Committee Secretary
Senate Select Committee on Cyber Safety
Australian Parliament House
Canberra ACT 2600

Inquiry into Sexting by Minors

This submission responds to the Committee's inquiry regarding sexting by minors.

In summary, sexting is a phenomenon that has attracted more heat than light. There is danger that an overreaction on the part of legislators and law enforcement personnel will result in greater harms to Australian minors than the injury attributable to sexting.

The authors of this submission accordingly urge caution on the part of the Senate Committee. We note the desirability of establishment of a coherent national regime, consistent with the Commonwealth's telecommunication powers, that clearly differentiates between abusive behaviour by adults and imprudent behaviour by minors. Such a regime should not impose inappropriate burdens on telecommunication intermediaries. It should also provide for mandatory removal on a timely basis of images on social network services and other sites.

We endorse the May 2013 *Sexting* report by the Victorian Parliament's Law Reform Committee, the 2013 study *Young People and Sexting in Australia: Ethics, Representation and the Law* by Kath Albury, Kate Crawford, Paul Byron & Ben Mathews and ''Sexting' and the law – how Australia regulates electronic communication of non-professional sexual content' (2010) 22(2) *Bond Law Review* 41 by Dan Svantesson.

Basis

The submission has been made by Bruce Arnold and Benjamin Smith.

Mr Arnold is an Assistant Professor, Law, at the University of Canberra. His teaches cybercrime, privacy, intellectual property and other areas relevant to the Committee's inquiry. He has been cited in major government, industry and academic studies regarding cybercrime and online activity. Among activity of particular relevance he delivered the concluding keynote at the Victorian online child safety summit in 2010 regarding sexting, highlighting harms associated with inappropriate criminalisation and the desirability of avoiding 'cotton wool kids'.

Mr Smith is studying law at the University of Canberra and is co-authoring work on online activity and crime, including a forthcoming article in *Privacy Law Bulletin* regarding the Law Reform Committee report.

The submission is independent of the University of Canberra. Mr Arnold is a member of the Australian Privacy Foundation (and endorses the APF submission to the Committee). He is General Editor of *Privacy Law Bulletin*, the leading privacy and confidentiality practitioner journal.

Neither Mr Arnold nor Mr Smith have what would otherwise be reasonably perceived as a substantive conflict of interest.

Sexting

Sexting – the generation and transmission (via mobile phones and other wireless devices) of intimate still/moving images – has attracted increasing attention over the past seven years. That attention reflects uptake of mobile technologies by Australian adults and minors.

It also reflects what on occasion has resembled a moral panic, with hyperbole by advocacy groups feeding headlines that place pressure on legislators and law enforcement personnel to 'do something' to fix a problem through criminalisation and through intervention by teachers, telecommunication service providers and other intermediaries.

A key feature of the attention has been anxiety about danger to minors, in particular that young people are being exploited by adults.[1] That anxiety has been fostered by some advocacy organisations and commentators, which regrettably operate on the basis that facts should never get in the way of a newsbyte or an opportunity to build a constituency among people whose insecurities are looking for a focus and who accordingly blame 'the internet' in the same way that their grandparents blamed comics, television or talking pictures.

As the APF noted, consistent with a range of government and peer-reviewed scholarly studies, Australia is **not** seeing an epidemic of sexting. It is important to look at facts and to acknowledge that tabloid headlines – although resonant in parts of the community – are not evidence.

Courts are not seeing a large number of prosecutions of adults for sexting, either of adult partners or of minors. There is no reason to believe that the absence of prosecutions is attributable to the inadequacy of law in the various Australian jurisdictions or indifference on the part of law enforcement agencies.

