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# Inquiry into options for addressing the issue of sexting by minors

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## **Senate Select Committee on Cyber-Safety**

**6 August 2013**

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## Table of Contents

<b>Acknowledgement .....</b>	<b>2</b>
<b>Introduction.....</b>	<b>3</b>
<b>What is sexting? .....</b>	<b>5</b>
<b>Sexting in Australia .....</b>	<b>6</b>
Legal framework.....	7
Commonwealth laws.....	7
State and Territory Legislation .....	11
Recommendations from recent reviews on sexting in Australia .....	13
Victorian Law Reform Commission recommendations .....	13
<b>Ways the international community has dealt with sexting .....</b>	<b>15</b>
United States.....	15
United Kingdom.....	17
<b>Conclusion .....</b>	<b>18</b>
<b>Attachment A: Profile of the Law Council of Australia .....</b>	<b>20</b>

## Acknowledgement

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## Introduction

1. The Law Council of Australia is pleased to provide the following submission to the Senate Select Committee on Cyber-Safety (the Committee) as part of its inquiry into options for addressing the issue of sexting by minors (the inquiry).
2. The practice of sexting has arisen from the increasing use of mobile phones and social media, particularly by young people, and involves the creation and sharing of images of a sexual nature by and between some users of this technology.<sup>1</sup> It has attracted the attention of the media, policy makers and academics in recent years.
3. The issue of policy responses to sexting has been the subject of a number of inquiries recently. For example, the Victorian Parliament's Law Reform Committee released the report of its inquiry into sexting in May 2013,<sup>2</sup> and the National Children's and Youth Law Centre in conjunction with NSW Legal Aid and the University of NSW released a report titled '*New Voices / New Laws*' which examined peer-to-peer sexting and cyber-bullying in November 2012.<sup>3</sup> The issue was also discussed by the Joint Select Committee on Cyber-Safety in its 2011 report of its inquiry into cyber-safety titled, '*High-Wire Act: Cyber-Safety and the Young*.'<sup>4</sup>
4. The Law Council notes that researchers from the Sydney Institute of Criminology, University of NSW, and University of Western Sydney are also currently conducting a study into the sexting habits of young people aged between 13 and 18 years.<sup>5</sup> The aim of this research is to enhance understanding about the sexting practices and perceptions of young Australians in an effort to influence policy and inform public debate on this issue.
5. The Law Council briefly considered whether existing criminal offences regarding use of a carriage service to engage in a range of activities relating to child pornography or child abuse material were so broad as to cover sexting in its submission to the Senate Legal and Constitutional Affairs Committee's 2010 inquiry into the *Crimes Legislation Amendment (Sexual Offences against Children) Bill 2010*.<sup>6</sup>

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<sup>1</sup> See T. Crofts and M. Lee, 'Sexting, Children and Child Pornography', *Sydney Law Review*, March 2013, Vol. 35(1), p.85. Available from [http://sydney.edu.au/law/slr/slr\\_35/slr35\\_1/04\\_Crofts\\_Lee.pdf](http://sydney.edu.au/law/slr/slr_35/slr35_1/04_Crofts_Lee.pdf). See also M. Lee, T. Crofts, M. Salter, S. Milivojevic, and A. McGovern, 'Let's Get Sexting: Risk, Power, Sex and Criminalisation in the Moral Domain,' *International Journal for Crime and Justice*, 2013, Volume 2( 1), p.39; S. Walker, L. Sancic and M. Temple-Smith, 'Sexting and young people', *Youth Studies Australia*, 2011, Vol. 30(4), p.8.

<sup>2</sup> See Parliament of Victoria, Law Reform Committee Report, *Inquiry into Sexting*, Parliamentary Paper No. 230, May 2013, available from <http://www.parliament.vic.gov.au/lawreform/article/944> (Law Reform Committee Report)

<sup>3</sup> See National Children's and Youth Law Centre, Law *New Voices/ New Laws*, November 2012, available from [http://www.lawstuff.org.au/\\_data/assets/pdf\\_file/0009/15030/New-Voices-Law-Reform-Report.pdf](http://www.lawstuff.org.au/_data/assets/pdf_file/0009/15030/New-Voices-Law-Reform-Report.pdf) (New Voices/New Laws Report)

<sup>4</sup> Joint Select Committee on Cyber-Safety, *High Wire Act: Cyber-Safety and the Young*, June 2011, available from [http://www.aph.gov.au/parliamentary\\_business/committees/house\\_of\\_representatives\\_committees?url=jsc/report.htm](http://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=jsc/report.htm) (High-Wire Act Report)

<sup>5</sup> See <http://sydney.edu.au/news/84.html?newsstoryid=11946>

<sup>6</sup> Law Council of Australia, Submission to Senate Legal and Constitutional Affairs Committee, *Inquiry into the Crimes Legislation Amendment (Sexual Offences against Children) Bill 2010*, March 2010, available from <http://www1.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/CrimesLegislationAmendment%28SexualOffencesAgainstChildren%29Bill2010Submission.pdf>

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6. The Law Council notes that there are a range of views about sexting by young people, which influence policy responses. Whilst the practice has been described by some commentators as being “embedded in wider systems of friendship, courtship and social bonding”<sup>7</sup> or attributed to “typical adolescent impulses to flirt, find romantic partners, experiment with sex and get attention from peers,”<sup>8</sup> others have focused on the legal implications of sexting for young people - particularly the possibility for young people to “fall foul of child pornography laws that are ill designed to deal with such practices and from which age provides little protection.”<sup>9</sup>
  7. Whilst sexting may not always be innocuous or victimless, nor something to be encouraged or condoned, the Law Council is of the view that sexting by young people (that is, those aged under 18 years) is not necessarily the type of predatory and exploitative behaviour sought to be targeted by laws that are designed to criminalise child pornography activity.<sup>10</sup> Similar views have been expressed by other commentators who have noted that “young people sexting one another is not generally the same as the exploitation of children by adults for the purposes of some kind of sexual gratification.”<sup>11</sup>
  8. The possible long-term ramifications for young people who are charged with child pornography offences under Commonwealth or State and Territory legislation as a result of sexting are of concern to the Law Council. Indeed, the consequences for young people who may be prosecuted under such legislation are significant. For example, the young person may be labelled a sex offender and may have to register as such. The young person will then be faced with the intense social stigma that attaches to that label and forced to deal with the consequences that are associated with that.<sup>12</sup>
  9. The Law Council notes that the Committee is interested in any issues that may be of relevance in relation to addressing the issue of sexting by minors. Given the broad nature of the inquiry, the Law Council’s submission focuses on the following:
    - The definition of sexting;
    - Sexting in Australia, including current legislative approaches to address this issue;

