

Australian Privacy Foundation

Submission To the Senate Select Committee on Cyber Safety Inquiry into Sexting by Minors

Introduction

1. APF welcomes this initiative of the Senate Select Committee on Cyber Safety and notes that it follows an initiative of the Victorian Parliament's Law Reform Committee.
2. This submission is intended to be made public.
3. In light of the absence of specific questions raised in any discussion paper, this submission largely builds on what we have already stated on the topic of sexting in other contexts.

The incidence, prevalence and nature of sexting by minors

4. The APF has not produced any statistics on the prevalence of sexting by minors. However, the limited statistics that are available from around the world suggest that sexting is more than a myth and less than an epidemic. Thus, a need for research, studies and inquiries such as this one, into sexting is no doubt established.
5. Furthermore, the fact that sexting may have significant, life-long, implications for the parties involved suggest that there is a need to take sexting seriously, whether a widespread use of sexting can be statistically ascertained or not. That is, sexting may be sufficiently serious in individual cases for the phenomenon to warrant attention, even if it should turn out to be impossible to prove that it is widely engaged in. After all, no one would suggest that murder is a minor issue just because murders fortunately are relatively rare in our society.

The extent and effectiveness of existing awareness and education about the social and legal effect and ramifications of sexting

6. Like virtually all types of conduct involving technology, the societal response to sexting must come in the form of what has been referred to as the "holy trinity of regulation, technology and education" (D. Svantesson, "Sexting" and the law – 15 minutes of fame, and a lifetime of shame, *Masaryk University Journal of Law and Technology* Vol. 5 No. 2 (2011); pp. 289-303).
7. Thus, whether current awareness and education campaigns have been effective or not (a question others may be better placed to assess), education remains a key component of how society should respond to sexting.

General observations about sexting by minors

8. The starting point of any discussion of 'sexting' must be an appreciation for the diversity of the types of conduct the term refers to. There is a considerable difference between two consenting adults (perhaps a married couple) sending each other 'sexts' and a situation where a paedophile coerces a child to send 'sexts'. These two situations may represent the extremes. In the first scenario few people would object to the conduct, while nobody could seriously support what takes place in the second scenario. In between these extremes there are many variations. In fact, the only thing that is common to all sexting scenarios is that there is at least a sender of the 'sext' (a sext may

for example be sent to a non-existing e-mail address, and in such a case, there is no receiver). In other words, sexting is a classic example of a situation in which one size does *not* fit all.

9. It is also useful to view sexting as a process involving several steps (see further: D. Svantesson, "Sexting" and the law – 15 minutes of fame, and a lifetime of shame, *Masaryk University Journal of Law and Technology* Vol. 5 No. 2 (2011); pp. 289-303) and several actors. Typically, the actors would include a sender, one or several intermediaries, one or several receivers, and in cases where the receiver(s) redistributes the sext, subsequent receivers.

10. Before sensible rules can be drafted, it is necessary to first map out the various scenarios that fall within the definition of sexting. It is then useful to start by approaching those scenarios individually, seeking to decide what is reasonable for each scenario. So for example, a little simplified, we may ask what should be the outcome if sexting occurs between two consenting adults, what should be the outcome if sexting occurs between two consenting underage persons etc. Only once that is done should we seek to define broader rules that can regulate sexting.

11. If we start by focusing on the initial communication of the sexting content we can identify four distinct scenarios: (1) Adult sending to an adult; (2) Adult sending to Young person; (3) Young person sending to an Young person; and (4) Young person sending to an adult.

12. Consequently, we only have four basic scenarios as our starting point in this context. We can of course imagine that a person is sending the content to more than one other person. In such a case we need to look at each communication separately and in that way we still only have four basic scenarios.

13. What complicates this is that for each of these four scenarios, we need to consider a wide range of factors: (1) The age of the sender; (2) The age of the receiver; (3) How the sext is used by the receiver; (4) Any pressure or encouragement applied to the sender (this is of course not a binary yes or no question, we need to consider nature and degree of pressure or encouragement); (5) The relationship between the parties; (6) The senders (objective) intentions in sending be sext; (7) Is it the sender who is depicted in the content?; (8) Whether the sending was intended or accidental; and (9) Any other relevant factors.

14. Because of these factors the four basic scenarios quickly mutate into a very large number of scenarios. However, we need to map out those scenarios to understand what we are dealing with.

15. A similar exercise must be carried out in relation to each step in the sexting process; that is in relation to the creation/collection of the content, the use of the content by the original receiver, any redistribution of the content, any use by subsequent receivers and so on.

