



The Executive Officer
Law Reform Committee
Parliament of Victoria
Spring Street, East Melbourne VIC 3002

Via email to: vplrc@parliament.vic.gov.au

15th June 2012

Dear Dr Koops,

Re: Inquiry into Sexting

Electronic Frontiers Australia (EFA) appreciates the opportunity to make this submission in relation to the Inquiry into Sexting.

About Electronic Frontiers Australia

Electronic Frontiers Australia Inc. (EFA) is a non-profit national organisation representing Internet users concerned with on-line rights and freedoms. EFA was established in 1994, is independent of government and commerce, and is funded by membership subscriptions and donations from individuals and organisations with an altruistic interest in promoting online civil liberties.

EFA's board members, volunteers, staff and supporters, past and present, include a large number of people with significant expertise and active involvement in these issues, via industry, academia, and civil society. EFA has always had as a goal of its advocacy work not only to lobby for the particular principles it supports, but also to contribute the expertise developed to policy development and public debate.

This is a response to the inquiry into "creating, sharing, sending or posting of sexually explicit messages or images via the internet, mobile phones or other electronic devices by people, especially young people, (known as 'sexting')".

The phenomenon of 'sexting' has been referred to, and defined, elsewhere, and is recognised a problematic issue in several jurisdictions. For example, the US National Center for Missing and Exploited Children (NCMEC) defines it as "youth writing sexually explicit messages, taking sexually explicit photos of themselves or others in their peer group, and transmitting those photos and/or messages to their peers."

Prevalence

We are unaware of research about the prevalence of sexting in Victoria. Research into sexting has been undertaken in other jurisdictions, some of which may be expected to have roughly similar attitude. It seems very likely that sexting is a relatively common phenomenon. Estimates of the prevalence of sexting in various jurisdictions range from 8% to over 20%.

It is relatively difficult to assess the prevalence of sexting without well-designed research. Peer pressure or concerns about reactions of parents or authority figures may make

teenagers unwilling to respond honestly in situations where their privacy is not guaranteed. Research also indicates that a significant amount of sexting takes place between teenagers who are in a sexual or romantic relationship, where it remains private and is not shared inappropriately, and thus is not discoverable other than by disclosure of those involved. The prevalence of sexting behaviour can therefore be masked in situations where it remains unproblematic.

Appropriateness of Existing Laws

We note that under Victorian law it is a defence against a charge of possession of Child Pornography under section 70.2.(d) of the Crimes Act to be a minor of a similar age to the minor depicted, or to be the minor in question. From this it would appear that consensual sexting that is not inappropriately shared is not criminalised under Victorian law (though, of course, Victoria is still subject to Federal Child pornography law). EFA regard this aspect of Victorian law as appropriate. If trust is maintained between participants and no inappropriate sharing occurs, sexting has no problematic consequences, including legal consequences (and nor should it have legal consequences between teenage couples who are legally able to have a sexual relationship). Sharing of a sexual image between two young people who are able to legally consent to sexual activity with one another may not always be wise, but it should not be criminalised.

Child pornography laws are designed to prevent child sexual abuse, and to discourage material that encourages paedophilia. Consensually produced material between minors is not abusive, and paedophilia does not apply to minors. It is thus inappropriate for Child pornography laws to apply to private sharing of material between consenting minors.

The issue arises when 'sexting' media is shared beyond those for whom it is intended. Non-consenting dissemination of sexual images is the issue that should be addressed, not the mere creation or private possession of such images. The issue then becomes a complex one. Without knowledge of the circumstances of the creation of an image creation, there is nothing intrinsic to an image that makes it possible to tell whether an image was created consensually. It is possible for images to be shared well beyond their origin, making knowledge of the circumstances of creation difficult. Therefore, even when an image is produced consensually, if it is non-consensually shared there is nothing intrinsic to distinguish it from material that would qualify as child pornography.

Even when such considerations do not apply (such as when material is only shared between minors) significant psychological harm can result, and that harm may be intentional, and may therefore be considered criminal. But is such harm of a sexual nature, and should the offender therefore be considered a sex offender if a minor?

EFA believes that such inappropriate, non-consensual, sharing should be considered in the context of cyber-bullying and other emotionally damaging interactions between teenagers, and that concentrating on child pornography law in this context is inappropriate. Images that are not sexually explicit enough to qualify as sexting or child pornography can still be similarly disseminated with an intent of emotional damage, and should be considered part of the same problem of cyber-bullying. Even when the intention is to cause harm to another (which should be illegal) the intent may not be sexual, and no purpose is served by placing a minor who offends in this way on a sex-offenders register.



Accordingly, it is our opinion that prosecutions under child pornography law, and the placing of minors on sex-offender registers, are issues that should be decided on a case by case basis by a judge or other expert. These legal remedies are inappropriate in many cases, and no useful purpose is served, and much harm done, by their inappropriate application.

Education

EFA considers that education that focusses on child pornography laws and the legal consequences of sexual content is inappropriate. These legal remedies are frequently inappropriate, and education should not concentrate on the danger of poor policy choices within the legal system. Rather, the issue should be considered as part of the wider problem of cyber-bullying, which itself should not be considered separately to other forms of bullying, but integrated into anti-bullying programmes and responses. Sexually explicit material is far from being the only form of material that can be used as part of a bullying campaign, and cyber-bullying campaigns should not determine their response primarily by the nature of the material, but by its potential and intention for psychological harm.

EFA considers education that emphasises the significant trust intrinsic in the sharing of intimate photography and other media as appropriate. Further, EFA suggest that educational programmes should:

- emphasise the importance of respecting the privacy of other students,
- emphasise that trust violation is a serious issue and an inappropriate way to express anger or other negative emotions, and;
- teach students how to preserve their own privacy and reduce the potential for inappropriate sharing.

EFA does not consider online surveillance of students as a proposed solution to this issue as appropriate. Rather than providing an effective solution to this issue, such surveillance will infringe on student's privacy rights, thereby undermining any messaging that seeks to focus on the importance of respect for privacy.

Summary

Sexting is a widespread phenomenon that, while problematic, may be harmless in many, if not the majority of cases. Where it is a consensual exchange between two minors the law should not become involved, and this is recognised by Victorian law. Where it does become a problem, the primary issue is use of sexually explicit media in a context of cyber-bullying or online shaming. EFA believes strategies to deal with this issue should be similar to those employed for the wider issue of bullying. It is however recognised that while sexting and child pornography are separate issues (and the laws of Victoria do reflect this), there is some potential overlap, particularly when material is distributed well beyond the initial creator or intended recipient. Given that determining whether a sexting act falls within the realm of child pornography is contingent on the specific circumstances in each case, and that the consequences for the individuals involved can be extremely serious, EFA believe that the flexibility of responses available to the judiciary, and also to those handling cases within the school system, should be increased as much as practicable.

Please do not hesitate to contact us should the Committee desire any additional information or explanation. EFA will also be happy to provide a representative to appear before the Committee, if appropriate.

Yours sincerely,

A handwritten signature in black ink, appearing to read "David Cake", written in a cursive style.

David Cake
Chair, Electronic Frontiers Australia