

SUBMISSION TO THE SENATE SELECT COMMITTEE ON CYBER SAFETY

Introduction: The Alannah and Madeline Foundation

The Alannah and Madeline Foundation welcomes the opportunity to make this submission to the Select Committee on Cyber Safety.

The Alannah and Madeline Foundation is a national charity, keeping children safe from violence. The Foundation was established in memory of Alannah and Madeline Mikac, aged six and three, who, with their mother and 32 others were killed at Port Arthur, Tasmania on 28 April 1996. It cares for children who have experienced or witnessed serious violence and run programs that prevent violence in the lives of children.

The Foundation works to prevent school-based bullying and is the auspice organisation for the National Centre Against Bullying.

The Alannah and Madeline Foundation plays an advocacy role and is a voice against childhood violence.

The Foundation's **National Centre Against Bullying (NCAB)** is a peak body made up of experts in the fields of childhood wellbeing and bullying, chaired by the Hon Alastair Nicholson (AO, RFD, QC, former Chief Justice of the Family Court of Australia). NCAB works with school communities, government, media and industry to reduce bullying and minimise its harm to young people.

The Foundation has a number of programs that help children and young people.

- The Foundation's **Children Ahead** Program helps children by focusing on what they need to recover from traumatic events or violent circumstances. We work collaboratively with relevant agencies to make sure children who are suffering the effects of violence, and their families, have the community connections needed for immediate and long term support.
- A **Refuge Therapeutic Support** Program funds group therapy including art, pet and music therapy to help children who are residing in refuges and are distressed or traumatised by their experience of serious violence.
- In Australia, thousands of children are placed in emergency foster care or domestic violence refuges each year, often with nothing but the clothes they are wearing. The **Buddy Bags Program** provides these children with a back pack full of essential items including toiletries, pyjamas, socks, underwear, a teddy bear, photo frame and pillow slip. Buddy Bags provide personal belongings and help restore a sense of security in these children's lives.
- **Children 365**: celebrate them every day was developed in memory of 4-year-old Darcey, who was killed on 29 January 2009. This initiative encourages adults to take the time to think about why children in their lives are important and how they can spend time together. Through an annual calendar and a range of activities, Children 365 gives people practical suggestions for ways they can engage positively with children. Children 365 begins each year on the last day of children's week.

In addition, the Foundation develops programs designed to help prevent violence in the lives of children.

- The **Better Buddies** Framework is a peer support initiative designed to create friendly and caring primary school communities where bullying is reduced. Older children buddy up with younger

children and learn the values of caring for others, friendliness, respect, valuing difference, including others and responsibility. This occurs through formal and informal activities in the classroom and beyond. Better Buddies enables younger students to feel safe and cared for, while older students feel valued and respected in their role of mentor and befriender.

- As bullying and other forms of personal attack started to move to cyberspace, our prevention efforts have also moved to address cyberbullying and broader issues of cybersafety and wellbeing. **eSmart's** overarching aim is to equip people with the knowledge and skills to get the best out of technology while avoiding the pitfalls and taking on a range of ethically informed behaviours. Our **eSmartschools** initiative is a whole-school change program that helps schools enhance wellbeing, manage cybersafety and reduce cyberbullying and bullying. We have developed **eSmart libraries**, which aims to spread the message of 'smart, safe responsible' into community hubs and organisations. An eSmart Library operates under a framework for embedding cybersafety into its policies, procedures and teaching/support of library users. eSmart is focused on educating individuals about the smart, safe and responsible use of digital technologies, but within a setting where organisational operations support a culture of appropriate behaviour.

NCAB, which was founded in 2012, has conducted conferences and seminars and made submissions to Governments on issues relating to bullying since that time and has promoted international exchanges of information and arranged for overseas experts to present at its conferences.

As part of this process, in conjunction with the Foundation, the Sir Zelman Cowen Centre and the Australian Federal Police (AFP) it conducted a highly successful seminar on 'Bullying, Young People and the Law' at the Centre on 18-19 July 2013, which also dealt with the issue of sexting.

We believe it is important that our society takes a balanced and thoughtful view on sexting, treating it with due seriousness but not in an unnecessarily punitive fashion.

