

SEMINAR

Sexting, adolescents and the criminal law

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INTRODUCTION

Good morning everyone

Today I will talk to you about the impact of the criminal law and sex offender registration laws on adolescents who engage in sexting related behaviour.

Sexting may be captured by child pornography laws and, therefore, those who engage in this behaviour may find themselves charged, convicted and possibly subject to inclusion on the Australian National Child (sex) Offender Register (ANCOR)¹. The risk of inclusion on the register is also very real for adolescents who engage in 'consensual sexual activity'.

I should say at the outset, that I use the term 'consensual' loosely and for ease of reference to refer to factual consent or willingness (as distinct to legal consent) – children under the age of 16 years cannot legally consent to sexual activity nor can children legally consent to the production, possession or distribution of sexually explicit images of themselves.

In April 2009 the Law Reform Commission of Western Australia received a reference to examine the impact of Western Australia's sex offender registration laws on juveniles and also on adults (who committed a reportable offence in exceptional circumstances).

- Discussion paper (Feb 2011)
- Final report (Jan 2012)
- 20 recommendations for reform to Parliament (tabled May 2012).²
- The main driver for reform in this area was the need to ensure that sex offender registration laws were not unfairly applied to children who had been convicted of reportable offences as a result of consensual sexual activity, sexual experimentation or sexting.

¹ ANCOR establishes a national database and information on all registered offenders in Australia is shared between law enforcement agencies.

² Can be accessed at <http://www.lrc.justice.wa.gov.au/>.

WHAT IS SEXTING?

DEFINITION OF SEXTING

As noted in the invitation for today's event, sexting is often understood to be the receiving and sending of sexually explicit or sexually suggestive images or videos via mobile phone (sex + text).

However, the term is also used more widely.

The federal parliamentary joint select committee on cyber-safety described sexting in its interim report, *High-Wire Act Cyber-safety and the Young* (June 2011), as

the practice among some young women and men of creating, sharing, sending or posting sexually suggestive or explicit messages or images via the Internet or mobile phones.

Likewise, it has been observed that the term sexting applies not only to mobile phones but also to email, instant messaging and social networking sites.³

Therefore, when I refer to sexting behaviour I am talking about:

→ Mobile phone communications

→ Other electronic communications eg emails or posting photos or videos on the web (eg, YouTube or Facebook) and the use of iPads, iPods and other electronic devices with internet connections to send images.

WIDE VARIETY OF BEHAVIOUR

Sexting covers a wide variety of behaviour ranging from consensual sharing of images between two adolescents to more sinister behaviour involving the dissemination of images to third parties

Examples might include

- boyfriend and girlfriend talking explicit photos of or recording a video of themselves and sharing the images with each other (consensual)

³ Lounsbury K et al, *The True Prevalence of 'sexting'* (April 2011) Crimes Against Children Research Centre, University of New Hampshire , 2.

- person producing a sexually explicit image of him or herself and sharing that image electronically with another person (either solicited or unsolicited) (ie, non-consensual and consensual)
 - where person encourages or requests a child to forward image it may be part of a 'consensual' adolescent relationship or attempt to commence relationship eg, flirting, or it could be serious grooming by online predator
- person who has received image with the consent of the person in the image then disseminates that image electronically to other persons without the first person's approval (and this could be repeated by the recipients) (non-consensual dissemination)
 - motivation may be very sinister eg, to forward to known child pornography websites or groups
 - motivation may be bullying, harassment, prank, or personal revenge eg, after breakup

and finally the expression might be used with reference to

- image taken of child without that child's knowledge or consent and then shared electronically with another person or persons (non-consensual recording and dissemination) (eg, child could take a photo of another child showering and send to friends)

EXTENT OF SEXTING IN AUSTRALIA

No clear evidence of how frequently adolescents engage in sexting in Australia

- not enough studies undertaken
- difficult to measure because behaviour tends to only be reported when it goes beyond the consensual exchanges of images and is widely disseminated

In a recent submission to the Victorian Parliamentary Law Reform Commission, the Western Australian Police submission reported that:

The true prevalence of this type of activity is unknown as the reporting of these incidents usually comes to light through adult intervention of a parent or teacher. Anecdotally, such incidents investigated by the Online Child Exploitation Squad surfaced and spiked in 2009, however, through public awareness via the media by police and efforts in educating young people by the Department of Education and independent schools in conjunction with the Australian Communication and Media Authority, the number of reported incidents is relatively low. For example, in the past four months since 30 January 2012, there were seven reported cases involving, predominantly, internet services, Facebook, Skype and Habbo.

