'Sexting', Children and Child Pornography

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Abstract

Public, media and political concern has grown in recent years over the practice of children using new media technologies to send or distribute sexually explicit images of themselves or others to their peers, a practice commonly known as 'sexting'. Common platforms for such practices include mobile phone messaging and social network sites, such as Facebook, MySpace and YouTube. This article explores current legal frameworks within Australia which may apply to sexting. Most alarmingly, young people engaging in sexting may fall foul of child pornography laws that are ill designed to deal with such practices and from which age provides little protection. Indeed, young people face being placed on sex offender registers for behaviour they may think of as simply having some fun among friends. The article argues that the existing legislation lacks the capacity to discriminate properly between a broad range of activities with divergent motivations, the presence or absence of consent, and differing levels of potential harm. It concludes by suggesting that the current legislative framework has the potential to produce more harms than many of the practices it seeks to regulate.

I Introduction

In recent years there has been growing societal concern over the practice of 'sexting' among young people. 'Sexting' concerns the digital recording of sexually suggestive or explicit images and distribution by mobile phone messaging or through the internet on social network sites, such as Facebook, MySpace and YouTube.[1] News media have caught onto this phenomenon with increasing reports of children being charged with child pornography offences in relation to sexting. In 2008 *The Age* claimed that in the previous year 32 teenagers had been charged

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1 See, eg, Joint Select Committee on Cyber-Safety, Parliament of Australia, *High Wire Act: Cyber Safety and the Young, Interim Report* (June 2011) 136 [4.47]. Moran-Ellis, however, notes that there is a lack of clarity over the term 'sexting' and what behaviours it specifically covers: see Jo Moran-Ellis, 'Sexting, Intimacy and Criminal Acts: Translating Teenage Sextualities' in Paul Johnson and Derek Dalton (eds), *Policing Sex* (Routledge, 2012) 115.

with child pornography offences as a result of sexting in Victoria.[2] Three years later the *Herald Sun* could not obtain figures of how many young people had been charged with child pornography offences in Victoria, but based on the news item in 2008, estimated the number to be in the hundreds.[3] *The Sunday Mail* agreed but was more specific with numbers, claiming that '[i]n the past three years, more than 450 child pornography charges have been laid against youths between the ages of 10 and 17.'[4] Such media reports generally lack case specific details, which makes it difficult to determine their accuracy and assess what specific sorts of behaviours are leading to charges and convictions. More recent reports are beginning to cast doubts on these claims and suggest that they are grossly exaggerated. In 2012, the *Herald Sun* reported, in remarkable contrast to its 2008 report, that police were turning a blind eye to teenage sexting and that in the past four years only two teenage boys had been charged with pornography offences under the *Criminal Code Act 1995* (Cth) sch 1 ('*Criminal Code* (Cth)') and five others had been let off with a caution for sexting.[5] In the same year in evidence before the Victorian Law Reform Committee's Inquiry into Sexting, the Acting Commander of Victoria Police noted that there were no examples of under-18-year-olds going to court for offences relating to sexting alone.[6]

In order to give some context to the flurry of somewhat contradictory media attention and gain a better understanding of whether, and how, children[7] might be liable to prosecution under child pornography laws, this article will explore the relevant legal provisions and issues applicable to sexting in Australia.[8] It will be argued that when laws were being strengthened to deal with the increased threats that new technologies pose in relation to the possession, creation and distribution of child pornography, little attention was initially given to the possibility that children could be caught up in these laws. Moreover, there is currently little to prevent children from being prosecuted and facing severe sanctions, including placement on sex offender registers with all the flow-on negative consequences

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2 Lucy Battersby, 'Alarm at Teenage "Sexting" Traffic', *The Age* (online), 10 July 2008 <http://www.theage.com.au/national/alarm-at-teenage-sexting-traffic-20080709-3clg.html>.

3 Susie O'Brien, 'Teen Sexters Are Not Criminals', *Herald Sun* (online), 11 October 2011 <http://www.heraldsun.com.au/opinion/teen-sexters-are-not-criminals/story-e6frfhqf-1226163442450>.

4 Jason Tin, 'More than 450 Child Pornography Charges Laid against Youths Aged 10 to 17 in Past Three Years', *The Sunday Mail* (online), 9 October 2011 <http://www.couriermail.com.au/news/queensland/more-than-450-child-pornography-charges-laid-against-youths-aged-10-to-17-in-past-three-years/story-e6freoof-1226162048084>.

5 Natasha Bita, 'Sexting Teens Risk Porn Charge', *Herald Sun* (online), 1 October 2012 <http://www.heraldsun.com.au/news/national/sexting-teens-risk-porn-charge/story-fndo45r1-1226484895382>.