Recommendations

1. The Alannah and Madeline Foundation proposes that recommendations of the Victorian Law Reform Committee's Inquiry into Sexting (May 2013) are considered by the Select Committee as a national approach.
2. That, in any recommendations proposed by the Senate Inquiry into Sexting:
 - a. Young people's voices are taken into account and that consultation with young people be undertaken to establish their views
 - b. That the welfare of minors be a primary consideration in establishing the nature and duration of sexting-related offences. We believe these should not involve incarceration of minors under any circumstances
 - c. That the Committee consider the way 'risks' for young people are viewed in regard to these activities and to make explicit their socially constructed and gendered nature and the fact that they take place within relationships and cultural contexts.
3. In accordance with recommendations from the recent Symposium on *Bullying, Young People and the Law*, convened by the National Centre Against Bullying, that the Federal Government establishes a National Digital Communication Tribunal with the power to act, speedily and in an informal manner, to direct the immediate removal of offensive material from the internet.
4. That the Alannah & Madeline Foundation's cybersafety behavioural change model, eSmart is endorsed by the committee as a systematic approach to creating smart, safe and responsible environments for minors to interact online.

Submission

Introduction

Sexting is a word used to describe a range of activities relating to the creation and dissemination of sexually explicit messages or nude-or semi-nude images via digital technologies.

Images of all kinds are manufactured and transmitted with great ease. As at May 2012, an estimated 99% of 18-24 year-olds in Australia were using a mobile phone 49% - 8.67 million people - were estimated to be using a smartphone at May 2012, compared with 25% at June 2011 (ACMA 2013)

While there is little prevalence data about sexting and young people from Australia, a report from the US (The National Campaign to Prevent Teen and Unplanned Pregnancy, 2008) reveals that 20 per cent of teenagers had sent or posted nude or semi-nude pictures or videos of themselves. Thirty-nine per cent of all teens had sent or posted sexually suggestive messages and 48 per cent had received such messages. Fifty-nine per cent of all young adults had sent or posted sexually suggestive messages. A report from 2009 (Associated Press-MTV poll) showed that 'more than a quarter of the 1247 participants (ages 14 to 24) had been involved in some type of "naked sexting"'. 14% of 14-15 year-olds reported having sent a photo or video of themselves to someone they had never met face-to-face (ACMA, 2013) Further data are needed on the prevalence of sexting here.

The voices of children

While taking nude or sexualised images is also part of adult sexual practice, it is considered here in relation to the broader discourse of young people's online safety (Mitchell et al, 2012). However, as Albury et al, (2013) note, the voices of young people are noticeably absent from discussions. They do not use the term 'sexting' themselves and tend to refer to 'selfies' (pictures taken of oneself), 'someone else's' (pictures taken of another person) (Cartwright, J, July 2013) or 'pictures' (Albury et al, 2013). Another, largely comedic set of images falls under the 'sneaky hat' label, where genitals or breasts are covered with hats, caps or umbrellas. The set of practices should be disaggregated and considered individually and in the context of young people as the producers of online content rather than simply consumers of it.

The term 'sexting' itself is often misleading, as not all of the images have a sexual or suggestive purpose. There is work to be done on developing a classification of the different types of images based on the way they are produced, spoken of and used by young people. This classification should clearly distinguish offensive and harmful images and usages from private, public, 'contextual' or joke images (Albury et al, 2012).

It is also debatable whether all people subscribe to fundamentally similar notions of privacy; that is that one controls information about oneself and shares it only to certain individuals. Young people have grown up in an environment where sharing sometimes quite intimate thoughts – and images – are seen as the norm. Private and public selves are entwined in ways it's difficult for older generations to understand.

We need to question the meanings young people ascribe to the set of behaviours described as 'sexting'. One way of looking at them is that they are part of the process of growing up and exploring sexuality. Teenage sexual curiosity and experimentation has always been a fact of life and courtship customs have varied between societies and within societies over time. A recent phenomenon of teenage dating rituals is the incorporation of technology into this explorative and experimental stage. A study completed in America (The National Campaign to Prevent Teen and Unplanned Pregnancy, 2008) showed that, even though many adults condemn the behaviour as 'stupid or unthinking ... young people who sent images had a detailed understanding of the personal and professional risks associated with electronically transferring naked images, suggesting that

increased access to information alone is unlikely to curb the trend. We advocate that the welfare of young people must be a primary consideration when new legislation is framed around sexting-related offences and that they should not be incarcerated under any circumstances.

Finally, we are concerned about discrepancies in ways young women's and young men's involvement in 'sexting' is viewed. We would ask that the Committee consider the way 'risks' for young people are viewed in regard to these activities and to make explicit their socially constructed and gendered nature and the fact that they take place within relationships and cultural contexts (see Albury et al, 2012). Any education about sexting should consider the individual's personal and social ethical responsibility in their use of digital technologies from the point of view of digital and broader citizenship.

The National Centre Against Bullying was recently sponsored by The Alannah and Madeline Foundation, the Australian Federal Police and the Sir Zelman Cowen Centre to hold a national symposium on 'Bullying, Young People and the Law' (Sir Zelman Cowen Centre, Victoria University, July 18 & 19, 2013) (see Appendix 1 for recommendations) and the issue of sexting was one of many examined over the course of the two days primarily as it concerns the unauthorised forwarding of images by second and third parties.