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<sup>7</sup> See K. Albury, N. Funnell and E. Noonan, ‘The politics of sexting: Young people, self-representation and citizenship,’ Speech at Australian and New Zealand Communication Association Conference: ‘Media, Democracy and Change’, Old Parliament House, 7 - 9 July 2010, p.4, available from <http://www.confuciusinstitute.unsw.edu.au/media/File/AlburyFunnellNoonan.pdf>

<sup>8</sup> J. Wolak and D. Finkelhor, ‘Sexting: A Typology’, University of New Hampshire, Crimes Against Children Research Centre, March 2011, p.3, available from

[http://www.unh.edu/ccrc/pdf/CV231\\_Sexting%20Typology%20Bulletin\\_4-6-11\\_revised.pdf](http://www.unh.edu/ccrc/pdf/CV231_Sexting%20Typology%20Bulletin_4-6-11_revised.pdf)

<sup>9</sup> Op.cit, T. Crofts and M. Lee, ‘Sexting, Children and Child Pornography’, p.85. See also N. Stone, ‘The Sexting Quagmire: Criminal Justice Responses to Adolescents’ Electronic Transmission of Indecent Images in the UK and the USA,’ *Youth Justice*, 2011, Vol.11(3), pp. 266-281. DOI: 10.1177/1473225411420533

<sup>10</sup> Op.cit, Law Council of Australia, Submission to Senate Legal and Constitutional Affairs Committee, *Inquiry into the Crimes Legislation Amendment (Sexual Offences against Children) Bill 2010*, p. 17.

<sup>11</sup> Op.cit, M. Lee, T. Crofts, M. Salter, S. Milivojevic and A. McGovern, ‘Let’s Get Sexting: Risk, Power, Sex and Criminalisation in the Moral Domain.’

<sup>12</sup> Op.cit, Law Council of Australia, Submission to Senate Legal and Constitutional Affairs Committee, *Inquiry into the Crimes Legislation Amendment (Sexual Offences against Children) Bill 2010*, p. 17.

- Recommendations from recent reviews of sexting in Australia, particularly the inquiry into sexting by the Parliament of Victoria's Law Reform Committee; and
- The prevalence of sexting internationally and international approaches for addressing the issue of sexting by young people.

## What is sexting?

10. Sexting is a relatively new practice which emerged in the mid 2000's and coincided with the increasing use of mobile phone technology by society.<sup>13</sup>
11. Whilst the term originally referred to the sending and receiving of text messages of a sexual nature by mobile phone users (hence the combination of the words 'sex' and 'texting'),<sup>14</sup> it has subsequently evolved to refer to the creation and distribution of sexually explicit or suggestive video or images through email, mobile phone messages or social media.<sup>15</sup> Whilst it is an activity engaged in by both adults and young people,<sup>16</sup> this submission focuses only on sexting by people under the age of 18.
12. There are a number of aspects to sexting. These include:<sup>17</sup>
  - Requesting an image;
  - Creating an image;
  - Sharing an image with an intended recipient consensually; and
  - Distributing an image to others without consent.
13. The reasons why young people engage in sexting vary. However, it is a practice that has been found to most commonly take place in the following situations:<sup>18</sup>
  - An exchange of images exclusively between two people engaged in a romantic relationship;
  - Exchanges between people who are not yet in a relationship, but where at least one person hopes to be; and

<sup>13</sup> Op.cit., Law Reform Committee Report, p.2.

<sup>14</sup> See D. Svantesson, 'Sexting and the Law – 15 minutes of fame, and a lifetime of shame,' *Masaryk University Journal of Law and Technology*, 2011, Vol 5(2), p.290. See also Law Reform Committee Report, p.2.

<sup>15</sup> Op.cit., M. Lee, T. Crofts, M. Salter, S. Milivojevic, and A. McGovern, 'Let's Get Sexting: Risk, Power, Sex and Criminalisation in the Moral Domain,' p.36. See also A. Hasinoff, 'Sexting as media production: Rethinking social media and sexuality', *New Media and Society*, 2012, Vol. 15(4), p.449. DOI: 10.1177/1461444812459171

<sup>16</sup> For examples of some more high profile adult sexting cases see ABC News, 'New York mayoral candidate Anthony Weiner embroiled in fresh sexting scandal,' 24 July 2013, available from <http://www.abc.net.au/news/2013-07-24/weiner-bid-for-ny-mayor-seat-hit-by-new-sex-scandal/4839518>; C. Saltau, 'The Shane file spins out of control,' *The Age*, 29 June 2005, available from <http://www.theage.com.au/news/people/warne-spins-into-another-sex-scandal/2005/06/28/1119724634851.html>

<sup>17</sup> Op.cit., New Voices/New Laws Report, p.12.

<sup>18</sup> A. Lenhart, Pew Internet and American Life Project, *Teens and Sexting*, December 2009, p.3, available from [http://www.pewinternet.org/~media/Files/Reports/2009/PIP\\_Teens\\_and\\_Sexting.pdf](http://www.pewinternet.org/~media/Files/Reports/2009/PIP_Teens_and_Sexting.pdf)

- An exchange of images between partners that are shared with others outside the relationship.
14. As in the case of standard text messages, emails and social media, messages received as a result of sexting (also known as 'sexts'), are able to be saved and stored by the person/s that they are sent to. This can be problematic as the individuals who engage in this behaviour are "unable to control or limit downstream distribution of a text message."<sup>19</sup> Indeed, whilst a person may initially send the sext to one intended recipient, they have "no control over the persons to whom that message is later distributed."<sup>20</sup> This is particularly the case in situations where there may have been a relationship breakdown, in which case "the image may be posted online, used to cyber-bully, or go into collections of such material held by the offender(s)."<sup>21</sup>

## Sexting in Australia

15. It is difficult to know how prevalent sexting amongst young people is in Australia.<sup>22</sup> Whilst some commentators have described sexting to be "more than a myth, and less than an epidemic,"<sup>23</sup> accurate statistics on the proportion of young people in Australia who are engaging in this behaviour have not been forthcoming to date.
16. Indeed, as noted by the Victorian Parliament's Law Reform Committee, the numbers of young people who have been found to have had some experience with sexting in the studies that have been carried out to date range from four to 40 per cent of young people.<sup>24</sup> A similar observation has been made by other commentators who have found the quantitative data that is currently available on sexting to be "of poor quality and contradictory."<sup>25</sup> It has been suggested that the discrepancies in data could be attributed to differences in the way that sexting is defined, as well as differing views about the prevalence of this issue amongst different age groups.<sup>26</sup>
17. Despite the frequency with which sexting cases involving young people have been reported by the media in recent years, the reliability of these reports as a method to ascertain the prevalence of this activity amongst young people has been questioned.<sup>27</sup> Indeed, reports of sexting by young people have been

<sup>19</sup> S. Shafron-Perez, 'Average Teenager or Sex Offender? Solutions to the Legal Dilemma Caused by Sexting,' *Marshall Journal of Computer and Information Law*, 2009, Vol.26, p.433.