Use of technology

The ABS data (Australian Social Trends, *Children of the digital revolution*, June 2011) based on 2009 information found that:

- 60% of 5–8 year olds used the internet, increasing to 96% of 12–14 year olds.
- In 2009, an estimated 841,000 children, almost a third (31%) of all children (5–14 years), owned a mobile phone.

Extent of sexting

A more recent Australian study of internet use (random sample of 400 children aged between 9 and 16 were interviewed between November 2010 and February 2011) found that

- 60% of the children interviewed access the internet via a mobile device eg, iPod, iPhone or other mobile phone)
- 15% of the 11-16 years internet users had received sexts (most being 15-16 years old).⁴

The Australian Council of Educational Research explained in its submission to a current Victorian Parliamentary Law Reform inquiry into sexting that a survey of 4770 students from independent schools in Victoria in 2009 found that just over 7% of girls had been asked to send a nude picture of themselves (by Year 11 this figure increased to 16%).

The Office of the Victorian Privacy Commissioner noted that its Youth Advisory Group had undertaken a survey and found that 18% of the respondents aged 10–15 years said 'Yes' when asked whether they had ever taken and/or sent a nude or semi-clothed photo of themselves or someone else on their mobile phone.

Susan McLean, (former member of Victoria Police for 27 years and now a cyber safety expert) advised the Victorian Parliamentary Law Reform that even primary schools are now reporting issues with sexting.

⁴ Green L et al, *Risks and Safety for Australian Children on the Internet: Full findings from the AU Kids Online survey of 9-16 year olds and their parents* (2012)

IS SEXTING A CRIMINAL OFFENCE?

There is no specific offence for sexting and therefore there is data available on the number of people who are charged with criminal offences as a consequence of sexting behaviour.

SEXTING AND CHILD PORNOGRAPHY OFFENCES

Sexting behaviour may fall within various child pornography offences

Western Australian law – definition of child for purposes of offences relating to child exploitation material is child under 16

Involving child (under 16) in child exploitation (s 217 Code):

- Applies where a person invites, causes, procures or offers a child to be involved in the production of child exploitation material so although potentially very serious but could apply where child or young person requests (invites) a child to make an explicit video and share it with them (eg, 15 year old boyfriend ask 15 year old girlfriend to text him an explicit video)

Production of child exploitation material (s 218 Code):

- Could apply where person records child under 16 engaging in sexual activity even the recording is done with consent and knowledge of that child and even where the person recording is in the video and is same age as child.

Distribution of child exploitation material (s 219 Code):

- Could apply where person sends explicit image/video of child under 16 to another person (even if done with the consent of the child in the image/video or if done by child in the image/video). Could apply also where one person shares images with number of friends or uploads onto Facebook etc

Possession of child exploitation material (s 220 Code):

- Could apply where person has the material stored on their electronic device (note - defence available if material was unsolicited and the person made reasonable attempts to delete the material after becoming aware of it)

‘Child exploitation material’ includes child pornography which is defined to mean material that, ‘in any way likely to offend a reasonable person, describes, depicts or

represents a person, or part of a person, who is, or appears to be a child' either engaging in sexual activity or in a sexual context.

Maximum penalty for most of these offences is 10 years' imprisonment.

