

SEXTING BY MINORS

A SUBMISSION TO THE COMMONWEALTH SENATE SELECT
COMMITTEE ON CYBER SAFETY

YOUTH LAW CENTRE ACT

19 AUGUST 2013

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I RESPONSE TO TERMS OF REFERENCE

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16 August 2013

Christine McDonald
Committee Secretary
Senate Select Committee on Cyber Safety
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Ms McDonald,

We would like to thank the Senate Select Committee on Cyber Safety for the opportunity to provide input into your inquiry addressing the issue of sexting by minors. This is an area of law that has and does impact our clients and we welcome the inquiry.

The stated terms of reference are:

On 27 June 2013 the Senate appointed the Select Committee on Cyber Safety to inquire into and report on options for addressing the issue of sexting by minors by 30 August 2013

We have chosen the following definition, drawn from the Law Reform Committee of Victoria, for the purposes of this submission:

Sexting: The creating, sharing, sending or posting of sexually explicit messages or images via the internet, mobile phones or another electronic device by people. A sext may include taking a picture or video using a phone or webcam that is sexually suggestive or involves full or partial nudity. It can even include using computer programs to make someone appear naked.

Please feel free to contact us if you have any queries about this submission.

Yours sincerely,

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About the Youth Law Centre ACT

The Youth Law Centre ACT (YLC) provides free and confidential legal advice, information, referrals and minor assistance to young people aged between 12 and 25. This assistance is provided to young people in a variety of matters including criminal law, employment, tenancy, motor vehicle accidents, family law, and debt.

Additionally, the YLC engages with Canberra's young people through an outreach program. This includes attending high schools, colleges, universities and youth centres throughout the Australian Capital Territory. These attendances often involve presentation of legal information and referrals for young people, as well as conducting stalls at orientation days, youth festivals and exhibitions. The YLC is a regular participant in National Youth Week activities, including hosting a stall during the National Youth Week Festival, as well as attending exhibitions and activities at schools.

Furthermore, the YLC has a strong presence in the local Canberra youth worker community, and has close ties to the Youth Coalition of the ACT. The YLC regularly attends youth worker meetings and forums.

Disclaimer

While this submission report has been researched and written with due care, the Youth Law Centre ACT does not warrant that it is free from errors or omissions, or that it is exhaustive. The information was last reviewed on 19 August 2013. The submission provides information about several jurisdictions in Australia and the United States of America. It does not provide legal advice.

II INTRODUCTION

There were 12.2 million internet subscribers in Australia at the end of December 2012, according to the Australian Bureau of Statistics. Over ninety-eight per cent of internet connections in Australia are Broadband Connections. This widespread access to high-speed internet, combined with the increasing use of ‘smartphones’, has generated an environment where sexual messages, images and videos can be instantly created and distributed.

Digital technologies have transformed the way people find information, form friendships, communicate with those in their networks, and maintain relationships. While young people can explore their social personalities through digital communication, the ease of creating pictures, messages and videos through digital means can and does prompt some of them to explore and to express their sexuality using technology.

The law regards any explicit, and some suggestive, depiction of a minor as child pornography, and young people commit an offence under this law when they create, possess or distribute images of themselves or others. The severe consequences of child pornography offences, including relevant reporting requirements and sex offender registration, even apply to children who create a ‘sext’ of themselves.

In September 2011, the Legislative Assembly of the Parliament of Victoria referred an inquiry into sexting to the Law Reform Committee. Public submissions to the Committee generated resurgent concern and interest in the prevalence of sexting, the issue of consent, as well as the appropriateness and efficacy of existing laws, including the application of sex offender registration.

In the Youth Law Centre’s view, the current sexting laws contain inadequacies. They do not recognise a distinction between sexting by young people and the distribution of images by a registered ‘paedophile’ or adult sex offender. The law also fails to adequately acknowledge the genuine and significant harm that registration may have on young people for the rest of their lives.

We have made recommendations that we believe will address these shortcomings. We have grappled with the strengths and limitations of the State and Territory jurisdictions in Australia to inform our recommendations. We have also noted some case-studies and examples of law reform in the United States. Additionally, two hypothetical scenarios have allowed us to apply the law to mitigating circumstances. We sincerely hope that these various scenarios and facts help the readers of this submission to carefully reflect upon, reassess and reform the law of sexting, a prevalent issue that affects young people in the contemporary digital age.