<sup>20</sup> *Ibid.*

<sup>21</sup> *Op.cit.*, High Wire Act Report, para. 4.48.

<sup>22</sup> *Op.cit.*, Law Reform Committee Report, p.30.

<sup>23</sup> See Australian Privacy Foundation, *Submission to the Victorian Parliament's Law Reform Committee on the Inquiry into Sexting*, 7 June 2012, p.1, available from

[http://www.parliament.vic.gov.au/images/stories/committees/lawreform/isexting/subs/S08 -](http://www.parliament.vic.gov.au/images/stories/committees/lawreform/isexting/subs/S08_-_Australian_Privacy_Foundation.pdf)

[Australian\\_Privacy\\_Foundation.pdf](http://www.parliament.vic.gov.au/images/stories/committees/lawreform/isexting/subs/S08_-_Australian_Privacy_Foundation.pdf) and cited in Parliament of Victoria, Law Reform Committee Report, *Inquiry into Sexting*, Parliamentary Paper No. 230, May 2013, p.30, available from

<http://www.parliament.vic.gov.au/lawreform/article/944>

<sup>24</sup> *Op.cit.*, Law Reform Committee Report, p.30.

<sup>25</sup> *Op.cit.*, S. Walker, L. Sancu and M. Temple-Smith, 'Sexting and young people', p.9.

<sup>26</sup> *Op.cit.*, New Voices/New Laws Report, p.14.

<sup>27</sup> See <http://sydney.edu.au/news/84.html?newsstoryid=11946>

See for example ABC News, 'Police warn of dangers of digital technology after teens arrested for distributing explicit photograph', 3 July 2013, available from <http://www.abc.net.au/news/2013-07-03/teens-arrested-for-distributing-explicit-picture/4796128>; C. Zielinski, 'Teens arrested over explicit photos,' *The Age*, 3 July 2013, available from <http://www.theage.com.au/victoria/teens-arrested-over-explicit-photos-20130703-2pb65.html>.

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described by some academics and youth workers as “sensationalised or over-reported by the media,”<sup>28</sup> and as lacking “specific case details, which makes it difficult to determine their accuracy and assess what sorts of specific behaviours are leading to charges and convictions.”<sup>29</sup>

18. Notwithstanding the absence of large scale data about the prevalence of sexting amongst young people in Australia, a number of commentators and youth organisations have found sexting by young people to be taking place with some frequency.<sup>30</sup>
19. A study that is currently being conducted by researchers from the Sydney Institute of Criminology, the University of NSW and the University of Western Sydney about the sexting experiences of young people aged between 13 and 18 years of age may provide the type of prevalence data that is currently lacking in relation to this issue. Once completed, it may also provide useful insights into the circumstances in which such behaviour is taking place.<sup>31</sup>

## Legal framework

20. There are currently no legislative provisions at the Commonwealth, State and Territory levels that specifically deal with an offence of sexting. Rather, such behaviour is likely to be dealt with using offences that were originally envisaged to deal with activities associated with child pornography.
21. This submission focusses on the *Criminal Code Act 1995* (Cth) (Criminal Code) and how it may capture sexting behaviour. The submission also refers to some aspects of relevant State and Territory legislation.

### Commonwealth laws

22. There are a number of offences under Commonwealth legislation that may apply to sexting.
23. Subdivision D of Division 474 of the Criminal Code contains offences relating to use of a carriage service to access, transmit, publish, possess, distribute, control, produce, supply, or obtain child pornography or child abuse material.<sup>32</sup> The Criminal Code also makes it an offence to engage in such behaviour outside of Australia.<sup>33</sup> The maximum penalty for these offences is 15 years imprisonment.<sup>34</sup> This penalty increases to a maximum of 25 years imprisonment if the conduct involves two or more people and takes place on three or more occasions.<sup>35</sup>

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<sup>27</sup> See <http://sydney.edu.au/news/84.html?newsstoryid=11946>. See also <http://www.dailytelegraph.com.au/newslocal/city-east/sydney-university-to-conduct-survey-into-teen-sexting-habits/story-fngr8h22-1226684221391>

<sup>28</sup> Op.cit., S. Walker, L. Sancı and M. Temple-Smith, ‘Sexting and young people’, p.12.

<sup>29</sup> Op.cit., T. Crofts and M. Lee, ‘Sexting, Children and Child Pornography’, p.86.

<sup>30</sup> Op.cit., Law Reform Committee Report, p.35. See also New Voices/ New Laws Report, p.12 and S. Walker, L. Sancı and M. Temple-Smith, ‘Sexting and young people’, p.12.

<sup>31</sup> See <http://sydney.edu.au/news/84.html?newsstoryid=11946>. See also <http://www.dailytelegraph.com.au/newslocal/city-east/sydney-university-to-conduct-survey-into-teen-sexting-habits/story-fngr8h22-1226684221391>

<sup>32</sup> See ss. 474.19, 474.20, 474.22, *Criminal Code Act 1995*

<sup>33</sup> Ss. 273.5 and 273.6, *Criminal Code Act 1995*

<sup>34</sup> Ss 474.19 and 474.20, *Criminal Code Act 1995*

<sup>35</sup> S. 474.24A, *Criminal Code Act 1995*

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24. It is also an offence to use a carriage service in a way that a reasonable person would regard as being, in all the circumstances, menacing, harassing or offensive. The penalty for this offence is 3 years imprisonment.<sup>36</sup>
25. Under the *Telecommunications Act 1997*, a carriage service is defined to mean a “service for carrying communications by means of guided and/or unguided electromagnetic energy.”<sup>37</sup> Telecommunications using phones and the internet will therefore be captured by this definition.
26. The definition of ‘child pornography material’ under the Criminal Code is very broad.<sup>38</sup> It is defined under section 473.1 to include:
- (a) *material that depicts a person, or a representation of a person, who is, or appears to be, under 18 years of age and who:*
    - (i) *is engaged in, or appears to be engaged in, a sexual pose or sexual activity (whether or not in the presence of other persons); or*
    - (ii) *is in the presence of a person who is engaged in, or appears to be engaged in, a sexual pose or sexual activity;*

*and does this in a way that reasonable persons would regard as being, in all the circumstances, offensive; or*
  - (b) *material the dominant characteristic of which is the depiction, for a sexual purpose, of:*
    - (i) *a sexual organ or the anal region of a person who is, or appears to be, under 18 years of age; or*
    - (ii) *a representation of such a sexual organ or anal region; or*
    - (iii) *the breasts, or a representation of the breasts, of a female person who is, or appears to be, under 18 years of age;*

*in a way that reasonable persons would regard as being, in all the circumstances, offensive; or*
  - (c) *material that describes a person who is, or is implied to be, under 18 years of age and who:*
    - (i) *is engaged in, or is implied to be engaged in, a sexual pose or sexual activity (whether or not in the presence of other persons); or*
    - (ii) *is in the presence of a person who is engaged in, or is implied to be engaged in, a sexual pose or sexual activity;*

*and does this in a way that reasonable persons would regard as being, in all the circumstances, offensive; or*
  - (d) *material that describes:*

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<sup>36</sup> S. 474.17, *Criminal Code Act 1995*

<sup>37</sup> Section 7, *Telecommunications Act 1997*

<sup>38</sup> Op.cit., Law Council of Australia, Submission to Senate Legal and Constitutional Affairs Committee, *Inquiry into the Crimes Legislation Amendment (Sexual Offences against Children) Bill 2010*, p.17.