There is similarly no reason to believe that law enforcement agencies are encountering large numbers of egregious sexting incidents involving minors but are refraining from prosecution of those minors on a discretionary basis.[2]

Sexting **is** occurring. On occasion it is both reprehensible and appropriately treated as a criminal offence under state/territory and Commonwealth law.[3] However, there is no reason to believe that sexting is 'out of control' and must be addressed on an urgent basis through extraordinary Commonwealth law. Some sexting by minors is in essence trivial; part of the exploration and indeed boundary setting that is an essential feature of becoming a resilient young person in a digital environment. It can be a benign and contemporary version of what has always taken place behind the shelter shed at primary school or with a Polaroid while the parents were away.

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[1] We note that such exploitation both should and can be effectively criminalised. Our comments in this submission do not endorse exploitation; they do however offer cautions about simplistic responses at the Commonwealth and state/territory levels.

[2] Law enforcement, child welfare personnel, teachers and parents are conceivably encountering instances where minors have engaged in sexting and – more importantly – where that sexting has resulted from or resulted in a discernable harm to the minors. In the absence of credible and comprehensive statistics we urge caution and encourage the Committee not to rely on anecdote. To adapt the Sherlock Holmes aphorism, is the dog isn't barking in the night that may mean there is no dog.

[3] eg *Criminal Code Act 1995* (Cth), s 473.1 and *Criminal Code Act 1995* (Cth), s 474.19(1)(iii)

Treating all minors as victims or as criminals denies those young people agency and increases rather then eliminates vulnerability.

We accordingly urge the Committee to take a cautious approach and to critically examine claims by particular advocate, especially claims that are unsubstantiated by facts and seek severe penalties or place exceptional burdens on intermediaries.

Such an approach does not condone illegality or deny the pain felt by victims and their associates. It does however foster a regime that is –

- intelligible (in particular can be readily understood by junior law enforcement personnel, educators, journalists, parents and other entities)
- consistent across Australia (so that we do not have significant variations depending on state/territory borders)
- aligned with the needs and capabilities of minors (in particular does **not** result in young people experiencing a form of civil death through being placed on a sex offenders register after unwise experimentation)
- integrated with Australian law in other areas (notably privacy and telecommunications but extending to stalking, defamation and other offences).

A minor-centric regime

Legislators, particularly when an election is looming, are under pressure to 'do' something. We urge the Committee to disregard that pressure and instead foster a minor-centric approach to the regulation of sexting, ie one that –

- recognises sexting is a broad label for a range of behaviours and potential harms
- recognises that criminalisation may result in substantive harms to both victims and offenders
- accordingly emphasises a differentiated approach (for example treats sexting by a naive 11 year old or reckless 16 year old differently to sexting by a 45 year old)[4]
- as a corollary emphasises education rather than intervention by law enforcement agencies.

Such a regime is in the best interests of the child (recognised as a guiding principle in Australian law regarding minors), irrespective of whether the child is a victim or offender.

The documents noted above have highlighted that sexting takes different forms. It might involve adults making images of themselves or other adults and disseminating those images, covertly or otherwise. It might involve minors making images of themselves or of each other and disseminating those images, with or without the agreement or awareness of someone who is featured in the images or the agreement of a recipient of the images. It might – egregiously – involve an adult sending intimate images to a minor or eliciting images from a minor, activity properly addressed under current Australian law.

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[4] Judge Paul Grant, President Children's Court of Victoria *Submission to Victorian Law Reform Committee Inquiry into Sexting* 3 July 2012 submission S.53

Simplistic analyses have conceptualised all sexting that involves images of minors in terms of child pornography and thus requiring penalties that include imprisonment, public shaming and inclusion on a sexual offenders register.

As submissions, such as that by Svantesson, to the Victorian Law Reform Committee (and earlier testimony by Mr Arnold to a range of bodies) have noted that the one size fits all analysis means that some young people are being potentially branded for life as sexual offenders alongside adults whose behaviour is rightly stigmatised and punished with imprisonment.

Most of those young people are doing what young people do: they are experimenting, being reckless, flouting authority through oppositional behaviour, making mistakes and otherwise growing up. Some are naive; the Australian legal system should not be aiming to punish naivety. Some are angry; the system should be cautious about severe punishment for kids whose idea of an appropriate response to a broken romance (or to schoolyard jealousy) is to share intimate photos of the former loved one … particularly to share through globally-accessible social network services.