Accordingly, the Youth Law Centre recommends the following:

- First, the Youth Law Centre recommends that the definition of child and the age of sexual consent should be consistent across all State and Territory jurisdictions so that sexting offenders are treated fairly and uniformly across Australia.
- Second, we recommend that consensual sexting between parties (where one or both parties are minors) in a lawful sexual relationship should be decriminalised.
- Third, we recommend that courts should have increased discretion not to place defendants on the child sex offenders register if satisfied that the offender does not pose a risk of committing a reportable offence in the future.
- Fourth, we recommend that a new offence of ‘sexting’ be created to separate it from child pornography offences.
- Fifth, we recommend that defences be introduced to protect those engaging in ‘lawful sexting’ – with a person with whom they are engaging in lawful sexual relations.
- Sixth, we recommend that the sex offenders register be reviewed to remove those who have been convicted of sexting offences that depict lawful sexual activity.

This has been a thought-provoking task and we thank the Senate Select Committee on Cyber Safety for the opportunity to provide input into the issue of sexting by minors.

III JURISDICTIONAL COMPARISON

This section will examine the existing laws that govern sexting related offences in all State and Territory jurisdictions and at Commonwealth level. It highlights the similarities, differences and inadequacies in the legislation that inform our recommendations.

A *Sexting-Related Offences*

In all State and Territory jurisdictions it is an offence to produce, possess or distribute child pornography.¹ Sexting between minors becomes an offence where the relevant sext can be characterised as child pornography. In all State and Territory jurisdictions in Australia, the definition of child pornography (or ‘child exploitation material’) encompasses material that depicts or describes, in an offensive way, a person who is, or appears to be, a child engaging in sexual activity, or in a sexual context.²

Importantly, each State and Territory prescribes different definitions of ‘child’ for the purpose of child pornography and different ages of consent to sexual activities (see Table 1). In most jurisdictions, those who are over the age of a ‘child’ can legally engage in and record sexual activities. For example, in the current Australian Capital Territory legislation, even if the person is over 16 years old and can legally engage in sexual intercourse, they can still be charged with a child pornography offence for sexting if they are under the age of 18.

The recommendations of this section have been informed by the defences which currently exist to protect minors from sexting offences in Tasmania and Victoria. In both jurisdictions, specific defences are available to remedy the discrepancy that exists between the age of a ‘child’ and the age of sexual consent.

¹ *Crimes Act 1900* (NSW) s 91H; *Criminal Code 1899* (QLD) ss 228A-D; *Crimes Act 1958* (Vic) ss 68-70; *Criminal Code Act Compilation Act 1913* (WA) ss 218-20; *Criminal Code Act 1924* (Tas) ss 130-130D; *Criminal Code Act 1983* (NT) s 125B; *Crimes Act 1900* (ACT) ss 64A-65; *Criminal Law Consolidation Act 1935* (SA) ss 63-63B.

² *Crimes Act 1900* (NSW) s 91FB; *Criminal Code 1899* (QLD) s 207A; *Crimes Act 1958* (Vic) s 67A; *Criminal Code Act Compilation Act 1913* (WA) s 217A; *Criminal Code Act 1924* (Tas) s 1A; *Criminal Law Consolidation Act 1935* (A) s 62; *Criminal Code Act 1983* (NT) s 125A.

In Tasmania it is a defence to a child pornography charge if it can be proved that the material depicts lawful sexual activity.³ Furthermore, there is an age-based defence to the charge of sexual intercourse with someone under the age of 17 years. A person who is 15 years or above can legally consent to sexual intercourse with a person not more than 5 years older than themselves, as can a person who is 12 years or above with a person not more than 3 years older.⁴ This age-based defence informs the scope of our recommendation about new defences that can, based on circumstances, acknowledge lawful sexting between minors.

In Victoria, it is a defence to the charge of possession of child pornography if the accused is not more than two years older than the child.⁵ Accordingly, any sexts sent in the course of that consensual and legal sexual relationship will not amount to a child pornography offence. The table below summarises the definition of a child and the age of sexual consent across Australian jurisdictions.

Table 1: Age of a ‘child’ for the purposes of child pornography offences and age of sexual consent in State and Territory jurisdictions

	Age of a ‘child’	Age of sexual consent
ACT	Person under the age of 18 years ⁶	16 years ⁷
NSW	Person under the age of 16 years ⁸	16 years ⁹
NT	Person under the age of 16 years ¹⁰	16 years ¹¹
QLD	Person under the age of 16 years ¹²	Sodomy: 18 years ¹³ Carnal knowledge: 16 years ¹⁴
SA	Person under the age of 17 years ¹⁵	17 years ¹⁶

³ *Criminal Code Act 1924* (Tas) s 130E(2).

⁴ *Ibid* s 124(3).

