Dr Sean Turner
Committee Secretary
Parliamentary Joint Committee on Law Enforcement
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Friday, 30 July 2021

Dear Dr Turner

Re: Parliamentary Inquiry into law enforcement capabilities in relation to child exploitation

My name is Dr Dominique Moritz and I am a senior lecturer in the School of Law and Society at the University of the Sunshine Coast. I am an adjunct member of the Sexual Violence Research and Prevention Unit. My research interests and expertise relate to children's decision-making including consent and capacity. My knowledge broadly encompasses criminal law and health law and I have a particular interest in child exploitation material criminalisation.

Thank you for the opportunity to make a submission regarding the law enforcement capabilities in relation to child exploitation. I would like to address one of the terms of reference:

(b) reviewing the efficacy of and any gaps in the legislative tools and tactics of law enforcement used to investigate and prosecute offenders.

My submission relates exclusively to online child exploitation material offending issues. I will refer to those offences as "CSEM" (child sexual exploitation material), despite the Australian jurisdictions labelling them as 'child sexual abuse material' or 'child exploitation material', to account for the acknowledged significance;[1] exploitative nature;[2] and stigmatisation to children.[3]

There are two gaps within the legislative tools used to prosecute offenders considered in this submission: sexting offences and the contextual element of CSEM offences. I will address each of them below.

[1] Alisdair A Gillespie, 'Child pornography' (2018) 27(1) *Information & Communications Technology Law* 30, 30.
[2] Hadeel Al-Alosi, 'Criminalising Fictional Child Abuse Material: Where Do We Draw the Line?' (2017) 41 *Criminal Law Journal* 183.
[3] ECPAT International, 'Terminology Guidelines for the Protection of Children from Sexual Exploitation and Sexual Abuse', *Terminology and Semantics: Interagency Working Group on Sexual Exploitation of Children* (Web Page, 2016) <http://luxembourgguidelines.org/english-version/>.

1. Sexting

Criminal law does not consistently address online sexual behaviour across jurisdictions in relation to 'sexting'. The effect of the law's application regarding children's online sexual behaviour may cause challenges for law enforcement. There are three key challenges for the legislative tools to prosecute offenders.

A. Sexting is (in many cases) dichotomous to CSEM

Sexting relates to electronically communicating images or videos depicting nudity or sexualisation.[4] It is prevalent amongst young people with up to a quarter of children having sent sexual images according to one study.[5] Children participate in sexting for a range of non-exploitative reasons including flirtation and experimentation; improving their body image; bonding with friends or sexual partners; and/or having alternatives to sexual intercourse.[6] While sexting can have exploitative consequences, such as bullying,[7] revenge pornography[8] and gendered pressures,[9] it is a common interaction for older children despite the legal consequences. However, it should not be comparable to CSEM where it occurs between *consenting* individuals, despite those individuals being children, because CSEM offences are designed to address degradation and exploitation[10] rather than children's sexual agency. Where adults are involved in sexting behaviour with children, it is a clearer CSEM offence.

B. The law addresses sexting and CSEM behaviour alike

The prevalence of children accessing technology leads to unintended effects of CSEM legislation. Under the law, sexting behaviour is inseparable from CSEM offences in terms of establishing the elements of the legislation. Children who possess and/or share sexual content through sexting inadvertently engage the CSEM legislation because they are sharing material involving children depicted in sexualised ways.[11] Those children can then be prosecuted for CSEM offences, unless law enforcement or prosecutions exercise discretion not to prosecute them. There is limited information about the extent of such outcomes in Australia although the Queensland Sentencing Advisory Council suggests that over a 10 year period from 2006 – 2016, there were 3,035 offenders dealt with for CSEM offences in Queensland; 28 of the offenders sentenced in court for CSEM offenders were aged less than 17 years old while a further 1,470 children under 17 were diverted

[4] Dan Jerker B Svantesson, '"Sexting" and the Law – How Australia Regulates Electronic Communication of Non-professional Sexual Content' (2010) 22(2) *Bond Law Review* 41, 41.
[5] Melissa R Lorang, Dale E McNiel and Renee L Binder, 'Minors and Sexting: Legal Implications' (2016) 44(1) *The Journal of the American Academy of Psychiatry and the Law* 73, 75.
[6] Karen Cooper and others, 'Adolescents and Self-taken Sexual Images: A Review of the Literature' (2016) 55 *Computers in Human Behavior* 706; Michel Walrave, Wannes Heirman and Lara Hallam, 'Under Pressure to Sext? Applying the Theory of Planned Behaviour to Adolescent Sexting' (2014) 33(1) *Behaviour & Information* 86, 87.
[7] Panagiota Korenis and Stephen B Billick, 'Forensic Implications: Adolescent Sexting and Cyberbullying' (2014) 85
Psychiatric Quarterly 97, 99.
[8] David Plater, '"Setting the Boundaries of Acceptable Behaviour?" South Australia's Latest Legislative Response to Revenge Pornography' (2016) 2 *University of South Australia Student Law Review* 77, 85.
[9] Murray Lee and Thomas Crofts, 'Gender, Pressure, Coercion and Pleasure: Untangling Motivations for Sexting between Young People' (2015) 55 *British Journal of Criminology* 454, 455.
[10] *R v Booth* [2009] NSWCCA 89.
[11] Dominique Moritz and Larissa S. Christensen, 'When sexting conflicts with child sexual abuse material: the legal and social consequences for children' (2020) 27(5) *Psychiatry, Psychology and Law* 815; Jonathan Clough, 'Lawful Acts, Unlawful Images: The Problematic Definition of Child Pornography' (2012) 38 *Monash University Law Review* 213.

by police.[12] For the children subject to police diversion for CSEM offending, a majority had committing a sexting offence. Children participating in sexting are entering the criminal justice system even if the outcome is diversion from court.