6 Evidence before the Inquiry into Sexting, Victorian Law Reform Committee, 18 September 2012, 13 (Acting Commander, Neil Paterson, Victoria Police).

7 The terms 'child' and 'children' will be used throughout this article to refer to persons under the age of 18.

8 Aside from child pornography laws, offences such as inciting an act of indecency (see, eg, *DPP (NSW) v Eades* [2009] NSWSC 1352 ('*Eades*')) or publishing an indecent article may cover 'sexting' cases. Civil laws, such as defamation, privacy and breach of confidence, may also apply to such behaviours. For an overview of applicable laws see Dan Svantesson, '"Sexting" and the Law — How Australia Regulates Electronic Communication of Non-Professional Sexual Content' (2010) 22(2) *Bond Law Review* 41. The focus of this article is child pornography offences, given these are the most serious offences applicable and carry severe penalties.

that this may have for their future. The article will finally assess the appropriateness of applying criminal laws to the widely varying scenarios that may be regarded as 'sexting'.

II Legal Framework

In the last decade there has been considerable activity in Australia to reform criminal laws to better protect children from exploitation as the subjects of pornography or abuse material, and to protect them from the harms associated with viewing such material. Within Australia, the states and territories have primary responsibility for criminal law, with the Commonwealth having power to make criminal laws only in specific areas; for instance, relating to external affairs or the use of carriage services[9] (that is, means of communication, such as mobile telephone networks and the internet which operate across jurisdictions).[10] Thus, in relation to child pornography, while Australian state and territory laws are used to deal with 'conduct occurring in "real life," the Commonwealth's offences ensure that offenders are also prevented from using particular carriage service networks to disseminate child pornography material.'[11] In response to the realisation that new technological tools, such as the internet and mobile phones, facilitate the creation and distribution of child pornography, the federal government has moved to strengthen laws dealing with child sex-related offences. As noted in the report of the Commonwealth Attorney-General's Department on reforming this area of law:

> While previously child pornography was relatively hard to find, internet technologies such as newsgroups and chat rooms have resulted in the move of child pornography onto the internet in a major way. The internet is rapidly becoming the most important exchange medium for child pornography and allows paedophiles and other child pornography exploiters the opportunity to make contacts worldwide.[12]

New technologies are thus seen to be fuelling the exploitation of children, not only by increasing demand for 'ever greater levels of depravity' but also 'through the repeated distribution of the image, or images, through international networks.'[13] In light of such rapid technological developments, it was recognised that a 'proactive approach to updating criminal laws' was needed, with the federal government taking 'an important leadership role in this area' by creating new Commonwealth offences designed to 'provide a springboard to a national approach to this issue.'[14] At the Commonwealth level, this has led to the inclusion of 'a range of important new measures dealing with the use of the Internet to facilitate or exploit the sexual abuse of children' into the *Criminal Code* (Cth) through the

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9 The *Australian Constitution* s 51 details the legislative powers of the Commonwealth Parliament; 'crime' is not one of those heads of power.

10 *Telecommunications Act 1997* (Cth) s 7.

11 Criminal Justice Division, Attorney-General's Department (Cth), *Proposed Reforms to Commonwealth Child Sex-Related Offences* (2009) 11 [44].

12 Ibid 10–11 [43].

13 Ibid 44 [245].

14 Commonwealth, *Parliamentary Debates*, House of Representatives, 4 August 2004, 32 035–6 (Peter Slipper).

Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Act (No 2) 2004 (Cth).[15]

A *Definition of Child Pornography*

A significant feature of the Commonwealth criminal law is that it aims clearly to detail the sort of material that is subject to prohibition and hence distinguish and extensively define child abuse material and child pornographic material. This is in response to the notorious difficulty of delineating licit from illicit material. As Makkai notes:

> Investigations into the widespread possession of online child sexual abuse images reveal enormous variety in the types of images collected by adults with a sexual interest in children. While there is almost universal condemnation of the sexual exploitation of children through such images, it is not possible to define precisely what constitutes an illegal child sexual abuse image. This is because the concept is broad, changeable and, at the margins, elusive.[16]

Given that the consequences of a child pornography conviction are relatively severe and include placement on sex offender registers, it is important that the definition of what amounts to child pornography or abuse material is as precise as possible. At the same time, the definition must be flexible enough to ensure that certain images of children — for example, innocent family pictures of a naked/semi-naked child and images legitimately used in artistic or scientific contexts — fall outside the definition, while being able to criminalise images, which may have the same subject matter, but which are made or held for sexualised purposes. Where the images show sexual behaviour with or in the presence of a child, or where the child is in a sexualised pose, there should be relatively little difficulty subsuming such an image under the definition of child pornography. More problematic are images of naked children, which may show genitalia, the anal region or breasts. Here much may depend on the context of the image; for example, where it is taken and whether it is taken surreptitiously and without consent.[17] Even more complex is the issue of images which the everyday viewer would regard as innocuous but which may be sexualised by the viewer (sometimes referred to as the 'paedophilic gaze'[18]). Again, here context must be the key to determining whether such images amount to child pornography. As Krone notes, the number of images, how they are organised and the context in which they are taken, stored etc, may all indicate a sexual interest.[19]

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15 Ibid 32 035. More recent amendments have been made through the *Crimes Legislation Amendment (Sexual Offences Against Children) Act 2010* (Cth).