[Showing offensive material to children under 16 years (s 204A Code): Could apply to conduct where a child under 16 is shown images of a child under 16 engaging in sexual activity for the purpose of encouraging that child to engage in (unlawful) sexual activity

Using electronic communication to procure child under 16 to engage in sexual activity or to expose child under 16 to indecent matter (s 204B Code): Only applies to adult 'offenders' but this could apply to 18 year old using electronic communication to procure a 15 ½ year old to engage in sexual activity]

Commonwealth law (child under 18 years)

There are a number of child pornography offences under the *Criminal Code 1995* (Cth) but one of the most relevant for present purposes is s 474.19: **Using a carriage service for child pornography material**

This could apply where a person distributes child pornography material using a carriage service (phone/internet) or where a person transmits child pornography material to himself or herself (eg, girlfriend sends image to boyfriend by text and then boyfriend emails to himself to download on computer)

A person is guilty of an offence if:

- (a) the person:
 - (i) accesses material; or
 - (ii) causes material to be transmitted to himself or herself; or
 - (iii) transmits, makes available, publishes, distributes, advertises or promotes material; or
 - (iv) solicits material; and
- (aa) the person does so using a carriage service; and
- (b) the material is child pornography material.

Penalty: Imprisonment for 15 years.

A carriage service has the same meaning as it does under the *Telecommunications Act* – ie, a service for carrying communications by means of guided and/or unguided electromagnetic energy – eg, telephone services or internet access services

Child pornography is defined to include material that depicts a person who is, or who appears to be, under 18 years of age and who is engaged in a sexual pose or sexual activity and does this in a way that reasonable persons would regard as being offensive (see s 473.1)

Because the Commonwealth offences apply to children under the age of 18 years or who appear to be under the age of 18 years, it is possible for a child or young adult to be charged with this offence as a result of accessing an image of their 16- or 17-year old girlfriend (even if the image was sent to them by the 16- or 17-year old and even though the two parties could lawfully engage in sexual activity)

But a child (under 18 years) cannot be prosecuted for these types of offences under the Commonwealth legislation without the consent of the AG (s 474.24C of the Criminal Code Cth)

SEXTING AND OTHER OFFENCES

Stalking (s 338E(1) Western Australia Code): a person who pursues another person with intent to intimidate is guilty of a crime and liable to 3 years' imprisonment (or 8 years' if committed in circumstances of aggravation). Also, less serious offence with lesser penalty if person pursues another person in a manner that could reasonably be expected to intimidate and does in fact intimidate that person or a third person.

The 'traditional' concept of stalking involves following person or repeated physical presence but definition of 'pursue' includes repeatedly communicating with the person 'whether directly or indirectly and whether in words or otherwise'. The term 'intimidate' includes to 'cause apprehension or fear in the person' and to 'compel the person to do an act that the person is lawfully entitled to abstain from doing'.

Threatening behaviour (Western Australia s 338A Code): would depend on the nature of the 'sext' and whether anything said etc was threatening (eg, A sends picture of child and A engaging in sex and threatens to distribute picture)

Use of carriage service to menace or harass (s 474.17 Code (Cth): where a person uses a carriage service in a way that reasonable persons would regard as being menacing, harassing or offensive.

Reported in the media that Labor plans to introduce (if elected) a new state offence of cyber bullying – ie an offence to use an electronic device to harass, menace or threaten another person (*West Australian*, 14 August 2012)

Approach to prosecution in Western Australia

In its recent submission to the Victorian Parliamentary Law Reform Committee, the Western Australia Police stated:

- For cases involving consensual sexting between children in an adolescent relationship and no evidence of exploitation, the Western Australia Police policy is to educate rather than prosecute
- For cases involving exploitation approval to charge is required from OIC of online child exploitation squad.
- For cases where images or movies from consensual sexting between children are distributed by one party to third parties ‘serious consideration is given to prosecuting the child distributing the images or movies’. This appears to be the case even if the person distributing the image is not doing so for sexual gratification but instead as form of bullying, harassment, prank etc
- This approach is consistent with what the Commission found during its reference → it seemed fairly clear that the police and DPP do not actively pursue charges involving consensual behaviour between two closely aged peers. However, if one party alleges coercion, or where a parent strongly demands action, charges are usually pursued; it should not be unsurprising that sometimes the allegation of coercion cannot be sustained by the time the matter reaches court (eg, one party caught by parent or school and falsely claims he or she was not a willing participant). But, by then it is too late, the juvenile charged will be convicted because ‘lack of consent’ is not necessary to sustain the charge.