⁵ *Crimes Act 1958* (Vic) s 70(2)(d).

⁶ *Crimes Act 1900* (ACT) s 4.

⁷ *Ibid* s 55.

⁸ *Crimes Act 1900* (NSW) s 91FA.

⁹ *Ibid* s 66C.

¹⁰ *Criminal Code Act 1983* (NT) s 125A.

¹¹ *Ibid* s 127.

¹² *Criminal Code 1899* (QLD) s 207A.

¹³ *Ibid* s 208.

¹⁴ *Ibid* s 215.

¹⁵ *Criminal Law Consolidation Act 1935* (SA) s 62.

¹⁶ *Ibid* s 49.

TAS	Person under the age of 18 years ¹⁷	17 years ¹⁸
VIC	Person under the age of 18 years ¹⁹	16 years ²⁰
WA	Person under the age of 16 years ²¹	16 years ²²

In addition to the child pornography offences in the State and Territory jurisdictions, sexting may be an offence under the *Criminal Code Act 1995* (Cth). Under the Commonwealth law, it is a crime to use a carriage service (such as a phone or the internet) to access, transmit, make available, publish, distribute, advertise, promote or solicit child pornography.²³ Since sexting necessarily involves the use of a carriage service, the Commonwealth law applies in conjunction with state law.

The Commonwealth law definition of a ‘child’ includes anyone under the age of 18 years.²⁴ Consequently, a 17-year-old person engaging in lawful sexual activity may be subject to Commonwealth child pornography laws by recording the act on a mobile phone – even if the image is intended solely for private use. However, where the accused is under the age of 18 years, proceedings are not to be commenced without the consent of the Attorney-General. Despite this barrier to prosecution, a person may still be arrested, charged and remanded in custody in connection with a sexting-related offence before the necessary consent has been given.²⁵

B Defences

This section examines defences in current Australian sexting legislation. We will be focusing on the jurisdictions which inform the recommendations of this submission. There are a number of potential defences to sexting-related offences in the legislation of the various

¹⁷ *Criminal Code Act 1924* (Tas) s 1A.

¹⁸ *Ibid* s 124.

¹⁹ *Crimes Act 1958* (Vic) s 70AB.

²⁰ *Ibid* s 45.

²¹ *Criminal Code Act Compilation Act 1913* (WA) s 217A.

²² *Ibid* s 321.

²³ *Criminal Code Act 1995* (Cth) s 474.19.

²⁴ *Ibid* Dictionary.

²⁵ *Ibid* s 474.24C.

States and Territories. These defences fall broadly into three categories: (1) innocent possession; (2) unsolicited material; and (3) purpose-driven defences.

Innocent Possession: In New South Wales and the Australian Capital Territory, it is a defence to sexting-related offences if the defendant did not know, or had no reasonable grounds for suspecting, that the relevant sext amounted to child pornography.²⁶ This is applicable where the defendant reasonably believed that the person in the image they exchanged was not a ‘child’ (for the purposes of child pornography). This defence may apply if the defendant reasonably believed that the material would not be considered ‘offensive’ and therefore would not amount to child pornography. A defence to this effect also exists in Western Australia.²⁷

Unsolicited Material : In New South Wales, Tasmania and South Australia, it is a defence if the child pornography (the sext) came into the defendant’s possession unsolicited and the defendant took reasonable steps to delete it as soon as they became aware of its nature.²⁸ This would apply where a sext was received, without it being requested, and was immediately deleted.

Purpose-driven defences: Most State and Territory jurisdictions have some form of purpose-driven defence for sexting-related offences. However the defences vary in their content. For example, Queensland, Western Australia and Tasmania all include a defence where the material was obtained for a genuinely artistic, scientific or public benefit.²⁹ New South Wales also provides a defence where the material was obtained for a public benefit purpose.³⁰ Tasmania and the Northern Territory offer a defence where the material is being used for a legitimate medical purpose.³¹

²⁶ *Crimes Act 1900* (NSW) s 91HA(1); *Crimes Act 1900* (ACT) s 65(3).

²⁷ See, *Criminal Code Act Compilation Act 1913* (WA) s 221A(1)(b).

²⁸ *Crimes Act 1900* (NSW) s 91HA(2); *Criminal Law Consolidation Act 1935* (SA) s 63A(2); *Criminal Code Act 1924* (Tas) s 130E(3).

²⁹ *Criminal Code 1899* (QLD) s 228E(2); *Criminal Code Act Compilation Act 1913* (WA) s 221A(1)(c); *Criminal Code Act 1924* (Tas) s 130E(1)(b).