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- (i) *a sexual organ or the anal region of a person who is, or is implied to be, under 18 years of age; or*
  - (ii) *the breasts of a female person who is, or is implied to be, under 18 years of age;*

*and does this in a way that reasonable persons would regard as being, in all the circumstances, offensive.*

27. Child abuse material is defined under the Criminal Code to include:

- (a) *material that depicts a person, or a representation of a person, who:*
  - (i) *is, or appears to be, under 18 years of age; and*
  - (ii) *is, or appears to be, a victim of torture, cruelty or physical abuse;*

*and does this in a way that reasonable persons would regard as being, in all the circumstances, offensive; or*

- (b) *material that describes a person who:*

- (i) *is, or is implied to be, under 18 years of age; and*
- (ii) *is, or is implied to be, a victim of torture, cruelty or physical abuse;*

*and does this in a way that reasonable persons would regard as being, in all the circumstances, offensive.*

28. Subdivision F of Division 474 in the Criminal Code also outlines a number of offences relating to the use of a carriage service involving sexual activity with a person under the age of 16,<sup>39</sup> including section 474.27A which makes it an offence to use a carriage service to transmit indecent material to a person under 16 years of age. The penalty for this offence is 7 years imprisonment. It is a defence to a prosecution for an offence against section 474.27A if the defendant proves that, at the time the communication was transmitted, he or she believed that the recipient was at least 16 years of age.<sup>40</sup>

29. The Law Council has previously expressed concern about the broad definition of child pornography material and its ability to include a wide variety of photographic and video material commonly captured and distributed by young people using mobile phones and internet-based social networking sites.<sup>41</sup> Similar views have also been expressed by a number of academics, who have noted that sexting by young people is likely to be covered by a number of these Criminal Code provisions given such messages frequently contain sexual content depicting individuals under the age of 18, and involve the “transmission

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<sup>39</sup>These include: Using a carriage service for sexual activity with person under 16 years of age (Div. 474.25A); Using a carriage service to procure persons under 16 years of age (Div 474.26); Using a carriage service to “groom” persons under 16 years of age (Div 474.27); Using a carriage service to transmit indecent communication to person under 16 years of age (Div 474.27A)

<sup>40</sup> S.474.29(5), *Criminal Code Act 1995*

<sup>41</sup> Op.cit., Law Council of Australia, Submission to Senate Legal and Constitutional Affairs Committee, *Inquiry into the Crimes Legislation Amendment (Sexual Offences against Children) Bill 2010*, p.17.

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(or creation with the intention of transmission) of material with the intent to place it on the internet or distribute it through a mobile network.”<sup>42</sup>

30. One of the Law Council’s constituent bodies, the Queensland Law Society, has expressed concern about the definition of ‘child pornography material’ in the Criminal Code, particularly the ambiguity of the phrase, ‘*appears to be under 18 years of age.*’ The QLS considers that this ambiguity should be addressed to remove the potential for a person to be convicted of an offence as a result of someone appearing to be under 18. The QLS is also of the view that the reference to 18 years of age in the definition of ‘child pornography material’ should be amended to 16 years, so that it is not only consistent with the Criminal Code provisions prohibiting sexual activity/intercourse with a child outside of Australia,<sup>43</sup> but so that the definition is brought into line with the age of consent in most Australian jurisdictions.<sup>44</sup>
31. The Law Council notes that police appear to have used discretion in not charging any person under 18 years of age with sexting type offences under the Criminal Code to date.<sup>45</sup> Notwithstanding this, the Law Council remains concerned that as long as the child pornography offences remain the only option for dealing with sexting, there is the possibility that young people may be convicted of these serious offences in circumstances where the behaviour may not be of an exploitative nature, which these offences are primarily aimed at addressing.
32. The problem with the current legislative framework at the Commonwealth level and its application to sexting has been succinctly articulated by researchers from the University of NSW and the Queensland University of Technology who have noted that:
- “One difficulty that has become apparent in the sexting context is that laws created to prohibit and respond to ‘genuine’ child pornography have not been updated to clearly exclude consensual sexting behaviour. This type of behaviour, which was not a part of mobile phone culture at the time the laws were created, has since become far more common as mobile phone technology has developed. The law does not clearly accommodate what many people would justifiably feel is either merely self-regarding material created by young people (e.g. taking a photo/video of yourself and not distributing it) or is consensual private material created by and for young people involved in romantic relationships (e.g. images of yourself and a genuinely consenting partner).”<sup>46</sup>*
33. The Law Council notes that amendments have been made to the Criminal Code in an effort to offer some protection to young people who may be charged with offences under the child pornography provisions. For example, sections 273.2A

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<sup>42</sup> Op.cit., T. Crofts and M. Lee, ‘Sexting, Children and Child Pornography’, p.89.

<sup>43</sup> See ss. 272.8, 272.9, *Criminal Code Act 1995*

<sup>44</sup> The age of consent is 16 years in all jurisdictions except South Australia and Tasmania where it is 17 years. See <http://www.aifs.gov.au/cfca/pubs/factsheets/a142090/>

<sup>45</sup> See Australian Federal Police, Submission to Senate Select Committee on Cyber-Safety’s *Inquiry into Options for Addressing the Issue of Sexting by Minors*, July 2013, p.8, available from [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate\\_Committees?url=cybersafety\\_ctte/cyber\\_safety/submissions.htm](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=cybersafety_ctte/cyber_safety/submissions.htm)

<sup>46</sup> K. Albury, K. Crawford, P. Byron and B. Mathews, *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, University of New South Wales, p.6, available from [http://jmrc.arts.unsw.edu.au/media/File/Young\\_People\\_And\\_Sexting\\_Final.pdf](http://jmrc.arts.unsw.edu.au/media/File/Young_People_And_Sexting_Final.pdf)

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and 474.24C of the Criminal Code provide that proceedings for an offence under Division 273 (relating to offences involving child pornography or child abuse material outside Australia) and Subdivision D of Division 474 (involving offences relating to the use of carriage services for activities relating to such materials) must not be commenced without the consent of the Attorney-General if the defendant was under 18 at the time they allegedly engaged in the conduct constituting the offence.

