against Children Act, such an exclusion would potentially reduce protections for children and young people against online child pornography offences in circumstances where the incident involved malicious or exploitative behaviour.

12. However, 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.

13. 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.

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

Conclusion

15. The Commonwealth child sex-related offence regime has been comprehensively reviewed and updated to ensure it is adapted to suit modern forms of offending, including sexting. The Commonwealth approach upholds community interest in preventing the circulation of sexually explicit images of minors by young people and avoids problematic legislative distinctions between legal and illegal forms of sexting-related behaviour.

16. The provisions of the Criminal Code allow the specific circumstances of each incident to be taken into account in determining whether to investigate or prosecute a young person for online child pornography offences, thereby ensuring that such offences can be dealt with appropriately. Together with the safeguards outlined above, the offences strike an appropriate balance between preventing inappropriate prosecutions for sexting and ensuring children and young people are adequately protected from online sexual exploitation.

Part 10.6—Telecommunications Services

Division 473—Preliminary

473.1 Definitions

In this Part:

...

child pornography material means:

- (a) material that depicts a person, or a representation of a person, who is, or appears to be, under 18 years of age and who:
 - (i) is engaged in, or appears to be engaged in, a sexual pose or sexual activity (whether or not in the presence of other persons); or
 - (ii) is in the presence of a person who is engaged in, or appears to be engaged in, a sexual pose or sexual activity;
 and does this in a way that reasonable persons would regard as being, in all the circumstances, offensive; or
- (b) material the dominant characteristic of which is the depiction, for a sexual purpose, of:
 - (i) a sexual organ or the anal region of a person who is, or appears to be, under 18 years of age; or
 - (ii) a representation of such a sexual organ or anal region; or
 - (iii) the breasts, or a representation of the breasts, of a female person who is, or appears to be, under 18 years of age;
 in a way that reasonable persons would regard as being, in all the circumstances, offensive; or
- (c) material that describes a person who is, or is implied to be, under 18 years of age and who:
 - (i) is engaged in, or is implied to be engaged in, a sexual pose or sexual activity (whether or not in the presence of other persons); or
 - (ii) is in the presence of a person who is engaged in, or is implied to be engaged in, a sexual pose or sexual activity;
 and does this in a way that reasonable persons would regard as being, in all the circumstances, offensive; or
- (d) material that describes:
 - (i) a sexual organ or the anal region of a person who is, or is implied to be, under 18 years of age; or
 - (ii) the breasts of a female person who is, or is implied to be, under 18 years of age;
 and does this in a way that reasonable persons would regard as being, in all the circumstances, offensive.

...

Subdivision D—Offences relating to use of carriage service for child pornography material or child abuse material

474.19 Using a carriage service for child pornography material

- (1) A person is guilty of an offence if:
 - (a) the person:
 - (i) accesses material; or
 - (ii) causes material to be transmitted to himself or herself; or
 - (iii) transmits, makes available, publishes, distributes, advertises or promotes material; or
 - (iv) solicits material; and
 - (aa) the person does so using a carriage service; and
 - (b) the material is child pornography material.

Penalty: Imprisonment for 15 years.

- (2) To avoid doubt, the following are the fault elements for the physical elements of an offence against subsection (1):
- (a) intention is the fault element for the conduct referred to in paragraph (1)(a);
 - (b) recklessness is the fault element for the circumstances referred to in paragraph (1)(b).

Note: For the meaning of *intention* and *recklessness* see sections 5.2 and 5.4.

- (2A) Absolute liability applies to paragraph (1)(aa).

Note: For absolute liability, see section 6.2.

- (3) As well as the general defences provided for in Part 2.3, defences are provided for under section 474.21 in relation to this section.

474.20 Possessing, controlling, producing, supplying or obtaining child pornography material for use through a carriage service

- (1) A person is guilty of an offence if:
- (a) the person:
 - (i) has possession or control of material; or
 - (ii) produces, supplies or obtains material; and
 - (b) the material is child pornography material; and
 - (c) the person has that possession or control, or engages in that production, supply or obtaining, with the intention that the material be used:
 - (i) by that person; or
 - (ii) by another person;
- in committing an offence against section 474.19 (using a carriage service for child pornography material).

Penalty: Imprisonment for 15 years.

- (2) A person may be found guilty of an offence against subsection (1) even if committing the offence against section 474.19 (using a carriage service for child pornography material) is impossible.
- (3) It is not an offence to attempt to commit an offence against subsection (1).

...

474.24C Consent to commencement of proceedings where defendant under 18

- (1) Proceedings for an offence against this Subdivision must not be commenced without the consent of the Attorney-General if the defendant was under 18 at the time he or she allegedly engaged in the conduct constituting the offence.
- (2) However, a person may be arrested for, charged with, or remanded in custody or on bail in connection with, such an offence before the necessary consent has been given.