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Svantesson, Dan Jerker B

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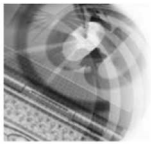
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Sexting and Australia's regulation of child pornography

Dan Jerker B Svantesson BOND UNIVERSITY

Sexting¹ recently gained media attention after a nude image of Lara Bingle was published in the magazine Woman's Day. The picture was taken a few years earlier by footballer Brendan Fevola using a mobile phone camera.

While sexting probably predates mobile phones, research into sexting generally, and sexting and the law in particular, is in its infancy. A study by *Girlfriend* magazine showed that 40% of the 588 Australian teenage girls in the study had been asked to send a nude or semi-nude image of themselves over the internet.² Studies overseas give similar results.³

Child pornography offences in Australia

The need for a robust approach to sexual offences against children is one of the few areas of law that has gained virtually universal acceptance. Australia's regulation of such offences occurs at both federal and state levels. For example, s 210 of the Criminal Code 1899 (Qld) states that:

Any person who [...] (e) without legitimate reason, wilfully exposes a child under the age of 16 years to any indecent object or any indecent film, videotape, audiotape, picture, photograph or printed or written matter; or (f) without legitimate reason, takes any indecent photograph or records, by means of any device, any indecent visual image of a child under the age of 16 years; is guilty of an indictable offence.

This section could arguably be applied to instances of sexting. Similarly, s 91H(2) of the Crimes Act 1900 (NSW) makes clear that a person who produces, disseminates⁴ or possesses child pornography⁵ is guilty of an offence. The Criminal Code Act 1995 (Cth) Pt 10.6 makes it an offence to access, transmit, publish, possess, control, produce, supply or obtain child pornography.⁶

Turning to law under development at the time of writing, aspects of the Crimes Legislation Amendment (Sexual Offences Against Children) Bill 2010 will impact on sexting in a similar manner. For example, the proposed s 474.27A would criminalise sexting from a person of at least 18 years of age to a person under 16 years of age:

(1) A person (the *sender*) commits an offence if:

- (a) the sender uses a carriage service to transmit a communication to another person (the *recipient*); and
- (b) the communication includes material that is indecent; and
- (c) the recipient is someone who is, or who the sender believes to be, under 16 years of age; and
- (d) the sender is at least 18 years of age.

What not to do: the US experience

Legislation similar to that described above has been used to prosecute sexting teenagers in the US. For example, an 18-year-old in the state of Florida was convicted of child pornography charges and placed on the sex offender registry. The events leading to the conviction were as follows:

He [Philip Alpert; the 18-year old in question] had been battling his 16-year-old girlfriend for some time when she left him an angry voicemail in the middle of the night, and he decided to exact revenge. To that end, he signed into her email account — she previously gave him her password — and accessed nude photographs of the girl that she had stored online — photos she, in fact, had once sent to Alpert. He then hit “select all” and distributed the photographs to some seventy individuals that his girlfriend had set up as part of her personal email list.⁷ [internal footnotes omitted]

Perhaps with the exception of how Mr Alpert gained access to the images, this scenario is typical of how sexting has legal consequences.

Another example involved around 20 teenage girls who were found to have been involved in sexting at a school in Pennsylvania, US. The District Attorney responded by announcing potential charges of possession and distribution of child pornography.⁸ As an alternative, the girls were “offered” an extensive re-education and counselling program.⁹

Some of the girls and their families decided to resist the District Attorney's approach and the matter ended up before a District Court as an application for a motion for a temporary restraining order. The girls and their parents

argued that their constitutional rights — the right to free expression, the right to be free from compelled expression,¹⁰ and the right as parents to direct their children's upbringing — were being violated.¹¹ The court ruled in favour of the girls and their parents:

The court here offers no final conclusion on the merits of plaintiffs' position. Testimony and evidence at the TRO [temporary restraining order] hearing, as well as allegations in the verified complaint, however, indicate a reasonable likelihood that the plaintiffs could prevail on this aspect. While the court emphasises that its view is preliminary and not intended to absolve the plaintiffs of any potential criminal liability, plaintiffs make a reasonable argument that the images presented to the court do not appear to qualify in any way as depictions of prohibited sexual acts. Even if they were such depictions, the plaintiffs' argument that the evidence to this point indicates that the minor plaintiffs were not involved in disseminating the images is also a reasonable one. Thus, a reasonable likelihood exists that plaintiffs will succeed on the merits, and this factor weighs in favour of granting a TRO.¹²

It is interesting to note that in this case the "victims" of child pornography and the parties responsible for it are one and the same — an absurd situation bearing in mind the serious purpose for child pornography laws.