34. Whilst these provisions establish some safeguards for young people who may be prosecuted for sexting, the Law Council submits that the Committee should consider the introduction of a more comprehensive and satisfactory legislative solution to distinguish between the different types of conduct which could currently be captured by the child pornography provisions, such as sexting, and behaviour that could be described as genuine child pornography. The QLS suggests that the Committee should also consider the introduction in the Criminal Code of a defence for the possession of sexual images of oneself or of someone else with their consent.
35. Discussions with young people about the fact that they might be breaking the law by engaging in sexting have highlighted the fact that in many cases, young people are unaware of the legal consequences that could possibly attach to this behaviour.<sup>47</sup> The situation is particularly confusing, when, as noted by the QLS, a 16 year old can consent to most forms of physical sexual activity, but could be charged under Commonwealth child pornography provisions if they take a photo of this sexual activity given the Commonwealth child pornography provisions refer to individuals under 18 years of age.
36. Indeed, it has been found that young people have a “strong desire for information on relevant laws, as well as clear guidelines on their rights and responsibilities with respect to sexting.”<sup>48</sup> Thus, in considering any new legislative approaches to the issue of sexting, the Law Council submits that the Committee should also recognise the need for young people to be educated about the legislation that may apply to sexting.
37. Further, studies to date have found that whilst young people agree that sexting should be against the law – particularly where the image is passed on to others without consent - they are of the view that there is a need for more appropriate responses and penalties to address this behaviour such as fines, community service and other forms of alternative dispute resolution.<sup>49</sup>

#### State and Territory Legislation

38. As mentioned above, there is no specific sexting offence at the State and Territory level. Instead, these jurisdictions have adopted an approach similar to that of the Commonwealth, whereby sexting is dealt with under the existing provisions dealing with the creation, dissemination and possession of child pornography/child abuse material in those jurisdictions.
39. Detailed discussions of the relevant State and Territory provisions and recommendations for how these should be reformed, can be found in the reports

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<sup>47</sup> Ibid., p.12.

<sup>48</sup> Ibid., p.17.

<sup>49</sup> Op.cit., New Voices/New Laws Report, pp.16 and 48.

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of the Victorian Parliament's Law Reform Committee,<sup>50</sup> and the *New Voices / New Laws* report of the National Children's and Youth Law Centre.<sup>51</sup> A number of academics have also written articles analysing relevant State and Territory laws that could apply to sexting which may be of assistance to the Committee.<sup>52</sup>

40. Legislation prohibiting the creation, dissemination and possession of child abuse or child pornography material can be found in every State and Territory.<sup>53</sup> As in the case of the relevant Commonwealth laws, it is possible that such legislation may be applied to sexting in the absence of offences that deal specifically with this type of activity. Indeed, this was evident in Australia's 'first' sexting case, *Director of Public Prosecutions v Eades*<sup>54</sup> where Damien Eades (who was 18 at the time the offence took place) was charged with possessing child pornography<sup>55</sup> after commencing a relationship with a 13 year old girl and asking her to send him a nude photograph of herself, which she did. Eades was also charged with an offence under section 61N(1) of the *Crimes Act 1900* (NSW) – namely, inciting a person under the age of 16 years to an act of indecency towards the defendant.
41. The matter was originally heard in Penrith Local Court, where Eades was found not guilty and the magistrate dismissed both charges. However, the NSW Director of Public Prosecutions appealed the decision to dismiss the charge under section 61N(1) on the grounds that the magistrate failed to:
- “...consider the surrounding circumstances, including the sexual nature of the text messages, the intention and purpose of the accused and the age of the complainant and the accused, in determining whether the act of sending the nude photograph, was an act of indecency.”<sup>56</sup>
42. Justice James J ultimately upheld this appeal, finding the Penrith Local Court magistrate erred in law in failing to consider the issues above. Justice James J remitted the matter to the Local Court to be dealt with according to law. Eades appealed this decision in the Court of Criminal Appeal.<sup>57</sup> The appeal was dismissed.
43. On 17 December 2010, the matter was heard in Ryde Local Court. The magistrate found the offence proven but did not record a conviction and placed Eades on a 12 month good behaviour bond.<sup>58</sup>

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<sup>50</sup> Op.cit., Law Reform Committee Report, p.80.

<sup>51</sup> Op.cit., New Voices/New Laws Report, p. 49.

<sup>52</sup> See for example, T. Crofts and M. Lee, 'Sexting, Children and Child Pornography', *Sydney Law Review*, March 2013, Vol. 35(1), available from [http://sydney.edu.au/law/slr/slr\\_35/slr35\\_1/04\\_Crofts\\_Lee.pdf](http://sydney.edu.au/law/slr/slr_35/slr35_1/04_Crofts_Lee.pdf); D. Swantesson, 'Sexting and the Law – How Australia Regulates Electronic Communication of Non-Professional Sexual Content,' *Bond Law Review*, 2010, Vol. 22(2), available from <http://epublications.bond.edu.au/blr/vol22/iss2/3>

<sup>53</sup> See for example, ss.91G, 91H, *Crimes Act 1900* (NSW); s.210, *Criminal Code 1899* (QLD); ss.69, 70, *Crimes Act 1958* (Vic); ss.64-66, *Crimes Act 1900* (ACT); ss.130-130E, *Criminal Code Act 1924* (Tas); Div 11A, *Criminal Law Consolidation Act 1935* (SA); ss.217-220, *Criminal Code Act 1913* (WA); ss.125A-125C, 127, *Criminal Code Act* (NT)

<sup>54</sup> [2009] NSWSC 1352, 17 December 2009.

<sup>55</sup> An offence under section 91H(3) of the *Crimes Act 1900* (NSW)

<sup>56</sup> *DPP (NSW) v Eades* [2009] NSWSC 1352, 17 December 2009 at para 5.

<sup>57</sup> *Eades v Director of Public Prosecutions* [2010] NSWCA 241, 17 September 2010.

<sup>58</sup> See <http://www.dailytelegraph.com.au/bond-for-sydney-man-sexting-with-teen/story-e6freuy9-1225972931904> and <http://www.heraldsun.com.au/ipad/bond-for-sexting-with-teen/story-fn6bfmgc-1225972959863>

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44. Whilst the Law Council is not aware of any young people being convicted of child pornography offences as a result of sexting to date, the Law Council remains concerned about the potential for young people to be convicted and placed on sex offender registers. Similar concerns have been expressed by the National Children's and Youth Law Centre which has noted that despite the fact that the NSW *Child Protection (Offenders Registration) Act 2000* "provides some protection against sex offender registration for young people who engage in sexting... it does not guarantee that every young person who shares nude or sexual images can avoid being placed on the register."<sup>59</sup>
  45. Every State and Territory in Australia has legislation providing for the establishment and maintenance of a register for child sex offenders,<sup>60</sup> and each of these jurisdictions has special provisions dealing with juvenile offenders.
  46. The Law Council does not consider that young people should be placed on sex offender registers for sexting-related offences. Placement on such registers can have a number of significant implications for a listed person. These include implications for future employment, as well as having to deal with the everyday stigma that attaches to being labelled a child sex offender.
  47. In light of the concerns outlined above, the Law Council would support the Committee examining alternative approaches at both the State and Commonwealth levels to deal with sexting where no exploitation is involved.