³⁰ *Crimes Act 1900* (NSW) s 91HA(3).

³¹ *Criminal Code Act 1924* (Tas) s 130E(1)(b); *Criminal Code Act 1983* (NT) s 125B.

C Sex Offender Registration

Every Australian State and Territory has legislation providing for the registration of child sex offenders. This is a relevant point in the discourse on sexting because the registration of sex offenders has procedural implications and consequences for young offenders.

The table below lists the legislation which dictates the registration of child sex offenders for each Australian jurisdiction.

Table 2: The State and Territory Legislation providing for the registration of child sex offenders

	Legislation
ACT	<i>Crimes (Child Sex Offenders) Act 2005</i>
NSW	<i>Child Protection (Offenders Registration) Act 2000</i>
NT	<i>Child Protection (Offenders Reporting and Registration) Act 2004</i>
QLD	<i>Child Protection (Offenders Reporting) Act 2004</i>
SA	<i>Child Sex Offenders Registration Act 2006</i>
TAS	<i>Community Protection (Offender Reporting) Act 2005</i>
VIC	<i>Sex Offenders Registration Act 2004</i>
WA	<i>Community Protection (Offender Reporting) Act 2004</i>

Additionally sex offenders are registered on the Australian National Child Offender Register (ANCOR). CrimTrac administers this register.³²

Sexting-related offences are reportable offences under the relevant Acts. In every State and Territory, except Tasmania, an adult offender is automatically included on the register once they are sentenced for a reportable offence. In Tasmania, the court has discretion to make an order that an offender not be placed on the register if the court is satisfied that the person does not pose a risk of committing a reportable offence in the future.³³

³² CrimTrac, *Australian National Child Offender Register*, Child Protection Services (last accessed: 16 August 2013) <http://www.crimtrac.gov.au/our_services/ChildProtectionServices.html>.

³³ *Community Protection (Offender Reporting) Act 2005* (Tas) s 6.

All jurisdictions have provisions that deal with children convicted of reportable offences. In South Australia, the Northern Territory and Victoria, if a person is sentenced for a reportable offence that they committed as a child, then they are not classified as reportable offenders.³⁴ However, child offenders may still be included on the register if the court makes a specific order to that effect. Before making such an order, the court must be satisfied that the person poses a risk to the sexual safety of any child, or children generally.³⁵

In Queensland, New South Wales, Western Australia and the Australian Capital Territory, the legislation provides that a child who commits a single sexting-relating offence will not be included on the register.³⁶ A single offence can include multiple sexts.³⁷ Offences arise from the same incident only if they are committed within a single period of 24 hours and are against the same person.³⁸ This suggests a minor would not become a registrable sex offender if they exchanged sexts with one person over the course of a single day. However, if a person under 18 continued to engage in sexts over a prolonged period, this could lead to their registration as a sex offender because they will have committed multiple offences. When determining whether to charge an individual with one or multiple offences in such a situation, NSW police place emphasis on the ‘same person’ component rather than the time period.³⁹

³⁴ *Child Sex Offenders Registration Act 2006* (SA) s 6(3); *Child Protection (Offenders Reporting and Registration) Act 2004* (NT) s 11(1)(a); *Sex Offenders Registration Act 2004* (Vic) s 6(3)(a).

³⁵ *Child Sex Offenders Registration Act 2006* (SA) s 9(3); *Child Protection (Offenders Reporting and Registration) Act 2004* (NT) s 13(1)(a); *Sex Offenders Registration Act 2004* (Vic) s11(3).

³⁶ *Child Protection (Offenders Registration) Act 2000* (NSW) s 3A (2); *Child Protection (Offender Reporting) Act 2004* (QLD) s 5(2); *Community Protection (Offender Reporting) Act 2004* (WA) s 6(4); *Crimes (Child Sex Offenders) Act 2005* (ACT) s 9(1)(c).

³⁷ *Child Protection (Offenders Registration) Act 2000* (NSW) s 3A(5); *Child Protection (Offender Reporting) Act 2004* (QLD) s 5(8); *Community Protection (Offender Reporting) Act 2004* (WA) s 6(8); *Crimes (Child Sex Offenders) Act 2005* (ACT) s 9(3).

³⁸ *Child Protection (Offenders Registration) Act 2000* (NSW) s 3(3); *Child Protection (Offender Reporting) Act 2004* (QLD) s 5(11); *Community Protection (Offender Reporting) Act 2004* (WA) s 5(1); *Crimes (Child Sex Offenders) Act 2005* (ACT) s 9(3).