We have referred above to potential branding. Work by Albury et al provides a credible and nuanced report on the attitudes of young people. It is consistent with anecdotal accounts of what law students, apprentices, primary and high school students do with wireless devices. In summary, there seem to be quite a few young people and adults making, distributing and viewing intimate images. That may be regrettable but it is a fact of life and is unlikely to be fundamentally inhibited by Australian legislation.

We have two concerns regarding criminalisation. The first, as indicated above, is the inappropriateness of criminalising activity by minors, ie people who lack full capacity and a full appreciation of potential consequences. Anecdotal accounts of law enforcement personnel confiscating mobile phones and threatening minors with prosecution, even imprisonment, are of concern. Such action is no doubt well-intended but may traumatise both offenders and victims (and encourage an inappropriate sense of victimhood among willing participants). It may also encourage the oppositional behaviour – the "I'll show you, so there" – evident in many minors dealing with authority figures. Enforcement may be counter-productive.

The second concern is that criminalisation inhibits efforts to foster resilience among young people. We need to allow minors to take risks and make mistakes … and to cope when something has gone wrong. Being told that you are victim, particularly the victim of a serious crime and perhaps complicit in that crime (ie willingly engaged in the production of child pornography), and being questioned by police may well cause greater trauma than being the subject of images or the subject of snickers from nasty kids at your school.

In essence, the remedy may be more damaging than the ostensible injury. In a 24/7 wireless world where police, teachers and parents cannot be everywhere lawmakers need to be wary about wrapping kids in cotton wool.

Lawmakers at the national and state/territory levels can however build resilience among minors and effectively address concerns regarding long-term access (and thus ongoing injury) to images of minors.

If sexting by minors involves sexual assault, it should be addressed on that basis, with caution about the impact on victims and offenders. The mass media have on occasion

highlighted incidents involving coercion. It is unclear however whether those incidents are representative.

Given what is known of adolescent and pre-adolescent experimentation it is likely that coercion is *not* a feature of most sexting; there is a need to be wary about conceptualising sexting as coercive on the basis that only coerced images gain the attention of the mass media or are used as examples by advocates.

Similarly, there are no indications that most images made by minors in the course of sexting are

- being widely disseminated and
- accessible on an ongoing basis through social network services or other digital media.

In the absence of hard data the Committee may wish to be cautious and, for example, encourage an authoritative investigation by the Australian Law Reform Commission rather than calling for new legislation or for the diversion of resources to enforcement by the Australian Federal Police.

The Committee might also consider what is the nature of harms. As a society are we concerned about images in the abstract or instead about the pain experienced by a boy or girl after someone else sees an intimate moment. In some instances the pain relates to the betrayal by a loved one or friend; the betrayal rather than the image is what hurts. In other instances the victim may be indifferent to viewing by strangers but hurt by knowing that peers are looking at the image. In other instances the young people may be unfussed about the image; the people who are distraught (rightly or otherwise) are the parents, guardians or teachers of those minors.

In responding we suggest that the Committee should consider three mechanisms.

Education

The first mechanism is education. Governments of different political persuasions have made much of curriculum reform, civics education and even a standards-based national curriculum. We suggest that the Committee encourage the integration of digital literacy across the primary and secondary school curricula in the different Australian jurisdictions. That literacy should not regarded as 'bolt-on' component or skill; it should be blended throughout the teaching.

In particular it should encompass –

- respect for autonomy (making choices, taking responsibility, seeking advice),
- awareness of the nature of digital media[5]
- respect for core values such as privacy
- examples of why you might not want to make and 'share' intimate images

We believe that such integration is more likely to be effective than one-off isolated initiatives such as the ACMA cybersmart site that appear to be high-cost low-impact.

[5] As a former Speaker of the House of Representatives probably now recognises, some texts are better not sent. As a succession of prominent footballers have discovered you can have too much sharing of what should have stayed zipped up or off the roof.