## **Recommendations from recent reviews on sexting in Australia**

48. As mentioned previously, there have been a number of inquiries conducted in Australia recently that have considered the issue of sexting. One of the most extensive inquiries was that carried out by the Victorian Parliament's Law Reform Committee. The report of this Committee's inquiry was tabled in May 2013 and highlighted a number of findings in relation to sexting as well as recommendations about the ways in which this issue could be better addressed.

### Victorian Law Reform Commission recommendations

49. The Victorian Parliament's Law Reform Committee made 14 recommendations and eight findings following its inquiry into sexting.<sup>61</sup> Whilst the majority of these findings and recommendations relate to reforms that could be made at the State level, the Committee may wish to consider whether it would be appropriate for some of these recommendations to be implemented nationally.
50. A number of the recommendations addressed the need for improved education and awareness about the internet and other communications technologies, such as the appropriateness of the behaviour of people who distribute intimate images or media without consent.<sup>62</sup> The need for schools to adopt holistic

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<sup>59</sup> Op.cit., New Voices/New Laws Report, p.21.

<sup>60</sup> NSW: *Child Protection (Offenders Registration) Act 2000*; VIC: *Sex Offenders Registration Act 2004*; QLD: *Child Protection (Offender Reporting) Act 2004*; SA: *Child Sex Offenders Registration Act 2006*; WA: *Community Protection (Offender Reporting) Act 2004*; NT: *Child Protection (Offender Reporting and Registration) Act 2004*; TAS: *Community Protection (Offender Reporting) Act 2005*; ACT: *Crimes (Child Sex Offenders) Act 2005*

<sup>61</sup> Op.cit., Law Reform Committee Report, p.xxii.

<sup>62</sup> Ibid., Recommendations 2 and 4.

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programs about cybersafety and to ensure their staff undertake training on this subject was also emphasised.<sup>63</sup>

51. The Committee may want to consider similar recommendations made by researchers from the University of NSW and QUT in their report, 'Young People and Sexting in Australia: Ethics, Representation and the Law.' This report also contained a number of recommendations relating to the need for improved education and information resources for young people about sexting. For instance, it recommended that educators, policy makers and legislators consider context-specific and age appropriate legal/educational approaches for young people in different age groups; that both educational and legal responses to sexting reflect 'harm reduction' principles rather than promoting abstinence from the production and exchange of digital photos between peers or from the use of social media; that sexting education be more focused on fostering ethical, respectful practices between intimate partners and within friendship networks; and that educational strategies that address sexting, including information resources for adults, distinguish between non-consensual production and distribution of sexting images and consensual image sharing.<sup>64</sup>
52. The National Children's and Youth Law Centre also found that there was a need for improved and more comprehensive education in relation to sexting and cyber-bullying in its report titled '*New Voices/ New Laws*'. This report recommended that such education should provide young people with information about the legal consequences of sexting and cyber bullying, and focus on practical solutions, early intervention, harm minimisation and the informed participation of the young people involved.<sup>65</sup>
53. In addition to its recommendations outlined above, the Victorian Parliament's Law Reform Committee also made a series of findings as a result of its inquiry.
54. A number of the Law Reform Committee's findings would appear to be consistent with the findings of other studies that have looked at sexting. This is particularly the case with respect to the finding about the harm that is associated with the distribution of intimate images or media of a person without their consent,<sup>66</sup> and the finding regarding the role of sexting in the reinforcement of gender stereotypes and double standards.<sup>67</sup>
55. Indeed, one of the key findings in the report, '*Young People and Sexting in Australia: Ethics, Representation and the Law*,' was the fact that young people had observed that gendered double-standards were applied to discussions of sexting, and digital representation in general.<sup>68</sup> In fact, one of the recommendations of the latter inquiry was that educational strategies that

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<sup>63</sup> Ibid., Recommendation 3.

<sup>64</sup> Op.cit., K. Albury, K. Crawford, P. Byron and B. Mathews, *Young People and Sexting in Australia: Ethics, Representation and the Law*, p.2.

<sup>65</sup> Op.cit., *New Voices/New Laws* Report, p.9.

<sup>66</sup> The harm associated with sexting has also been recognised by other studies on this issue, with the report by the National Children's and Youth Law Service, *New Vocies/New Laws*, outlining a number of negative social, emotional and psychological consequences that can arise as a result of sexting. For more information, see National Children's and Youth Law Centre, *Law New Voices/ New Laws*, November 2012, p.13, available from [http://www.lawstuff.org.au/\\_data/assets/pdf\\_file/0009/15030/New-Voices-Law-Reform-Report.pdf](http://www.lawstuff.org.au/_data/assets/pdf_file/0009/15030/New-Voices-Law-Reform-Report.pdf)

<sup>67</sup> In particular, where women may be portrayed in a negative way if they engage in sexting, yet the same behaviour by men does not attract the same negative connotations. See Law Reform Committee Report, p.xxv.

<sup>68</sup> Op.cit., K. Albury, K. Crawford, P. Byron and B. Mathews, *Young People and Sexting in Australia: Ethics, Representation and the Law*, p.1.

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address sexting, including information resources for adults, seek to problematize and challenge gendered double-standards in relation to concepts such as 'provocativeness', 'self-confidence', 'responsibility', 'consequences' and 'reputation'.<sup>69</sup>

56. The Law Council submits that the Committee should consider some of these recommendations in its report.

## Ways the international community has dealt with sexting

57. A number of studies into sexting have been conducted overseas. Similarly to Australia, the impetus for this research has been the increasing "role of cell phones in the sexual lives of teens and young adults"<sup>70</sup> and concerns about the ways in which young people are "using or misusing cell phones as part of their sexual interactions and explorations."<sup>71</sup>
58. The United States and the United Kingdom have both implemented a number of initiatives to address the issue of sexting by young people. Whilst legislative reforms have been introduced in some cases, a number of other reforms have either been introduced or considered. The Committee may find some of these suggestions of assistance.

### United States

59. Similarly to Australia, the prevalence of sexting by young people in the United States (US) is not definitively known. One of the most commonly cited studies about sexting in the US is that conducted by the Pew Internet and American Life Project which surveyed 800 young people between the ages of 12 and 17 years in October 2009. This survey also involved interviews with the parents or guardians of the young people who participated.<sup>72</sup>
60. The Pew study found that 4% of the 12-17 year olds surveyed had sent sexually suggestive nude or nearly nude images of themselves to someone else via text messaging, with 15% of 12-17 year olds indicating that they had received these types of messages.<sup>73</sup> Another study of young people in the US by the National Campaign to Prevent Teen and Unplanned Pregnancy in conjunction with Cosmogirl.com found that 20% of young people aged between 13 and 19 years had electronically sent, or posted online, naked or semi-naked pictures or videos of themselves.<sup>74</sup> The number of 13-19 year olds who had sent or posted a sexually suggestive text or email message was even higher, with 39% of respondents in this age group admitting to such behaviour.<sup>75</sup>

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<sup>69</sup> Ibid., p.2.