Examples of prosecution or cautioning:

- In a letter to the editor in 2009 of *The West Australian* a lawyer stated that a young teenager had appeared in the Children’s Court and was convicted of an offence for sending an explicit photo text message to his girlfriend (and was placed on the register)
- In July 2010 the *Sunday Times* reported that 13 teenagers had been charged with child pornography by mid-2010 (cf to 8 at the same period the year

before) and that some of these teenagers had been charged in relation to sexting.

- In November 2010 it was reported in the media that a 13-year-old girl had been cautioned for sending a text message with a nude photo of herself at 17-year-old boy (he was also cautioned)
- Also reported in media that a 14-year-old boy who received images on his phone of a 14-year-old girl having sex with other teenagers was referred to the juvenile justice team (boys who had sex with girl charged along with boy who filmed sexual activity)
- In July 2011 two Victorian cases were reported in the media (these were the cases that sparked the Parliamentary inquiry). In one case an 18-year-old boy was sent images on this phone of girls aged 15 to 18 years and who were wearing underwear and/or topless. The images were sent to him by a female friend. He downloaded the images on his computer at the same time as downloading other images from his phone. Charged with one count of making and one count of possessing child pornography and sentenced to a good behaviour bond without a conviction being recorded (on register for 8 years).
- In the other case, a 17-year-old boy and 17-year-old girl filmed themselves having sex. Relationship ended and boy (now 18 years) emailed two still images to his friends. Charged with making and transmitting child pornography – fined but no conviction recorded (on register for 8 years).
- Case in Western Australia in 2011 where adult and two juveniles were convicted of offences in relation to an incident where female under the age of 16 was persuaded (by the two 17-year-olds) to lift her top on a webcam – without her knowledge the image was recorded. The adult (21 years) helped the two juveniles edit the image by inserting the female's name, her phone number and some very unsavoury words. The two 17-year-olds distributed the photo at her school and on social networking sites. The juveniles were fined \$300 (and were not placed on the register presumably because they fell within a very limited statutory exception which I will refer to later). The adult was fined \$1500 for indecent recording of a child and required to register for 8 years. The sentencing judge stated:

Young people like you must understand the dangers of modern technology. What might be considered a prank or a joke between mates can cause irreparable damage.

I accept that the nature of this conviction will be, to some extent, misleading. You are not a sexual pervert.

SEX OFFENDER REGISTRATION

Sex offender registers operate in every Australian jurisdiction as well as many overseas jurisdictions.

The rationale for these registers is that sex offenders (usually child sex offenders) are particularly dangerous and likely to reoffend – hence the need to monitor their whereabouts and keep a check on their circumstances.

It is worth noting that sex offender registration schemes are often underpinned by the fear of ‘stranger danger’; however, research shows that at least 75% of child sexual offences are committed by persons known to the victim. Further, research does not substantiate the view that child sex offenders are more likely to reoffend than other offenders but it is recognised that this is difficult to gauge because sexual offences are notoriously underreported. Importantly, in the present context, research considered by the Commission demonstrated that juvenile child sex offenders are less likely to reoffend than adult child sex offenders and juvenile child sex offenders benefit from a less punitive and therapeutic approach.

SEX OFFENDER REGISTRATION IN WESTERN AUSTRALIA

- *Community Protection (Offender Reporting) Act 2004* commenced operation on 1 February 2005.
- Stated purpose is to enhance community protection by facilitating the investigation of future offences and by reducing the likelihood of reoffending.
- At the end of 2009 there were 1,704 registered offenders in Western Australia – from 2005 to end of 2009 there had been 212 registered offenders included on the register as a result of juvenile offending
- By June 2011 there were 2500 registered offenders in Western Australia.

HOW DOES IT WORK

- Generally registration is mandatory – upon conviction and sentence for a reportable offence the offender is required to comply with reporting obligations under the Act. The court sentencing the offender has no say. This even applies where there is a sentence of no punishment where a spent conviction is given.