Right to be forgotten

The second mechanism is a version of what has been characterised as a 'right to be forgotten'.

Some people have expressed concern that once sexting images go onto the web they are likely to be accessible on an ongoing basis, potentially held in blogs, in image collections such as Tumblr and in social network sites such as MySpace or Facebook. Those images may be discoverable through global search engines such as Google.

Regrettably, some network operators have been slow to respond to requests to delete offensive, illegal or merely regrettable content ... for example because deletion would be inconsistent with the organisation's interpretation of free speech (a commitment that on occasion is another way of saying administratively inconvenient). The Committee may wish to consider whether there should be requirement for search engines and network operators to delete on a timely basis cached images that result from sexting.

That requirement should be predicated on a request by a parent/guardian (on behalf of the young person) or by an adult or teen who features in such an image. Comprehensive deletion of images from every part of the web is unviable but timely removal of cached images from the major search engines and image collections would go some way to minimise ongoing harms. Such a requirement would not fundamentally erode the conditional immunity of telecommunication and other service providers (eg the immunity enjoyed subject to not being aware of a 'takedown' request) and would address the weakness of potential other legal remedies regarding defamation and other offensive content.

In suggesting that the Committee consider this we emphasise that we are not calling for a mandatory or non-mandatory monitoring and deletion regime that is independent of requests by people whose images appear online or who act on behalf of the subjects of those images. It would be inappropriate in principle and practice to add regulatory burdens to telecommunication service providers, social network service operators and search engines. They should be expected to respond on a timely basis to reasonable requests but should not be required to systematically act outside that framework.

The Privacy Tort

It is axiomatic – and should be recognised in Australian law – that the dissemination of intimate images that have either been taken without consent, or published to a third party without consent is a serious invasion of privacy.

That invasion may have no direct financial consequences. It may however be the cause of significant suffering by the victim. We believe that the Committee has an opportunity to make a practical application of the right to privacy that is enshrined in international human rights instruments and in aspirational statements by all major political parties but as yet is not fully realised in terms of remedies.

A distinguished academic dismissed privacy as "a middle-class invention by people with nothing else to worry about", a right that is "the adult equivalent of Santa Claus and unicorns", associated with a "moral fog" that "permeates the feeble minds of law-makers and puts the innocent at risk".[6] The authors of this submission do **not** believe

[6] Mirko Bagaric (2007), 'Privacy Is The Last Thing We Need', *The Age* 22 April 2007

that the senators are feeble-minded or lost in the fog.

The Australian Law Reform Commission, the New South Wales Law Reform Commission and the Victorian Law Reform Commission – three sober bodies informed by extensive community consultation – have recommended the establishment of a statutory tort of invasion of privacy. Those recommendations were endorsed by the Victorian Parliament's Law Reform Committee in its 2013 report on Sexting. They are consistent with the High Court's indication, in *Lenah Game Meats*, that it would be receptive to such a tort.

Regrettably the current Commonwealth Government has disregarded the recommendations and appears to have walked away – on tiptoes – from its discussion paper about the tort.

We encourage the Committee to recommend that the Government move without delay to establishment of a statutory cause of action regarding serious invasions of privacy. Remedies under such a tort for unauthorised making and/or dissemination of sexting images would include compensation and apology. Such an apology would we believe be welcomed by many victims of disregard of their privacy, people who are interested in vindication – in an acknowledgment that they were wronged and that the offender (the person inappropriately making the image or disseminating the image) is contrite.

We do not believe that every victim of sexting would seek to use the tort. In practice they do not need to; it will be sufficient if a handful of people (adults and minors) successfully take action and thereby indicate to the community that particular behaviour is condemned by both ordinary Australians and the law.

Establishment of the tort as one response to sexting does not inappropriately chill the implied right of political communication, inhibit effective law enforcement or seriously crimp the activities of media organisations whose ostensible commitment to journalistic best practice is evident in the Leveson report.

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