<sup>70</sup> Op.cit., A. Lenhart, Pew Internet and American Life Project, *Teens and Sexting*, p.4.

<sup>71</sup> Ibid.

<sup>72</sup> Ibid., p.18.

<sup>73</sup> Ibid., p.3.

<sup>74</sup> The sample size of this study was 1,280 respondents—653 teens (ages 13-19) and 627 young adults (ages 20-26). See The National Campaign to Prevent Teen and Unplanned Pregnancy and Cosmogirl.com, *Sex and Tech – Results from a Survey of Teens and Young Adults*, 2008, available from [http://www.thenationalcampaign.org/sextech/PDF/SexTech\\_Summary.pdf](http://www.thenationalcampaign.org/sextech/PDF/SexTech_Summary.pdf)

<sup>75</sup> Ibid.

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61. The US has grappled with similar issues to Australia in relation to the most appropriate ways to address sexting amongst young people. Concerns have been expressed by both academics and policy makers about the inadequacy of using child pornography laws to deal with sexting.<sup>76</sup> Indeed, a number of young people have been prosecuted under child pornography laws for creating and sharing sexually explicit messages in the US. In some cases, this has had significant consequences for the young people involved.<sup>77</sup> For example, in one Florida case, an 18 year old man was convicted of sending naked images of his 16 year old girlfriend to friends and family after a fight with his girlfriend. His actions resulted in him being placed on probation for five years as well as being listed on Florida's sex offender register.<sup>78</sup>
62. According to one American academic, one of the most effective legal approaches to addressing sexting by young people is to "reclassify sexting as a separate offence that carries a misdemeanour charge."<sup>79</sup> It would appear that a number of US States have now taken such suggestions on board, amending existing legislation, or introducing new laws that make the production of sexual images by young people a misdemeanour rather than a felony in certain situations.<sup>80</sup>
63. Other States have focused on the need to educate young people about the risks involved in sexting and the implications of such behaviour. For example, in New York, an Act titled the *Cyber-crime Youth Rescue Act* was introduced.<sup>81</sup> This Act provides that if two people under the age of twenty and within five years of age from each other are charged with certain offenses involving the creation, exhibition or distribution of a photograph depicting nudity through the use of an electronic communication device, an interactive wireless communications device or a computer, they will have to participate in an "education reform program that involves a maximum of eight hours of instruction and provides information regarding the legal consequences and non-legal consequences of sexting, and the problems associated with technology and bullying."<sup>82</sup>
64. In New Jersey, complaints of sexting are reviewed by court intake services and a recommendation is made as to whether the complaint should be dismissed, diverted, or referred for court action.<sup>83</sup> A number of factors are taken into account in determining what action should be taken in relation to a complaint.<sup>84</sup> If

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<sup>76</sup> See for example J. Wolak and D. Finkelhor, 'Sexting: A Typology', University of New Hampshire, Crimes Against Children Research Centre, March 2011, available from

[http://www.unh.edu/ccrc/pdf/CV231\\_Sexting%20Typology%20Bulletin\\_4-6-11\\_revised.pdf](http://www.unh.edu/ccrc/pdf/CV231_Sexting%20Typology%20Bulletin_4-6-11_revised.pdf). See also S. Shafron-Perez, 'Average Teenager or Sex Offender? Solutions to the Legal Dilemma Caused by Sexting,' *Marshall Journal of Computer and Information Law*, 2009, Vol.26.

<sup>77</sup> Op.cit., S. Shafron-Perez, 'Average Teenager or Sex Offender? Solutions to the Legal Dilemma Caused by Sexting,' pp.440-441.

<sup>78</sup> See <http://edition.cnn.com/2009/CRIME/04/07/sexting.busts/>

<sup>79</sup> Op.cit., S. Shafron-Perez, 'Average Teenager or Sex Offender? Solutions to the Legal Dilemma Caused by Sexting,' p.452.

<sup>80</sup> See S. Handuja and J. Patchin, *State Sexting Laws – A brief overview of State Sexting Laws and Policies*, June 2013, available from [http://www.cyberbullying.us/state\\_sexting\\_laws.pdf](http://www.cyberbullying.us/state_sexting_laws.pdf). See also J. Wolak and D. Finkelhor, 'Sexting: A Typology', University of New Hampshire, Crimes Against Children Research Centre, March 2011, available from [http://www.unh.edu/ccrc/pdf/CV231\\_Sexting%20Typology%20Bulletin\\_4-6-11\\_revised.pdf](http://www.unh.edu/ccrc/pdf/CV231_Sexting%20Typology%20Bulletin_4-6-11_revised.pdf).

<sup>81</sup> See [http://assembly.state.ny.us/leg/?default\\_fld=&bn=A08170&term=2011&Summary=Y&Text=Y](http://assembly.state.ny.us/leg/?default_fld=&bn=A08170&term=2011&Summary=Y&Text=Y)

<sup>82</sup> Op.cit., S. Handuja and J. Patchin, *State Sexting Laws – A brief overview of State Sexting Laws and Policies*. See also

[http://assembly.state.ny.us/leg/?default\\_fld=&bn=A08170&term=2011&Summary=Y&Text=Y](http://assembly.state.ny.us/leg/?default_fld=&bn=A08170&term=2011&Summary=Y&Text=Y)

<sup>83</sup> [http://www.njleg.state.nj.us/2010/Bills/A2000/1561\\_R2.HTM](http://www.njleg.state.nj.us/2010/Bills/A2000/1561_R2.HTM).

<sup>84</sup> See [http://www.njleg.state.nj.us/2010/Bills/A2000/1561\\_R2.HTM](http://www.njleg.state.nj.us/2010/Bills/A2000/1561_R2.HTM).