- Reporting period for juveniles is 4 years or 7 ½ years (for adults it is 8 years, 15 years or life).
- Reporting obligations include initial report within 7 days, reporting any changes to personal details and travel plans and periodic reporting (monthly to yearly but were told that previously some reportable offenders had been required to report weekly).
- Personal details include name, date of birth, address, telephone numbers, email addresses, internet service providers, names and ages who generally reside in the same household, employment details, involvement with clubs or organisations where children participate, details of motor vehicles owned or driven, tattoos or other permanent distinguishing marks.
- More flexibility in other jurisdictions
 - Victoria, South Australia, Northern Territory and Tasmania have court discretion for juveniles
 - New South Wales, Qld, the Australian Capital Territory and Northern Territory have minimum sentencing thresholds so offenders sentenced to very low level sentences eg, no conviction, dismissal or good behaviour bond are not automatically subject to registration

In Western Australia → limited allowances made for juveniles

Statutory exception for juveniles:

Very limited

- Single prescribed offence (child pornography offences) ie ss 218–220 of the *Criminal Code* and two offences under the *Classification (Publications, Films and Computer Games) Enforcement Act 1996*
- BUT DOES NOT INCLUDE s 217 (involving a child in child exploitation because considered by the police to be more serious but could apply where a child or young adult invites a child under 16 to make an explicit video/photo and share it with them) and DOES NOT INCLUDE Commonwealth child pornography offences.⁵

⁵ The Commission recommended that s 217 and various Commonwealth offences be included in the list of prescribed offences (Recommendation 2)

- If multiple charges (eg, a charge of distribution and a charge of production), in order to constitute a single prescribed offence the offences must have been committed within a 24-hour period and have been committed against the same person. Conceivable that a person could produce image on one day and not distribute it for a number of days, weeks or years later.

Commissioner of Police discretion

- Commissioner of Police also has discretion to waive reporting obligations for a juvenile reportable offender but only for the less serious reportable offences under the Act
- Cannot use this power for offences committed against children under the age of 13 years (even if offender is also under 13 years) and DOES NOT INCLUDE s 217 of the Code (involving a child in child exploitation material) or the Commonwealth child pornography related offences⁶
- In any event the offender remains listed on the register

Another important aspect to be aware of is the soon to be operational public disclosure scheme

PUBLIC DISCLOSURE

Public sex offender register expected to be up and running next month October (Rob Johnson, Parliament (29 May 2012))

Three tiers:

Tier 1: non-compliant reportable offenders whose whereabouts are unknown (may publish all personal details other than those that would identify a child eg, name, photo and last known address)

Tier 2: reportable offenders who are subject to a dangerous sex offender supervision order; who have reoffended by committing certain offences and a person who has been found guilty of an offence punishable by five years' imprisonment or more and where Minister of Police satisfied offender pose a risk to lives or sexual safety of one or more persons or persons generally (photo and postcode only)

⁶ Commission recommended that this power be extended to apply to all offences committed by a juvenile and also to enable the Commissioner of Police to consider suspending reporting obligations for adult offenders (Recommendation 13)

Tier 3: parent or guardian makes a request and Commissioner of Police can inform parent or guardian that person is a reportable offender if satisfied that person has regular unsupervised contact with a child of the applicant

Regular unsupervised contact is defined as at least 3 days in any 12 month period (whether consecutive or not)

eg, volunteer parent sports coach; older sibling of school friend who babysits kids; parent of child's friend who drives them to school; looks after on weekends etc

Cannot disclose information about a person who is a child but the legislation doesn't state that cannot disclose information about a person who is now an adult but whose reportable offence was committed when he or she was under the age of 18 years.

