



THE LAW SOCIETY
OF NEW SOUTH WALES

Our Ref: JJ:GUml1180503

15 July 2016

Ms Melanie Gibbons MP
Chair, Joint Committee on Children and Young People
Parliament House
Macquarie Street
SYDNEY NSW 2000

By email: childrenyoungpeople@parliament.nsw.gov.au

Dear Ms Gibbons,

Inquiry into the Sexualisation of Children and Young People

Thank you for the opportunity to provide comments to the NSW Parliament Joint Committee on Children and Young People Inquiry into the sexualisation of children and young people ("Inquiry").

The Law Society of NSW understands that during public hearings conducted for the Inquiry, the issue of children and young people¹ engaging in 'sexting' was raised. This submission focuses on our concern with the operation of the current legal framework on sexting.

1. Current legal framework on sexting

The term 'sexting' refers to the sharing of nude or sexual images online or via mobile devices.² Consensual sexting engaged in by adults is not a criminal offence in NSW. There are currently no legislative provisions at the Commonwealth, State or Territory levels that specifically deal with an offence of sexting. Rather, this behaviour is likely to be captured by the offences associated with child pornography.³ The outline of relevant legal provisions below is non-exhaustive, but seeks to highlight key provisions of concern.⁴

In NSW, it is legal for persons aged 16 years or over to engage in consensual sexual activity, which would capture sexting. For children aged under 16 years, consensual sexting could potentially be captured by the offence of production, dissemination or

¹ In this submission, "child" and "young person" are used interchangeably to refer to a person aged under 18 years.

² National Children's and Youth Law Centre ("NCYLC"), Submission No 20 to the Senate Select Committee on Cyber-Safety, *Inquiry into Options for Addressing the Issue of Sexting by Minors*, 2013.

³ Law Council of Australia, Submission No 19 to the Senate Select Committee on Cyber-Safety, *Inquiry into Options for Addressing the Issue of Sexting by Minors*, 6 August 2013, 7.

⁴ For a comprehensive discussion of the legal framework on sexting under NSW and federal law, see NCYLC and Legal Aid NSW, 'New voices / new laws', Law reform research report, November 2012.

possession of child abuse material,⁵ or the offence of children not to be used for production of child abuse material.⁶ These offences carry penalties of imprisonment ranging from 10 to 14 years. Consensual sexting between children under 16 years of age could also be captured by the offence of committing an act of indecency,⁷ which has varying penalties depending on the age of the victim. This offence could also be considered “aggravated” if the act is filmed for the purposes of producing child abuse material.⁸ A person in NSW who is found guilty of any of the above offences may be registered under the *Child Protection (Offenders Registration) Act 2000* (NSW) (“CPOR Act”).⁹

Under Commonwealth legislation, sexting between children and young people aged under 18 years, even with consent, is a criminal offence. Section 474.19(1) of the *Criminal Code Act 1995* (Cth) (“Criminal Code”) prescribes the offence of using a carriage service for child pornography material, which states that persons under 18 years of age cannot consent to sexualised images of themselves being taken, sent or received. This Commonwealth offence is also a registrable offence under the CPOR Act.

Non-consensual sexting between two adults may be captured under the Commonwealth offence of using a carriage service to menace, harass or cause offence,¹⁰ which carries a maximum penalty of three years’ imprisonment. It is unclear whether non-consensual sexting between two young people under 18 years of age is captured under this same Commonwealth offence, or whether it is automatically captured under the more serious offence of using a carriage service for child pornography material.¹¹ This offence carries a maximum penalty of 15 years’ imprisonment and, as noted above, is a registrable offence under the CPOR Act.

2. Problems with the existing legislative framework as it applies to children and young people

2.1 Consensual sexting between children aged under 16 years is captured under child abuse legislation

The Law Society considers that children aged under 16 years can be disadvantaged by the current law’s treatment of consensual sexting. For example, currently under NSW legislation, consensual sexting between two children under 16 years of age is a criminal offence as the sexting images are categorised as “child abuse material”. The consequence of this categorisation is that both the child who sends the image and the child who receives the image may be found guilty of a child abuse material offence and may consequently be classed as a registrable person for the purposes of the CPOR Act.

The Law Society would support an examination of alternative legislative approaches to deal with sexting where no exploitation is involved.

Similarly, two young people under 18 years of age engaged in consensual sexting may be captured by the Commonwealth child pornography offences. The Law Society

⁵ Section 91H(2), *Crimes Act 1900* (NSW).

⁶ Section 91G, *Crimes Act 1900* (NSW).

⁷ Section 61N, *Crimes Act 1900* (NSW).

⁸ Section 61O(2A), *Crimes Act 1900* (NSW).

⁹ Section 3A, CPOR Act.

¹⁰ Section 474.17, Criminal Code.

¹¹ Section 474.19(1), Criminal Code.

acknowledges the Law Council of Australia's submission to the Senate inquiry into options for addressing the issue of sexting by minors, which notes that:¹²

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.