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an individual is diverted, they must participate in an education or counselling program about the potential consequences of sexting. Participation in this program is paid for by the young person's parents or guardians.<sup>85</sup>

65. In addition to the legislative reforms outlined above, some commentators have also expressed the view that school education programs for young people are another valuable way to convey the potential risks associated with sexting.<sup>86</sup> However, education programs should not solely focus on young people. Teachers and parents have also been identified as people that should be educated about the consequences of sexting as well as ways in which they could discuss and address this issue with the young people they care for.<sup>87</sup>

## United Kingdom

66. As in the case of Australia and the US, data about the prevalence of sexting in the United Kingdom (UK) differs depending on which study is examined. A 2009 study by UK researchers found that one third of the young people who took part in the study had received sexually suggestive messages at some point.<sup>88</sup> Another study by the University of Plymouth in conjunction with the South West Grid for Learning surveyed 535 young people aged between 11 and 18 years and found that 40% of respondents knew someone who had engaged in sexting, with 27% of respondents saying that sexting happened regularly or all the time.<sup>89</sup>
67. To date, there does not appear to be the same level of concern about the adequacy or inadequacy of the application of UK legislation to sexting offences. Some academics have observed that whilst "...sexting has to date not surfaced significantly in the UK as a dilemma for prosecutors, legislators or the courts...in many respects the law in England and Wales is no more sensitive to youthful perpetrators than reported cases indicate in the USA".<sup>90</sup>
68. Notwithstanding this, academics and policy makers in the UK have made a number of policy recommendations in relation to the ways in which sexting amongst young people could be better addressed. A number of these recommendations are similar to those made by reviews of sexting in Australia, and the initiatives adopted by some US States. This is particularly the case in relation to the need for increased education about the risks and consequences of sexting for not only young people, but for parents and teachers also. In this regard, UK researchers have noted the importance of ensuring that adults are as up to date as possible with the technology that young people are actually using. This is particularly important given different brands of mobile phones "have different network capacities, and may have different options to produce images

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<sup>85</sup> See [http://www.nileg.state.nj.us/2010/Bills/A2000/1561\\_R2.HTM](http://www.nileg.state.nj.us/2010/Bills/A2000/1561_R2.HTM). See also Op.cit., S. Handuja and J. Patchin, *State Sexting Laws – A brief overview of State Sexting Laws and Policies*.

<sup>86</sup> E. Ryan, 'Sexting: How the state can prevent a moment of indiscretion from leading to a lifetime of unintended consequences for minors and young adults,' *Iowa Law Review*, 2011, Vol. 96, pp.376-377. See also S. Hinduja and J. Patchin, Cyber-bullying Research Centre, *Sexting: A brief guide for educators and parents*, 2010, available from [http://www.cyberbullying.us/Sexting\\_Fact\\_Sheet.pdf](http://www.cyberbullying.us/Sexting_Fact_Sheet.pdf)

<sup>87</sup> Ibid., pp.376-377

<sup>88</sup> E. Cross, B. Richardson, T. Douglas and J. Von Kaenel-Flatt, *Virtual violence: Protecting children from cyberbullying*, 2009, available from <http://www2.beatbullying.org/pdfs/Virtual%20Violence%20-%20Protecting%20Children%20from%20Cyberbullying.pdf>

<sup>89</sup> A. Phippen, University of Plymouth, *Sharing personal images and videos among young people*, 2009, available from <http://www.swgfl.org.uk/Staying-Safe/Sexting-Survey>

<sup>90</sup> Op.cit., N. Stone, 'The Sexting Quagmire: Criminal Justice Responses to Adolescents' Electronic Transmission of Indecent Images in the UK and the USA,' p.278.

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or exchange, block or delete messages than Facebook or SMS or other networks or platforms.”<sup>91</sup>

69. The need for education resources for parents so that they are aware of how to develop and maintain open channels of communication with their children regarding sexual issues was also identified as being highly important, particularly in the context of strategies that assist them to “balance recognition of positive and pleasurable experiences while supporting or intervening when sexual experiences become problematic or coercive.”<sup>92</sup>
70. UK researchers have also identified internet service and mobile network providers as having a role to play in addressing sexting amongst young people.<sup>93</sup> Indeed, the need for these types of companies to provide easily accessible advice to young people if they do request assistance in removing or deleting an inappropriate image or message, was found to be particularly important in this regard.
71. Another recommendation by UK researchers that is equally applicable in the Australian context, is the importance of ensuring that policy initiatives in relation to sexting are gender and culturally sensitive.<sup>94</sup> In order to ascertain the effectiveness of the initiatives that are implemented, it is also important that the particular policy or legislative reforms are able to be evaluated at some point in the future.<sup>95</sup>

## Conclusion

72. Increased reports of sexting in recent years have been attributed to a corresponding increase in the use of mobile phone and social media technology by young people. Whilst the prevalence of sexting amongst young people in Australia is unknown, it is certainly the case that the practice is taking place with some degree of frequency amongst some young people.
73. Sexting by young people poses a number of challenges for policy makers in terms of its social and legal implications. Indeed, the potential for young people to be charged with child pornography offences in the absence of more specific sexting offences is particularly concerning.
74. This being the case, in considering options for addressing sexting by minors, the Committee should carefully consider and “balance the need to eliminate the harms of child pornography and punish the people who create it, with the need to protect offending teenagers from unwittingly committing a serious and punishable offence.”<sup>96</sup>

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<sup>91</sup> J. Ringrose, R. Gill, S. Livingstone, and L. Harvey, *A Qualitative Study of Children, Young People and Sexting*, 2012, p.56, available from [http://www.nspcc.org.uk/inform/resourcesforprofessionals/sexualabuse/sexting-research-report\\_wdf89269.pdf](http://www.nspcc.org.uk/inform/resourcesforprofessionals/sexualabuse/sexting-research-report_wdf89269.pdf)

<sup>92</sup> *Ibid.*, p.57.

<sup>93</sup> *Op.cit.*, E. Cross, B. Richardson, T. Douglas and J. Von Kaenel-Flatt, *Virtual violence: Protecting children from cyberbullying*, p.44. See also *Op.cit.*, J. Ringrose, R. Gill, S. Livingstone, and L. Harvey, *A Qualitative Study of Children, Young People and Sexting*, p.59.

<sup>94</sup> *Op.cit.*, J. Ringrose, R. Gill, S. Livingstone, and L. Harvey, *A Qualitative Study of Children, Young People and Sexting*, p.60.

<sup>95</sup> *Ibid.*

<sup>96</sup> R. Richards and C. Calvert, ‘When sex and cell phones collide: Inside the prosecution of a teen sexting case,’ *Hastings Communication and Entertainment Law Journal*, 2009, Vol. 32(1), p.6.

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75. The Law Council hopes that the comments outlined in this submission are of assistance to the Committee, and thanks the Committee for the opportunity to participate in this inquiry.

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## **Attachment A: Profile of the Law Council of Australia**

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The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Large Law Firm Group, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Independent Bar
- The Large Law Firm Group (LLFG)
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of approximately 60,000 lawyers across Australia.

The Law Council is governed by a board of 17 Directors – one from each of the Constituent Bodies and six elected Executives. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive, led by the President who serves a 12-month term. The Council's six Executive are nominated and elected by the board of Directors. Members of the 2013 Executive are:

- Mr Michael Colbran QC, President
- Mr Duncan McConnel President-Elect
- Ms Leanne Topfer, Treasurer
- Ms Fiona McLeod SC, Executive Member
- Mr Justin Dowd, Executive Member
- Dr Christopher Kendall, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.