³⁹ Kelly Tallon et al, ‘New Voices / New Laws: School-age young people in New South Wales speak out about the criminal laws that apply to their online behaviour’ (2012) *National Children’s and Youth Law Centre and Legal Aid NSW*, 21 [3.30].

D Sex Offender Reporting Requirements

It is important to note the impact that registration has on young offenders. Before a juvenile offender is entered on the Western Australian sex offenders register, the Police Commissioner must consider whether it is appropriate to suspend any reporting obligations imposed as a result of inclusion on the register. If the Commissioner is satisfied that the person does not pose a risk to the lives or the sexual safety of one or more persons, or persons generally, then they have the discretion not to include the offender on the register.⁴⁰

If an offender is registered as a sex offender, then they will be required to comply with a number of obligations imposed by the relevant State or Territory legislation. The offender must report a number of personal details, including:

- their name, and any name that they have previously been recognised by;
- their date of birth;
- their residential address and the names of any children who generally reside in the same household;
- their employment details;
- the details of any tattoos or permanent distinguishing marks;
- the details of any affiliation with any club or organisation that has children participants in its activities;
- the details of any convictions in foreign jurisdictions of reportable offences; and
- the details of any travel plans.⁴¹

Offenders are under an obligation to report these personal details to the police commissioner each year.⁴² The length of time for which an offender must comply with reporting obligations

⁴⁰ *Community Protection (Offender Reporting) Act 2004* (WA) s 61.

⁴¹ *Child Protection (Offenders Registration) Act 2000* (NSW) s 9; *Crimes (Child Sex Offenders) Act 2005* (ACT) s 59; *Child Protection (Offender Reporting) Act 2004* (QLD) s 16; *Sex Offenders Registration Act 2004* (Vic) s 14; *Community Protection (Offender Reporting) Act 2004* (WA) s 26; *Child Sex Offenders Registration Act 2006* (SA) s 13; *Child Protection (Offenders Reporting and Registration) Act 2004* (NT) s 16; *Community Protection (Offender Reporting) Act 2005* (Tas) s 17.

⁴² *Child Protection (Offenders Registration) Act 2000* (NSW) s 10; *Crimes (Child Sex Offenders) Act 2005* (ACT) s 37; *Child Protection (Offender Reporting) Act 2004* (QLD) s 18; *Sex Offenders Registration Act 2004* (Vic) s 16; *Community Protection (Offender Reporting) Act 2004* (WA) s 28; *Child Sex Offenders Registration Act 2006* (SA) s 15; *Child Protection (Offenders Reporting and Registration) Act 2004* (NT) s 18; *Community Protection (Offender Reporting) Act 2005* (Tas) s 18.

(‘reporting period’) depends on the type and number of offences committed. In all State and Territory jurisdictions, except Tasmania, sexting-related offences are classified as ‘class 2’ offences.⁴³ Offences of class 2 generally include acts of indecency, possession of child pornography, kidnapping of a child, filming a child for indecent purposes, and grooming offences. If an adult (18 years or older) is included on the register, the reporting periods are 8 years for a single offence, 15 years for two offences, or life for multiple offences.⁴⁴

In Tasmania, possession of child pornography is classified as a class 1 offence,⁴⁵ while production and distribution of child pornography are classified as class 2 offences.⁴⁶ The reporting periods for an adult offender included on the register in Tasmania are:

- 8 years: a single class 1 offence
- 15 years: a single class 2 offence; or multiple class 1 offences
- Life: multiple class 2 offences; or one or more class 2 offences and one or more class 3 offences.⁴⁷

In most State and Territory jurisdictions, if the offender was a child at the time the offence was committed the relevant reporting period is halved. For minors, the maximum reporting period obligation is therefore seven and a half years. This will apply in situations where the legislation stipulates a reporting period of life should apply.⁴⁸

⁴³ *Child Protection (Offenders Registration) Act 2000* (NSW) s 3; *Crimes (Child Sex Offenders) Act 2005* (ACT) sch 2; *Child Protection (Offender Reporting) Act 2004* (QLD) sch 2; *Sex Offenders Registration Act 2004* (Vic) sch 2; *Community Protection (Offender Reporting) Act 2004* (WA) sch 2; *Child Protection (Offender Reporting and Registration) Act 2004* (NT) sch 2; *Child Sex Offenders Registration Act 2006* (SA) sch 2.