C. Sexting law needs reconceptualisation

The age of consent for sexual intercourse in Australia is generally 16 or 17 with some jurisdictions prescribing defences to criminal charges for younger children who have sexual intercourse. Consent is relevant to sexting because the law acknowledges older children's capacity to consent to sexual intercourse yet fails to apply that same threshold to online sexual behaviour like sexting. Where children can consent to sexual intercourse, they should be able to consent to sexting.[13] Children under the age of consent should also fall outside CSEM criminality where the behaviour of all parties is consensual.

CSEM legislation should not capture sexting where it is done consensually between children. Options for reform include CSEM legislation having a sexting exception or defence which, I note, New South Wales have adopted.[14]

2. Contextual element of CSEM offences

The second gap within the legislative tools used to prosecute offenders considered in this submission relates to the contextual element of CSEM offences. CSEM offences generally require prosecution to establish the victims are (or appear to be) children, the CSEM is 'material', there is an offensive or sexual context, and the material is dealt with in some way such as it is possessed or distributed. The offensive or sexual context of the CSEM offences produces some incompatibilities with successful prosecutions because the legislation, in some jurisdictions, does not allow courts to consider the circumstances surrounding the offending.

South Australia (SA) and the Australian Capital Territory (ACT) consider the accused's sexual interest or arousal to determine whether a CSEM offence has been established. Such an approach considers the offender's intention or apparent intention to deal with the material which can be informed by a variety of factors including the circumstances of the offence and the offender's behaviour at the time as well as the depravity, or otherwise, of the alleged material.

All other Australian jurisdictions, apart from SA and the ACT, prescribe that CSEM is material a reasonable person would find offensive. Offensiveness is then assessed objectively based upon community standards.[15] It is the material itself which is assessed for offensiveness rather than what the offender did with it. So, an image of naked child on the beach would not be CSEM where a parent possessed it (and rightly so) because the image of the naked child is, of itself, inoffensive. Where a sexual offender possesses that same image for their own sexual gratification or shares that image through an online network, it is still not CSEM because the image itself is not offensive. The offender's motivations or the circumstances of the image's use are irrelevant.

[12] Queensland Sentencing Advisory Council, Sentencing Spotlight on child exploitation material offences (2017) 2.
[13] Dominique Moritz and Larissa S. Christensen, 'When sexting conflicts with child sexual abuse material: the legal and social consequences for children' (2020) 27(5) *Psychiatry, Psychology and Law* 815.
[14] *Crimes Act 1900* (NSW) ss 91HA(9), 91HAA. See, also, Victor Strasburger et al, 'Teenagers, Sexting, and the Law' (2019) 143(5) *Pediatrics* 1, 4.
[15] *Attorney-General v Huber* (1971) 2 SASR 142, 168

Such an interpretation has produced acquittals from CSEM offending. In *R v Melville*,[16] prosecution could not establish the accused's possession of six images depicting naked boys were CSEM because the images depicted boys 'relaxed in their nudity' which were, of themselves, not offensive. *Guerin v HB*[17] likewise held that CSEM relates to the image itself rather than any other circumstances and found the accused not to have breached CSEM legislation.

Other cases have widened the scope for assessing offensiveness, allowing some consideration of context. The accused in *CCI v The Queen*[18] was found guilty of CSEM for covertly filming pre-pubescent girls in the shower; despite the everyday nature of showering not being objectively offensive, the accused stored the footage amongst adult pornography as well as their collection containing close up footage of the children's genitalia which, contextually, contributed to the offensiveness. Such an approach has been affirmed in superior court decisions.[19] Limitations of the offensiveness approach in these jurisdictions mean that while the truly abusive and/or vast collections of CSEM are likely to be correctly captured within the legislative scope for prosecution, content which is not, of itself, offensive and has not been stored with other CSEM for context might fall outside the scope of prosecution despite the viewer's nefarious 'gaze' or intent to use for sexual purposes.[20]

Clare J in *R v Melville* stated 'if parliament chose to outlaw naked pictures of children it could do so in simple terms'.[21] Outlawing naked pictures of children would be unhelpful, particularly for proud parents and families, but perhaps it is time for parliaments to rethink the role of context in determining CSEM criminality.

Thank you, again, for the opportunity to contribute to this Parliamentary Inquiry. If I can provide any further information, please do not hesitate to contact me.

Yours sincerely,

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[16] [2009] QDC 436.
[17] [2017] NTSC 14.
[18] [2011] QDC 375.
[19] *Director of Public Prosecutions (NSW) v Annetts* [2009] NSWCCA 86; *Turner v The Queen* (2017) 271 A Crim R 54.
[20] Max Taylor and Ethel Quayle, *Child pornography: an internet crime* (Brunner Routledge, 2003); Tony Krone, 'Does Thinking Make It So? Defining Online Child Pornography Possession Offences' (2005) 299 *Trends and Issues in Crime and Criminal Justice* 1, 4-5.
[21] *R v Melville* [2009] QDC 436, [16].