The Law Society similarly agrees that consideration should be given to amending Commonwealth legislation to distinguish between the different types of conduct which are currently captured by the child pornography provisions, such as sexting, as opposed to behaviour that should rightly be categorised as child pornography.¹³

2.2 Children and young people aged under 18 years engaged in consensual sexting may be placed on the Child Protection Register

As noted above, the consequences of a person committing a child sexual offence under both State and Commonwealth legislation is that the person may be subject to registration under the CPOR Act. The Law Society has previously advocated that consensual sexual activity between adolescents should not be made registrable.¹⁴

In the 2013 statutory review of the CPOR Act, the Law Society recommended that consideration be given to excluding consensual sex between children or young persons as a registrable offence, subject to the following circumstances:

- (i) where the intercourse is consensual; and
- (ii) where the offender is under the age of 20; and
- (iii) where the difference in age between the offender and the victim is three years or less.

While the report on the statutory review of the CPOR Act noted that police had advised that no young person had been placed on the Child Protection Register solely for a sexting related offence,¹⁵ the Law Society nevertheless remains concerned that the legislation does not provide for exemptions where such sexting is consensual and both children are under 18 years of age.

On the matter of sexting, the Law Society's submission to the statutory review of the CPOR Act suggested that consideration should be given to excluding from the definition of "registrable offence" offences contrary to s 91H of the *Crimes Act 1900* (NSW) ("Crimes Act") where the offender is under the age of 20 and the victim appears to be, or is no more than three years younger than the offender, and the image was taken with the consent of the person depicted in it. The Law Society notes that that the sentencing Court would retain the discretion to make a Child Protection Registration Order on a case-by-case basis.

¹² Law Council of Australia, Submission No 19 to the Senate Select Committee on Cyber-Safety, *Inquiry into Options for Addressing the Issue of Sexting by Minors*, 6 August 2013, 10.

¹³ Law Council of Australia, Submission No 19 to the Senate Select Committee on Cyber-Safety, *Inquiry into Options for Addressing the Issue of Sexting by Minors*, 6 August 2013, 11.

¹⁴ Law Society of NSW, Submission to the Ministry for Police and Emergency Services, *Statutory Review of the Child Protection (Offenders Registration) Act 2000*, 29 August 2013.

¹⁵ Ministry for Police and Emergency Services, *Report on the Statutory Review of the Child Protection (Offenders Registration) Act 2000*, December 2013, 27.

The Law Society supports in-principle an amendment to the CPOR Act to ensure that a person would not be classed as a registrable person if they were a child at the time they committed the registrable offence and the act was consensual. The Law Society considers that further work must be undertaken to determine the appropriate scope of s 3A of the CPOR Act, particularly as the consequences of a child being placed on the Child Protection Register for life are substantial, and expansion of the exemptions outlined under s 3A should be properly considered.

2.3 Variation in penalties for children and young people as compared to adults for consensual and non-consensual sexting

As noted above, by virtue of the fact that non-consensual sexting by children and young people aged under 18 years may be classified as a child pornography offence under the Criminal Code,¹⁶ a person aged under 18 years who engages in sexting without consent may be subject to harsher penalties compared to an adult defendant who commits the same act. Similarly, while acts of sexting between two consenting adults are not criminalised, children and young people aged under 18 years engaged in consensual sexting may also be charged with a child pornography offence. Such an offence is also a registrable offence under the CPOR Act.

While the Law Society acknowledges that the Criminal Code does provide for some protections to young people who may be charged under the child pornography provisions,¹⁷ the Law Society nevertheless considers that consideration should be given to amending Commonwealth legislation to distinguish between the different types of conduct that are currently captured by the child pornography provisions, to differentiate between consensual sexting which is not exploitative, and other acts which should be captured under the child pornography offences.

2.4 Variations as to the age of consent across jurisdictions

The Law Society notes that there are inconsistencies between the age of consent for sexual activity in NSW and in Commonwealth, as well as across other Australian jurisdictions. In particular, while the Crimes Act defines a child as any person under the age of 16 years,¹⁸ the Commonwealth legislation defines a child to be aged under 18 years. This discrepancy creates confusion amongst 16 and 17-year-olds in NSW, who can legally engage in consensual sexual activity (including sexting) from the age of 16 years, but who would be committing an offence if they engage in sexting under the Commonwealth legislation.

Finally, the Law Society understands that the NSW Department of Justice is currently reviewing child sexual assault offences, which will provide an opportunity to examine the behaviour of sexting and whether this should continue to be captured by the existing child abuse material offences.¹⁹

¹⁶ Section 474.19(1), Criminal Code.

¹⁷ Sections 273.2A and 474.24C of the Criminal Code provide that proceedings for an offence involving child pornography or child abuse material outside Australia, or 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 years of age at the time they allegedly engaged in the conduct constituting the offence.

¹⁸ Section 91FA, Crimes Act.

¹⁹ NSW Department of Family and Community Services, Submission No 22 to the NSW Parliament Joint Committee on Children and Young People, *Inquiry into the Sexualisation of Children and Young People*, 5 February 2016, 14.

The Law Society thanks you for the opportunity to comment, and would welcome the opportunity to provide further information to the Inquiry if required. Should you have any questions about this submission, please contact Meagan Lee, Policy Lawyer on (02) 9926 0214 or email Meagan.Lee@lawsociety.com.au.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Gary Ulman', followed by a period.

Gary Ulman
President