16. In light of the above, it is clear that **law regulating sexting must be flexible enough to be sensitive to the great variation of scenarios** that fall within what is sexting. For example, while there is a widespread, and justified, reluctance to prosecute the sender of sexts, such reluctance assumes the scenario to involve a non-malicious sender. Sexting could, however, occur for example where an adult paedophile sends pornographic images to a child. In the latter type of situation, the law must be structured so as to prosecute the sender.

17. The role of the receiver may vary from somebody passively receiving an unsolicited and/or even unwanted 'sext', perhaps intended for somebody else, to situations where the receiver has coerced the sender to send the sext. Thus, there can be no general approach applied to all receivers of sexts. In fact, in some cases, the receiver may be the victim, such as the example above where an adult sends (unsolicited) sexual images to a child. In such cases the receiver should of course not be prosecuted.

18. However, where the receiver has in some way encouraged the sexting, a range of factors, such as those outlined above, ought to be taken into account in assessing whether the receiver ought to be prosecuted.

19. The role, and potential liability, of communications intermediaries has been discussed and debated at length in a variety of setting ranging from copyright infringements to defamation, to online fraud to child pornography.

20. It is the view of the APF that great care must be exercised in attributing liability to communications intermediaries. This applies in the sexting context as well.

21. In cases where the receiver redistributes the sext, questions arise as to the potential liability of the subsequent receivers. Also here must great care be exercised not to overgeneralise and not to seek to apply a one size fits all approach. Like the original receiver, the subsequent receivers may range from those who have applied pressure to obtain the sext, or who are part of an illicit ring of people who share illegal images, to those who really do not want to receive the sext at all.

Specific observations about the appropriateness and adequacy of existing laws

22. Academic writings have assessed how Australian law regulates sexting. One such assessment concludes that “sexting is regulated by a complex matrix of partly overlapping federal and state, civil and criminal, law” (D. Svantesson, “Sexting” and the law – how Australia regulates electronic communication of non-professional sexual content, *Bond Law Review* 22(2) (2010); pp. 41-57). Such a system of regulation is far from ideal, but it is a natural consequence where the laws predate, and did not anticipate, the type of conduct they are applicable to.

23. In light of this, we stress the importance of any legislative initiative suggested on sexting being formulated to take account of the system of laws it will form part of.

Specific observations about the application of the sex offenders register

24. In the context of a federal inquiry, the APF has already discussed the problems and dangers associated with typical sexting cases resulting in senders or receivers being placed on sex offenders registers. See in particular: Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into the Crimes Legislation Amendment (Sexual Offences Against Children) Bill 2010*, February 2010 ([http:// www.privacy.org.au/Papers/LegCon-SexOffChn-100223.pdf](http://www.privacy.org.au/Papers/LegCon-SexOffChn-100223.pdf)).

We concluded that **“While in some cases the behaviour aimed at in this provision may warrant an extreme response, or a very intrusive one, it is likely that the child sex offence process may also be an inappropriate and harmful legal response for a large number of such young people, and the criminal law may need to review the intent and target of child abuse material law in the light of this new development”**.

25. For the full discussion, we refer the Inquiry to the above-mentioned document.

Special issues relating to young people

26. The approach taken to young people is of particular importance in the context of online privacy protection. First, young people are often the earliest to adopt newly developed technologies. In that sense, they are at the forefront of online usage. Second, young people may be particularly prone to risk filled online behaviour. Finally, a change in the attitudes of the young people of today will have long term benefits not achievable in other ways.

27. Different models of the vulnerabilities, capabilities and needs of young people point to different ways of protecting their assumed interests. We suggest encouraging in young people a fundamental lifelong respect for their own and other people’s privacy against unwanted intrusions from any source, including government and business as well as ‘criminals’.

28. Such an approach should focus on less intrusive rather than more intrusive technical and legal measures, and adopt the emerging consensus that building individual ‘resilience’ and self respect in the face of any current or future challenge online is more likely to be in young people’s long term interests than a series of controversial, partial, quickly obsolete and ineffective technical measures, or draconian but rarely used ‘law and order’ provisions.

29. Education and assistance to schools and parents are two obvious elements in this context. Further, staged approaches to behavioural change, and a sensitivity to sexting as an aspect of bullying and victimisation must also be considered.