The symposium made a clear distinction between pictures sent by a young person to another young person freely and without coercion and the transmission of those images to a third party without the consent of the original sender and proposed that new laws are framed that better deal with these matters and protect young people.

The value of a Communications Tribunal

The Symposium's particular recommendation about material posted without consent to web or social media sites is that the Federal Government establishes a national digital communication tribunal with the power to act, speedily and in an informal manner, to direct the immediate removal of offensive material from the internet.

Support for Victorian Law Reform Committee Recommendations

Further, the Symposium supported the findings and recommendations of the Victorian Law Reform Committee's Inquiry into Sexting (May 2013) (see also Appendix 2).

It is easy to think of sexting as aberrant, even abhorrent and commentators from a number of discourses depict it in this way. However, commentators closer to the age of the doers tend to view this behaviour as more benign and part of an image-sharing culture in a sexually permissive society, one in which young people see sexualised images virtually everywhere they look. It is not surprising that they create their own sexual imagery, and perhaps unrealistic to expect that they live up to a higher standard than we set for the rest of society.

An eSmart Australia

Alannah and Madeline Foundation's mission is keeping children safe from violence. It understood early that bullying is one of the main forms of violence experienced by young people and its remit has broadened to include cyberbullying, of which sexting can be a form. This can occur when images are obtained from a young person so that they are accepted into a group or a relationship; it can also happen when an image is forwarded to a wider audience without the creator's permission. The effects can be highly damaging to a young person's self-esteem or reputation.

The Foundation has developed a behavioural change approach that creates respectful, caring and friendly environments where bullying and cyberbullying are not tolerated and has developed treatments for schools, libraries, homes and workplaces – eSmart. This is a suite of planned, systematic interventions that make it easy

for people to do the right thing, based on successful behaviour change interventions like SunSmart and Quit, providing consistent messaging in different settings and contexts over time. Focused at individual, organisational and community levels, everyone has a role to play (parents, teachers, librarians, police, employers, government and young people) and underpinned by appropriate legal and policy frameworks it would provide an appropriate structure within to address sexting, bullying and cyberbullying.

Resources

ACMA, 2013, Report 3 – Smartphones and tablets Take-up and use in Australia

ACMA, 2013, 'Like, Post, Share' Young Australians and Online Privacy
<http://www.cybersmart.gov.au/About%20Cybersmart/Research/ACMA%20research/Like-post-share.aspx> Accessed July 24 2013

Albury, K., Crawford, K., Byron, P. & Mathews, B. 2013. Young People and Sexting in Australia: ethics, representation and the law. April 2013. ARC Centre for Creative Industries and Innovation/ Journalism and Media Research Centre, the University of New South Wales, Australia.

Associated Press: MTV poll 2009 (accessed July 2013).

Cartwright, J, Bullying, Young People and the Law: Symposium, Sir Zelman Cowen Centre, July 18 & 19, 2013: Panel discussion on developing rights-based legal responses to sexting and cyberbullying incidents and Young people and sexting in Australia: ethics, representation and the law.

ISTTF, 2008, 'Enhancing Child Safety and Online Technologies: Final Report of the Internet Safety Technical Task Force to the Multi-State Working Group on Social Networking of State Attorneys General of the United States', The Berkman Center for Internet and Society, Harvard University. Retrieved April 11th 2009, from: <http://cyber.law.harvard.edu/research/isttf>

Mitchell, K. J., Finkelhor, D, Jones, L. M. and Wolak, J., Prevalence and Characteristics of Youth Sexting: A National Study, Pediatrics, 2012; 129; 13.

Nielsen's State Of The Online Market: Evolution Or Revolution? Report, March, 2011 www.nielsen-online.com

The National Centre Against Bullying first national symposium on Bullying, Young People and the Law: Sir Zelman Cowen Centre Victoria University, July 18 & 19, 2013: Recommendations.

Victorian Law Reform Committee Inquiry in to Sexting: Report. Parliamentary Paper No. 230, Session 2010-2013
(http://www.parliament.vic.gov.au/images/stories/committees/lawrefrom/isexting/LRC_Sexting_Final_Report.pdf)

Appendix 1

Recommendations from The National Centre Against Bullying first national symposium on Bullying, Young People and the Law

The first national conference on Bullying, Young People and the Law Symposium in Australia recommended the nation adopt a four-tier approach to addressing bullying, including cyberbullying.

The symposium, attended by pre-eminent legal, law enforcement and educators from throughout Australia and New Zealand, recommended that the approach involve:

- a) Education
- b) Appropriate responses by organisations to incidences of bullying and cyberbullying
- c) The establishment of a national digital communication tribunal; and
- d) An appropriate legal framework to address bullying and cyberbullying.