⁴⁴ *Crimes (Child Sex Offenders) Act 2005* (ACT) s 85-87; *Community Protection (Offender Reporting) Act 2004* (WA) s 46; *Child Protection (Offenders Registration) Act 2000* (NSW) s 14A; *Child Protection (Offender Reporting) Act 2004* (QLD) s 36; *Sex Offenders Registration Act 2004* (Vic) s 34; *Child Protection (Offender Reporting and Registration) Act 2004* (NT) s 37; *Child Sex Offenders Registration Act 2006* (SA) s 34.

⁴⁵ *Community Protection (Offender Reporting) Act 2005* (Tas) s 13, sch 1.

⁴⁶ *Ibid* s 14, sch 2.

⁴⁷ *Ibid* s 24.

⁴⁸ *Crimes (Child Sex Offenders) Act 2005* (ACT) s 89; *Community Protection (Offender Reporting) Act 2004* (WA) s 47; *Child Protection (Offenders Registration) Act 2000* (NSW) s 14B; *Child Protection (Offender Reporting) Act 2004* (QLD) s 37; *Sex Offenders Registration Act 2004* (Vic) s 35; *Child Protection (Offender Reporting and Registration) Act 2004* (NT) s 38; *Child Sex Offenders Registration Act 2006* (SA) s 38.

E *Conclusion*

The current framework of legislation dealing with child pornography offences includes situations where minors send inappropriate sexts to each other. It is the submission of the Youth Law Centre that this issue needs to be addressed. This is further complicated by inconsistent definitions of ‘child’ which exists in the assorted legislation amongst the States and Territories. Our recommendations (Section V) are informed by these issues. The above jurisdictional comparison highlights two key points. First, the lack of consistency in the definition of a ‘child’ between jurisdictions creates disparity in the way minors are treated when charged with sexting-related offences. Second, placement on the child sex offenders register may affect employment opportunities, visa applications and day-to-day travel arrangements. These factors lead the Youth Law Centre to suggest that child pornography and sexting should be distinguished and dealt with differently. On these bases, we propose the recommendations to follow in Section V.

IV Examples of Reform in the USA

In the United States of America there have been numerous cases where minors have been involved in child pornography offences for actions involving sexting. For example, over twenty-three students from Pennsylvania were threatened with child pornography charges when the District Attorney of Wyoming County was alerted that naked photos of these girls were found on various mobile phones.⁴⁹ Consider also the case of a sixteen- and seventeen-year-old couple who took photographs of themselves naked and engaged in consensual legal sexual activity. In this situation both the boyfriend and girlfriend were charged and convicted of child pornography offences.⁵⁰ These two US examples highlight the variety of situations in which minors can engage in sexting, and that sexting does in fact constitute a separate act from that of creating or distributing child pornography. These examples further demonstrate the need for law reform in order to prevent such outcomes from occurring in Australia.

In response to increasing rates of young people receiving child pornography convictions, several states in the US have recently introduced reforms. These changes suggest that US legislators are beginning to separate the creation of child pornography from the offence of sexting.

In New Jersey, prosecutors are now able to assess first-time offenders who did not know that sexting was a crime and send them to a diversionary program.⁵¹

In Vermont, sexting was removed from pornography legislation, and specific offences were introduced that apply to offenders under 18 years. When determining whether or not to record a conviction, the main considerations are the absence of voluntariness and coercion.⁵²

⁴⁹ Dawn C. Nunziato, 'Romeo and Juliet Online and in Trouble: Criminalizing Depictions of Teen Sexuality (c u l8r: g2g 2 jail)' (2012) 10 *Northwestern Journal of Technology and Intellectual Property* 58, 60-61.

⁵⁰ Ibid 61-62.

⁵¹ Krupa Shah, 'Sexting: Risky or Frisky? An Examination of the Current and Future Legal Treatment of Sexting in the United States' (2010) 2 *Falkner Law Review* 193, 214.

⁵² Amanda Hiffa, 'OMG TXT PIX PLZ: The Phenomenon of sexting and the constitutional battle of protecting minors from their own devices' (2010 – 2011) 61 *Syracuse Law Review* 499.

Additionally, any sexting convictions are struck off once the child turns 18 years old, therefore preventing the individual from being registered as a sex offender as they embark upon their adult life.

Nebraska added new sexting defences for those charged with child pornography. To establish the complete defence, the defendant must establish that:

- the defendant is 19 years or younger;
- the person in the image is 15 years or older;
- the images were created knowingly and voluntarily;
- the images are of one minor only;
- the images have not been forwarded to others by the defendant; and
- the defendant has not used coercion in the creation or sending of the images.⁵³

These reforms provide a spectrum of options that Australia could utilise to avoid young people undeservedly being labelled as ‘sex offenders’. Diversionary programs and specific offences and defences would ensure that we are discouraging child pornography associations while also protecting young people.