Alternative approach

Strong policy reasons speak in favour of an alternative approach being developed.

Several problems emerge from lumping sexting teens into the same category as depraved criminals who inflict harm on minors. First, and perhaps most obvious, teenagers engaged in sexting are not knowingly harming minors in the same way that traditional child pornographers do. [...] Second, the draconian penalties that stem from child pornography convictions can decimate a teenager's life making it all but impossible for the teen to become a productive member of society. [...] Finally, the stigma attached to being labelled a child pornographer is lasting. Few crimes carry such a pejorative marker, and members of the public often link child pornography with paedophilia and other heinous crimes — sometimes for good reason.¹³ [internal footnotes omitted]

Further, it has been noted that there is also a cost to society in that classing sexting teenagers as child sex offenders "severely dilutes the importance and utility of the sex offender registry".¹⁴

Australian law makers cannot ignore these problems. Even if prosecutors take greater care than some of their US counterparts and avoid prosecuting sexting teenagers, the fact that the law groups their behaviour with arguably the most offensive crime of all remains a problem.

Conclusion

Sexual curiosity among teenagers is, of course, nothing new, and the fact that technology plays an important

part in the life of teenagers comes as no surprise. Yet Australia's law is poorly equipped to deal with sexting. Australian law makers must take clashes between the law and technologies and their use seriously and address them as they arise. Sexting is merely one example.

Dr Dan Jerker B Svantesson,
Associate Professor,
Faculty of Law, Bond University

Footnotes

1. A combination of the words "sex" and "texting", sexting can be defined as the electronic communication of non-professional images or videos portraying one or more persons in a state of nudity or otherwise in a sexual manner.
2. Kids Helpline www.kidshelp.com.au/teens/get-info/hot-topics/sexting.php.
3. *Sex and Tech: Results from a survey of teens and young adults* National Campaign to Prevent Teen and Unplanned Pregnancy (2008) at www.thenationalcampaign.org/SEXTECH/PDF/SexTech_Summary.pdf. This article examines how Australia's regulation of child pornography may impact on sexting.
4. Defined to include sending, supplying, exhibiting, transmitting or communicating it to another person (such as via MMS), or the act of making it available for access by another person (such as posting it on a website): Crimes Act 1900 (NSW), s 91H(1).
5. Defined to mean "material that depicts or describes (or appears to depict or describe), in a manner that would in all the circumstances cause offence to reasonable persons, a person who is (or appears to be) a child: (a) engaged in sexual activity, or (b) in a sexual context, or (c) as the victim of torture, cruelty or physical abuse (whether or not in a sexual context)": Crimes Act 1900 (NSW), s 91H(1).
6. Criminal Code Act 1995 (Cth) ss 474.19 and 474.20.
7. Richards RD and Calvert C, "When Sex and Cell Phones Collide: Inside the Prosecution of a Teen Sexting Case" (2009) 32 *Hastings Comm & Ent LJ* 1 at www.firstamendment.com/articles/AlpertArticle.pdf.
8. Berger V, "Stop Prosecuting Teens for 'sexting'", (2009) *National Law Journal* <http://find.galegroup.com/gtx/start.do?prodId=AONE&userGroupName=bond>.
9. Above.
10. Part of the re-education would have involved the girls having to write an essay about why what they did was wrong.
11. *Miller v Skumanick* 605 F Supp 2d 634 at 640.
12. Above, at 645–6.
13. Above n 7 at 35.
14. Above. For information about the Australian National Child Offender Register (ANCOR), see: www.crimtrac.gov.au/systems_projects/AustralianNationalChildOffenderRegisterANCOR.html.