The symposium recommended:

- All governments to consider the introduction of a specific, and readily understandable, criminal offence of bullying, including cyberbullying, involving a comparatively minor penalty to supplement existing laws which are designed to deal with more serious forms of conduct. In developing the above approaches, it is necessary to take into account:
 - i. the voices of children and human rights
 - ii. summary offences that do not require proof of specific intent to cause harm
 - iii. appropriate penalties that in the case of children do not include incarceration
- The Federal Government to establish a national digital communication tribunal with the power to act, speedily and in an informal manner, to direct the immediate removal of offensive material from the internet.
- The adoption of the recommendation of the Victorian Law Reform Committee Report on Sexting in all States and Territories.
- The Federal Government be requested to support the convening of a young people and the law symposium in two years.

Appendix 2

Recommendations from the Victorian Law Reform Committee *Inquiry into Sexting* (May 2013)

Recommendation 1: That the Victorian Government periodically commission research to examine qualitative and quantitative aspects of sexting practices by children and adults in Victoria.

Recommendation 2: That the Victorian Government, through the Department of Education and Early Childhood Development, ensure all Victorian schools adopt holistic, integrated programs for internet and communications technologies awareness and safety into the school curriculum.

Recommendation 3: That the Victorian Government, through the Department of Education and Early Childhood Development, continue to encourage current and pre-service teachers to take part in professional development programs focusing on cybersafety education.

Recommendation 4: That the Victorian Government ensure that educational and media campaigns directed toward sexting focus on the appropriateness of the behaviour of people who distribute intimate images or media without consent, rather than on the person who initially creates the intimate images or media.

Recommendation 5: That Victoria Police review its policies to ensure that opportunities are provided for adults charged with offences in relation to sexting-type behaviour, where there is no evidence of exploitative behaviour, to be offered diversion by Police prosecutors.

Recommendation 6: That the Victorian Government introduce legislation to amend each of the child pornography offences in the Crimes Act 1958 (Vic) and the Classification (Publications, Films and Computer Games) (Enforcement) Act 1995 (Vic) to provide defences to the effect of the following:

It is a defence to a prosecution for an offence against subsection (1) to prove that:

- (a) The film or photograph depicts only the accused person; or
- (b) That, at the time of making, taking or being given the film or photograph, the accused was not more than 2 years older than the minor was or appeared to be and
 - (i) The film or photograph depicts the accused person engaged in lawful sexual activity; or
 - (ii) The film or photograph depicts the accused person and another person or persons with whom the accused could engage in lawful sexual activity; or
 - (iii) The film or photograph depicts a person with whom the accused could engage in lawful sexual activity, or more than one person, all of whom the accused could engage in lawful sexual activity with.

Recommendation 7: That at such time as the Victorian Parliament introduces legislation to give effect to Recommendation 6, the Victorian Government advocate to the Standing Council on Law and Justice that the Commonwealth, States and Territories amend their criminal legislation to provide defences to child pornography offences, consistent with the new Victorian defences.

Recommendation 8: That following the coming into operation of legislation from Recommendation 6, Victoria Police and the Victorian 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 legislation.

Recommendation 9: That the Victorian Government introduce a specific offence for sexting to the Summary Offences Act 1966 (Vic).

Recommendation 10: That, if Recommendation 6 and Recommendation 9 are not accepted in full, the Victorian Government introduce legislation to amend the Sex Offenders Registration Act 2004 (Vic) so that sentencing judges have discretion whether to order that an adult offender convicted of a sexting-related offence be listed on the Sex Offenders Register.

Recommendation 11: That, following the coming into operation of legislation from Recommendation 6, the Victorian Government establish a mechanism to review the registration of any person currently listed on the Sex Offenders Register, where that person would have had a defence under legislation introduced in accordance with Recommendation 6.

Recommendation 12: That the Victorian Government consider introducing legislation to create a statutory cause of action for invasion of privacy by the misuse of private information, following recommendations 23, 25, 27, and 29 to 33 of the Victorian Law Reform Commission's Surveillance in Public Places: Final Report 18 (2010).

Recommendation 13: That the Victorian Government consider creating a Digital Communications Tribunal, either as a stand-alone body or as a 'list' within the Victorian Civil and Administrative Tribunal, to deal with complaints about harmful digital communications. Development of the Digital Communications Tribunal should be informed by the New Zealand Law Commission's proposal for a Communications Tribunal.

Recommendation 14: That the Victorian Government advocate that the Standing Council on Law and Justice consider issues surrounding the creation of a national Digital Communications Tribunal.