The Youth Law Centre’s recommendations are informed by these US examples, and also by the contention that current Australian laws require change and reform in order to prevent prosecutions of this nature occurring in Australia. We recommend a didactic and warning-focused response, as opposed to one which is unnecessarily punitive. Children should be educated about sexting and its consequences before resorting to prosecution and registration.

⁵³ Jessica Stewart, ‘Legislative Update: Juvenile Sexting and Changing Child Pornography Law’ (2010) 30(4) *Childrens Legal Rights Journal* 43.

V Recommendations

Each State and Territory has its own sex offender register, and is responsible for the individuals within its jurisdiction. There exists also a national register called the Australian National Child Offender Register (ANCOR), which is administered by CrimTrac.⁵⁴ This allows nationwide monitoring of offenders, as well as the facilitation of information sharing. In light of the ANCOR and its national scope, it seems reasonable to have a streamlined national policy for the way sexting is addressed by the law, and the nature of offences which renders an individual eligible to be placed on the register.

This paper adopts recommended aspects from each jurisdiction, as well as examples from overseas cases so that such reform can be implemented on a Commonwealth level. Our recommendations encourage uniformity between jurisdictions, encouraging States and Territories to have consistent legislation. It is proposed that law reform recognise that the offence of sexting between minors is separate from that of child pornography.

A *Uniformity*

As part of a law reform process, issues of definition ought to be resolved. Each jurisdiction has different definitions of ‘child’ and ‘child pornography’, as well as different ages of consent for lawful sexual activity. We support the Commonwealth definition of ‘child’ as a person aged less than 18 years old. We also believe that the age of consent should be streamlined to 16 years old for all kinds of sexual activity.

We suggest that if sexting occurs between those capable of a lawful sexual relationship, there should not be legal consequences. For example, if a 17 year old and a 21 year old engage in consensual sexting, they should not be subject to legal penalty and registration, especially as it may cause lifelong disadvantage. To avoid confusion, sexting and child pornography offences should be separated in all jurisdictions. A uniform definition of child should be

⁵⁴ CrimTrac, *Australian National Child Offender Register*, Child Protection Services (last accessed: 16 August 2013) <http://www.crimtrac.gov.au/our_services/ChildProtectionServices.html>.

adopted, and additionally, the law and policy with regards to the penalties should also be consistent across all Australian jurisdictions.

However, we support the legislation governing cases of sexting between those who cannot have a lawful sexual relationship (due to age, duty of care or other exceptions) remaining as it currently is. The Youth Law Centre's recommendations are mutually exclusive and they do not interfere with the factors that constitute a lawful sexual relationship.

Recommendation 1: That the definition of 'child' and the age of sexual consent be consistent across all Australian State and Territory jurisdictions.

Recommendation 2: That consensual sexting between those engaging in lawful sexual relations be decriminalised.

The following section will discuss two ways these recommendations can be further enhanced: first, enhanced discretion; and second, the introduction of offences and defences.

B *Discretion*

This paper recommends enhancing the court's discretion as to whether to place offenders guilty of sexting on the sex offenders register. In 2010 the Commonwealth Criminal Code was amended to require the Attorney-General to consent to the prosecution of persons under the age of 18 on charges of child pornography. This was designed to preserve the application of child pornography laws to cases where there was evidence of malice and exploitation. However, sexting offences are still regarded as child pornography, and thus offenders remain under the same classification.

In most jurisdictions, although the offender is a child under the age of 18 years, there is limited judicial discretion to place these young offenders on the sex offenders register.⁵⁵ In

⁵⁵ *Child Protection (Offender Reporting and Registration) Act 2004 (NT) ss 11, 13; Child Protection (Offenders Registration) Act 2000 (NSW) s 3A(5).*

the Australian Capital Territory, the court has limited discretion as to whether to place a young person on the sex offenders register. The court has no discretion regarding those 18 years and over.

In order to further elucidate the following three recommendations, this submission uses two hypothetical examples to explore the application and impact of the law.

Example A

An 18 year old male was engaged in a consensual sexual relationship with his 17-year-old girlfriend. She sent him two unsolicited sext messages using her camera phone. These were later found by police on the male's phone.

In all jurisdictions except Tasmania, there is no judicial discretion to not place an adult on the sex offenders register if they have been found guilty of a reportable offence. This could be a 21 year old sending or receiving sexts with their 17 year old partner. This also has undue impact on individuals aged 18 years and over who may have received unsolicited sexts from friends or sexual partners. As demonstrated in Example A, there exists the possibility of individuals aged 18 years and older engaging in sexting consensually and without malice with a partner under the age of 18, who could subsequently be convicted with possessing child pornography and be placed on the sex offenders register.