30. Furthermore, contrary to popular belief, it is not conclusively established that 'young people' do not care about privacy (See e.g. Angelka Adrian, How much privacy do clouds provide? An Australian perspective, *Computer Law & Security Review* 29 (2013) 48, at 56 stating that "Younger generations have much less concern about online privacy than older generations"). First of all, on those occasions adults actually bother to enter into a dialogue with young people rather than presuming to know what young people think, privacy concerns are often expressed by young people. For example, at the *Nordic Youth Internet Governance Forum* held in Stockholm in June 2012, privacy was highlighted as one of the key concerns by the group of young persons present ("The Nordic Youth IGF conference (NYIGF) was a pre conference to EuroDIG. Thirty youths in the age group of 14 – 17 years from Norway, Denmark, Iceland, Finland and Sweden formed the Nordic Youth Delegation. The NYIGF youth conference resulted in a number of recommendations regarding Internet governance.")

http://www.guarder.net/eurodig/2012/EuroDIG%202012_short_messages_to%20the%20IGF_final.pdf
(visited 20/3).

31. Finally, while admittedly an unscientific method to prove the point, those who take the view that young people do not care about privacy should perhaps consider how willingly their teenage children would give them access to their e-mail accounts, Facebook account or indeed, old fashion diaries – if young people have no concerns about privacy, they would have no problem willingly handing over such information to their parents, but I suspect that such voluntary abandonment of privacy would be rare indeed.

The path forward

32. While the inquiry carried out by the Victorian Parliament's Law Reform Committee was not exclusively focused on sexting by minors, it placed the majority of its focus on the sexting of young people.

33. That Inquiry produced a range of important findings, and resulted in 14 Recommendations.

34. It is the Australian Privacy Foundation's view that the mentioned findings, and the well thought out Recommendations, ought to constitute the starting-point for the Senate Select Committee on Cyber Safety's inquiry into sexting by minors.

Concluding remarks

35. The Australian Privacy Foundation encourages the coming discussion to take place in the context of the Senate Select Committee on Cyber Safety's inquiry into sexting by minors and we look forward to, what we hope will be, a consultative approach in which public interests groups, and general society, gets to remain fully involved.

For further information contact:

Professor Dan Svantesson
E-mail: enquiries@privacy.org.au

Australian Privacy Foundation

Background Information

The Australian Privacy Foundation (APF) is the primary national association dedicated to protecting the privacy rights of Australians. The Foundation aims to focus public attention on emerging issues that pose a threat to the freedom and privacy of Australians. The Foundation has led the fight to defend the right of individuals to control their personal information and to be free of excessive intrusions.

The APF's primary activity is analysis of the privacy impact of systems and proposals for new systems. It makes frequent submissions to parliamentary committees and government agencies. It publishes information on privacy laws and privacy issues. It provides continual background briefings to the media on privacy-related matters.

Where possible, the APF cooperates with and supports privacy oversight agencies, but it is entirely independent of the agencies that administer privacy legislation, and regrettably often finds it necessary to be critical of their performance.

When necessary, the APF conducts campaigns for or against specific proposals. It works with civil liberties councils, consumer organisations, professional associations and other community groups as appropriate to the circumstances. The Privacy Foundation is also an active participant in Privacy International, the world-wide privacy protection network.

The APF is open to membership by individuals and organisations who support the APF's Objects. Funding that is provided by members and donors is used to run the Foundation and to support its activities including research, campaigns and awards events.

The APF does not claim any right to formally represent the public as a whole, nor to formally represent any particular population segment, and it accordingly makes no public declarations about its membership-base. The APF's contributions to policy are based on the expertise of the members of its Board, SubCommittees and Reference Groups, and its impact reflects the quality of the evidence, analysis and arguments that its contributions contain.

The APF's Board, SubCommittees and Reference Groups comprise professionals who bring to their work deep experience in privacy, information technology and the law.

The Board is supported by Patrons The Hon Michael Kirby and Elizabeth Evatt, and an Advisory Panel of eminent citizens, including former judges, former Ministers of the Crown, and a former Prime Minister.

The following pages provide access to information about the APF:

- Policies <http://www.privacy.org.au/Papers/>
- Resources <http://www.privacy.org.au/Resources/>
- Media <http://www.privacy.org.au/Media/>
- Current Board Members <http://www.privacy.org.au/About/Contacts.html>
- Patron and Advisory Panel <http://www.privacy.org.au/About/AdvisoryPanel.html>

The following pages provide outlines of several campaigns the APF has conducted:

- The Australia Card (1985-87) <http://www.privacy.org.au/About/Formation.html>
- Credit Reporting (1988-90) <http://www.privacy.org.au/Campaigns/CreditRpting/>
- The Access Card (2006-07) http://www.privacy.org.au/Campaigns/ID_cards/HSAC.html
- The Media (2007-) <http://www.privacy.org.au/Campaigns/Media/>