Possible that parent or guardian could inquire and be informed that person of interest is a reportable offender but not be told that the person is a reportable offender as a result of sexting type behaviour or underage consensual sexual activity that occurred when they were under the age of 18 years or when they were a young adult (the legislation appears to only permit disclose of whether the person is or is not a registered offender)

SEXTING, CONSENSUAL UNDERAGE SEXUAL ACTIVITY AND SEX OFFENDER REGISTRATION

- While there is evidence (albeit anecdotal) adolescents have been cautioned or charged as a result of sexting I am not aware of the number of children and young adults on register as a consequence of sexting behaviour
- Possible that in Western Australia, if charged, some juveniles have avoided registration by virtue of statutory exception but note that no exception for young adults
- But the Commission was informed of a number of cases where persons in Western Australia had been subject to registration as a result of underage consensual sexual activity or sexual experimentation

Case examples

21-year-old sentenced for offences that occurred when he was 11 years old. Offences involving showing 6- and 7-year-old neighbours pornography on the computer and touching them under their pants.

Offender had no criminal record

Sentenced to a good behaviour bond but **No** discretion re registration required to register and report for 7 ½ years (and Commissioner of Police had no discretion to waive reporting obligations because complainants were under 13 years)

(transcript)

15-year-old convicted of indecent dealing against 12-year old. Offences occurred at school and accepted by the prosecution that the complainant was a willing participant (she wanted to make another person jealous). Offender had no prior convictions. Sentenced to YCBO and required to register and report for 7 ½ years. It was reported in the newspaper that the parents of the complainant thought it was 'ridiculous' for the offender to be placed on the sex offender register

(transcript)

Three 16-year-old boys were charged for sexual penetration of a 14-year-old girl and a 4th was charged for filming the sexual activity and ended up on sex offender register. Media reported that girl's mother did not believe that the boys should have to be listed on the register

(media)

NUMBER OF CONSEQUENCES OF REGISTRATION

- WWCC not directly linked to the register in Western Australia ie determination of whether person should be granted a WWCC is made independently of whether the person is a registered sex offender (depends on charges and convictions) (*Working With Children (Criminal Record Checking) Act 2004* (WA))
- Ongoing obligations ie periodic reporting, reporting of all changes to personal details eg, new motor vehicle, move address, new job. These obligations can

be particularly onerous for young people from regional and remote area and for disadvantaged and vulnerable young people (eg intellectual disability, language barriers, cultural barriers).⁷ During its inquiry the Commission was repeatedly told of instances where young people were subject to overlapping obligations (eg, report on register, report as part of bail and report to corrections or youth justice officer as part of a community-based sentence)

- Lack of understanding about affect of registration – Commission told of instances where young people thought police had the power to restrict their movements eg, one boy told he couldn't go on an interstate football trip and another family told they couldn't take their child to visit another regional town. Some registered offenders believe that they cannot change jobs or move address.
- Failure to access health services and assistance – Commission told that the potential of sex offender registration may deter some young people from accessing health services and contraception and some families may be dissuaded from seeking treatment for inappropriate behaviour between siblings.
- Further punishment if non-compliant – potential to be charged with failing to report etc
- Stigmatisation/labelling – many people consulted by the Commission were particularly concerned about the impact of labelling children as sex offenders. Christabel Chamarette, a clinical psychologist, advised the Commission that for children

Whose sense of identity is fragile and evolving, the label of sex offender may become a self fulfilling prophecy

The report published by the Australian Crime Commission report in 2010 observed that:

There is general consensus amongst researchers and clinicians that to refer to juveniles as 'sex offenders', 'perpetrators', or 'abusers' is stigmatising and likely to inhibit the young person's impetus to change

- It is accepted that there is a degree of stigmatisation associated with prosecution and conviction in court for the underlying offence; however, with registration and reporting obligations the requirement to report to police for a number of years is a constant reminder of the label.

⁷ Commission recommended improved procedures for notification of reporting obligations and improved information to juvenile offenders (Recommendations 14 & 15)

- Although presently, information on the register is confidential the label of 'sex offender' will be known to the offender and possibly his or her family, the victim and others (when sentenced in court, required to complete paperwork and told afterwards that you are required to report to police etc)
- Commission told of one case where a 14-year-old boy was forced to move schools after rumours circulated that he was a registered sex offender and in another case an offender's sister posted a statement on Facebook that her brother was listed on the register.

THE WAY FORWARD: WHAT IS THE SOLUTION?