In Tasmania, if the court is satisfied that the adult offender does not pose a risk of committing a reportable offence in the future, then the court has discretion not to make an order under the *Community Protection (Offender Reporting) Act 2005* (Tas).⁵⁶ We support this discretion being implemented at a Commonwealth level, and being adopted by all state and territory jurisdictions. We additionally support the police having discretion not to charge individuals who are found to be sexting where sexual relations between them can be considered lawful.

⁵⁶ *Community Protection (Offender Reporting) Act 2005* (Tas) s 6.

Recommendation 3: That the courts have increased discretion not to place defendants on the child sex offenders register where the courts believe that those found guilty do not poses a risk of committing a reportable offence in the future.

C *Law Reform*

Law reform is required to recognise that the policy and regulation of sexting between minors is and should be separate from that of child pornography. This should occur both in the form of new offences and new defences.

Offences

The Youth Law Centre suggests that an offence be created specifically for sexting. Sexting offences should be separate from child pornography legislation because, as the Youth Law Centre has observed and discussed, sexting can involve parties engaging in consensual, lawful sexual activity. Drafting penalties outside of sex offender status should avoid mandatory registration requirements which may be disproportionate to the consequences of sexting. Apart from avoiding consequences of sex offender registration, creating new offences that specifically target sexting will enable legislators to achieve a more appropriate response that focuses primarily on caution, education and warning before prosecution and punishment.

Defences

The legislation should distinguish between those individuals who engage in sexting within the context of lawful sexual relations, and other people who deliberately engage with child pornography.

Example B

A 17-year-old girl and her 17-year-old boyfriend were engaged in a consensual sexual relationship. He sent her two unsolicited sext messages, and she later replied to her boyfriend with three photos depicting her nude. These photos were found by teachers at their school who referred the matter to the police.

Placing minors on the sex offenders register dilutes the importance and utility of the register as well as the distinction between two separate kinds of offenders.⁵⁷ Additionally, as seen in Example B, minors who engage in sexting while they are in consensual, lawful sexual relations are undeservedly susceptible to being charged with child pornography offences and consequently placed on the sex offenders register. Therefore, drawing on existing legislation from Tasmania, the Commonwealth could provide a defence to sexting charges where the image, message or video depicts sexual activity that is lawful and consensual.

Recommendation 4: That a new offence of sexting be created.

Recommendation 5: That defences be introduced to protect those engaging in sexting material that depicts lawful sexual activity.

D *Review of Register*

If criteria for registration is updated, or if new offences or defences are created, it will be imperative to review the register to ascertain who still ought to be placed on the register and who ought to be removed. This will begin to rectify the life-impacting stigma for those individuals who were placed on the register.

Recommendation 6: That Sex Offender Registers be reviewed to remove those convicted of sexting offences which depict either lawful sexual activity or self-images shared between individuals who were engaging in lawful and consensual sexual activity.

⁵⁷ Robert Richards and Clay Calvert, 'When Sex and Cell Phones Collide: Inside the Prosecution of a Teen Sexting Case' (2009) 32(1) *Hasting Communications and Entertainment Law Journal* 1, 35-36.



E *National Digital Communications Tribunal*

The Youth Law Centre understands that there have been conversations about the formation of a National Digital Communications Tribunal to provide a non-criminal response to sexting. We support this proposal in principle, and await additional details and research about the nature of this tribunal, its powers, roles and responsibilities.

VI CONCLUSION

The phenomenon of sexting should not be treated as an extension of child pornography offences when it takes place between consenting individuals and depicts lawful sexual activity. Based on our jurisdictional comparison, evidence of reform in the USA as well as our experience with clients facing these issues, we recommend the following:

Recommendation 1: That the definition of ‘child’ and the age of sexual consent be consistent across all Australian State and Territory jurisdictions.

Recommendation 2: That consensual sexting between those engaging in lawful sexual relations be decriminalised.

Recommendation 3: That the courts have increased discretion not to place defendants on the child sex offenders register where the courts believe that those found guilty do not poses a risk of committing a reportable offence in the future.

Recommendation 4: That a new offence of sexting be created.

Recommendation 5: That defences be introduced to protect those engaging in sexting material that depicts lawful sexual activity.

Recommendation 6: That Sex Offender Registers be reviewed to remove those convicted of sexting offences which depict either lawful sexual activity or self-images shared between individuals who were engaging in lawful and consensual sexual activity.

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