

Senate Select Committee on Cyber Safety

Submission by Civil Liberties Australia

Inquiry into Sexting by Minors

Civil Liberties Australia (CLA) thanks the Senate Select Committee on Cyber Safety (the Committee) for the opportunity to contribute to this Inquiry. CLA is concerned with the outcomes the practice of sexting has given rise to, and the inadequacy and inappropriateness of existing laws to deal with sexting, especially by young people. One concern that CLA holds is that media reporting could potentially construct moral panic. We advocate considered and rational debate and deliberation of the issues involved and the proposed policy changes. It would be undesirable for policy and law reform to be a consequence of a media frenzy confected by whipped-up hysteria in the community.

CLA takes this opportunity to engage with the Committee and participate in the development of legal policy that balances the interests of justice against the twin imperatives of rapidly-changing mores of teenagers and constantly-evolving technology. We advocate that the Committee recommends reform of the law congruent with the recommendations of the Report of Law Reform Committee of the Victorian Parliament into Inquiry into Sexting 2013. The CLA website has a [detailed analysis](#) of the excellent Victorian report.

CLA submits that 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 (known as 'sexting') should be addressed by disaggregating issues around child pornography and young people. Our position is that this inquiry should focus on intentionally distributing an intimate image of a person who had consented to share intimate images with another person but had not consented to have those images distributed beyond that person. CLA highlights the great harm that could be caused by such a breach of individual privacy.

CLA believes that the distribution of intimate images or media of a person without their consent has the potential to cause significant and ongoing harm. We submit that current Commonwealth law does not sufficiently accommodate the intent, magnitude, and range of harms committed through inappropriate sexting practices. Current laws for breach of confidence, copyright, intentional infliction of harm, defamation and sexual harassment are unsuited to providing victims of non-consensual sexting with legal remedies against a person who has disseminated, or threatens to disseminate, an intimate image of someone without consent.

We believe that the changes in Information Communication Technology (ICT) and society are not presently reflected in law. Rapidly-changing technology has galloped ahead of society's ability to keep safe the good name and reputation, and the privacy, of young Australians particularly. We submit that these changed circumstances require the Federal Government to respond with changes to Commonwealth law. Firstly, consistent with the recommendations of the Australian Law Reform Commission (ALRC) Review of Australian Privacy Law, CLA recommends the Australian Government introduce a tort of invasion of privacy consistent with Proposal 5-1 of that Review.

Secondly, within the *Criminal Code Act 1995* (Cth), a number of provisions are relevant to sexting. These are:

- s 474.17 using a carriage service in a manner that is menacing, harassing or offensive,
- s 474.25A(1) engaging in sexual activity with a person under 16 using a carriage service,
- s 474.25A(2) causing a person under 16 to engage in sexual activity with another person using a carriage service,
- s 474.26 using a carriage service with the intention of procuring a person under 16 to engage in sexual activity with the sender or with another person,
- s 474.27 using a carriage service to ‘groom’ a person under 16; and
- s 474.27A using a carriage service to transmit indecent communication to a person under 16 years of age.

CLA agrees with Finding 3 of the Report of Law Reform Committee of the Victorian Parliament into Inquiry into Sexting 2013 that s 474.17 is more appropriate than child pornography charges in cases of non-consensual sexting between people who could engage in lawful sexual activity, where the sexting is not exploitative. Accordingly, we submit that the defences in ss 474.25A(1), 474.25A(2), 474.26, 474.27 and 474.27A are inadequate and expose young people who engage in non-exploitative sexting to being charged with child pornography offences.

CLA submits that the Australian Government should introduce amendments to the above statutes that create a defence to a prosecution. The defence should be modelled on the proposed defence contained in Recommendation 6 of that report. This is consistent with Recommendations 6 and 7 of that Report.

CLA submits that consistent with Recommendation 8 of that report, in the event that the proposed defence is legislated in Victoria or another State or Territory, the Australian Federal Police and the Commonwealth Office of Public Prosecutions adopt an express policy that they will not prosecute Commonwealth child pornography offences where an accused person would have a valid defence to child pornography charges under Victorian or other State or Territory legislation.

CLA submits that consistent with Recommendation 14 of that report, the Australian Government advocate that the Standing Council on Law and Justice consider issues surrounding the creation of a National Digital Communications Tribunal.

Civil Liberties Australia thanks the Committee for the invitation to contribute this submission. We express our willingness to work with the Australian Government in the development of legal policy regarding sexting in the future, and are willing to provide more information, either orally or in document form, upon request.

Yours Sincerely

Dr Kris Klugman
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