DIFFERENT OPTIONS

1. New **sexting specific offence** to capture serious behaviour involving dissemination of sexually explicit images without consent without the need to classify the behaviour as child pornography (and this offence could be excluded from ambit of sex offender registration laws)
 - a. The Victorian Parliamentary Law Reform Committee received 60 submissions to its current inquiry on sexting – of these 13 submissions advocated decriminalisation of consensual sexting and 12 submissions argued that sexting (even malicious and non-consensual) should not be classified as child pornography – many suggested instead that it should be cyber-bullying
 - b. Difficulty is how to define the offence so that it covers malicious dissemination of images but doesn't include behaviour that should properly come within the scope of child pornography laws and also whether such an offence should exclude 'consensual sexting'
2. Could change the law so that **no children are required to be included on the register**
 - a. However, there are and will continue to be instances where children have engaged in very serious behaviour and present a significant risk to other children (eg, 17 year old interfering with 3 year old)
3. **Court discretion for determining registration** so that the sentencing court decided based on the individual circumstances of the offence and the offender whether registration is appropriate
 - a. 28 submissions to the VPLRC said that there should be discretion for both adults and juveniles with a further 7 submissions said that sex offender registers shouldn't apply to sexting (none of the 60 submissions argued for mandatory registration)
 - b. For its reference the Commission received 22 submissions in response to its proposals for reform (21 advocated for discretion for juveniles and the majority supported discretion for adults)
 - c. The need to treat each case individually is easily demonstrated by a simple example: currently a 60-year-old man convicted and sentenced

to sexual penetration of a 5-year-old girl has the same reportable offender status as a 15-year-old boy who is convicted as a result of having 'consensual' sex with his 15-year-old girlfriend.⁸

CONCLUSION

Commission's two main recommendations

For juveniles: sentencing court must consider reportable offender status at time of sentencing and may only make a juvenile offender reporting order' if satisfied that the offender poses a risk to the lives or sexual safety of one or more persons or persons generally

For adults: sentencing court may consider reportable offender status if satisfied that there are exceptional circumstances⁹ and the offender establishes that he or she does not pose a risk to lives or sexual safety of any person or persons generally.¹⁰

- Discretion enables the individual circumstances to be taken into account and the risk posed by the offender to be assessed.
- End result is that the register is not watered down by having low-risk offenders included and that young people are not unfairly targeted (and further stigmatised) by the onerous scheme. In this regard it is noted that it has been estimated that in Victoria alone there will be 20,000 registered offenders by 2034 (Office of Police Integrity Victoria). The Office has observed:

If we are to have tens of thousands of registered offenders in the future, the truly dangerous offenders may be overlooked in the vast sea of registrants.

However, the question remains

→ Whether other changes to the law are required so that children are not prosecuted for child pornography as a result of sexting and/or

⁸ Both are Class 1 offences – only difference is that if that is the only offence the adult will be required to report for 15 years but the juvenile will be required to report for 7 ½ years

⁹ For example, where very young adult (18 or 19 years) and older child (15 years) and relationship consensual or where adult offender honestly and reasonably believed that child was of or over 16 years (no defence if adult is less than 19 years of age)

¹⁰ Other recommendations – review of reportable offender status half way through reporting period (or upon turning 18 years so long as they have been reporting for 24 months) and retrospective right of review for existing reportable offenders

→ Whether other offences eg, cyber bullying might be more appropriate for some examples of malicious dissemination of sexually explicit images.

These issues were beyond the Commission's terms of reference but worthy of consideration

In conclusion,

Appropriate laws are only one part of the solution – apart from the legal consequences there are serious social consequences that can arise from sexting (eg, poor self-esteem, depression, suicide, truancy, impact on future employment) → appropriate education strategies are vital to discourage inappropriate behaviour → it is possible that the threat of criminal prosecution for child pornography and the potential for sex offender registration is one of a number of tools used by educators to dissuade adolescents from sexting

For this reason, full decriminalisation may not be the best way to proceed – instead judicial discretion (as recommended by the LRCWA) re registration and possibly alternative offences such as cyber bullying would provide the justice system with options that are appropriate and fair without sending a message to adolescents that the production, possession and distribution of sexually explicit images of children and young people is ok