16 Toni Makkai in Tony Krone, 'Does Thinking Make it So? Defining Online Child Pornography Possession Offences', *Trends and Issues in Crime and Criminal Justice* (No 299, April 2005) 1.

17 Ibid 4. For discussion of the relationship between art and obscenity (and child pornography) based on the furore surrounding artist Bill Henson's exhibition containing images of naked children, see Dave McDonald, 'Policing Obscenity' in Paul Johnson and Derek Dalton (eds), *Policing Sex* (Routledge, 2012) 99.

18 See Krone, above n 16, 5, quoting Max Taylor and Ethel Quayle, *Child Pornography: an Internet Crime* (Brunner-Routledge, 2003).

19 Krone, above n 16, 5.

The approach taken in the *Criminal Code* (Cth) is to define child pornography by reference to the behaviour or bodily parts depicted or described combined with a test of whether 'reasonable persons' would find this to be offensive. Reference to the standards of reasonable persons could perpetuate difficulties defining precisely what material amounts to child pornography. It may also lead to concerns that different standards are applied. Nonetheless, this requirement is designed to prevent over-reach of the criminal law by allowing 'for consideration of context in the way an image is made or the way in which an image is viewed'.[20] Thus, community standards should be reflected in the determination of whether the material is offensive and should be classified as pornography, particularly where the trial is by jury. Accordingly, the *Criminal Code* (Cth) defines child pornography as material that depicts or describes a person (or a representation of a person) who is under 18 years old (or who appears to be under 18), either engaged in (or appearing to be engaged in) a sexual pose or sexual activity or in the presence of a person who is engaged in (or appears to be engaged in) a sexual pose or sexual activity.[21] The definition also includes material where the dominant characteristic of that material is the depiction, description or representation for a sexual purpose, of the sexual organ, anal region of a person or breasts of a female person, who is, or who appears to be, under 18. In all these instances the depiction or description must be framed in such a way that reasonable persons would regard as being, in all the circumstances, offensive.

B *Child Pornography Offences*

The *Criminal Code* (Cth) does not contain a broad range of offences concerning child pornography. Rather, in line with the Commonwealth's power to make criminal law, the offences are linked to the mode by which the child pornography or child abuse material is accessed, transmitted or made available.[22] Thus, the *Criminal Code* (Cth) prohibits the use of a carriage service (that is, telephone, mobile telephone, internet etc)[23] to access, transmit or make child pornography available.[24] Alongside criminalising the use of the communication technology for these purposes, the *Criminal Code* (Cth) includes the preparatory offences of possessing or producing such material with the intent to place it on the internet or distribute it through a mobile network.[25] Given that sexting generally concerns the transmission (or creation with the intention of transmission) of material by mobile phone or the internet, most cases of sexting will fall under the *Criminal Code* (Cth). Further, in line with the Commonwealth's jurisdiction over external affairs,[26] possessing, controlling, producing, distributing or obtaining child pornography or child abuse material outside Australia are also prohibited by the *Criminal Code* (Cth).[27] Such behaviours within Australia or where there is no

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20 Ibid 2.
21 *Criminal Code Act 1995* (Cth) sch 1 ('*Criminal Code* (Cth)') s 473.1.
22 *Commonwealth Consitution* s 51(v).
23 *Telecommunications Act 1997* (Cth) s 7.
24 *Criminal Code* (Cth) ss 474.19, 474.22.
25 Ibid ss 474.20, 474.23.
26 *Commonwealth Consitution* s 51(xxix).
27 *Criminal Code* (Cth) ss 273.5, 273.6.

intention to place such material on the internet or distribute it by mobile phone are matters for the criminal law of the states and territories.

C *State and Territory Child Pornography Laws*

All states and territories have laws, variously defined, prohibiting the creation, possession and distribution of child pornography and child abuse material[28] and, while several jurisdictions have adopted Commonwealth terminology and definitions, there remains a notable degree of difference in detail throughout Australia. Some jurisdictions have assumed the umbrella term 'child exploitation material' (Queensland, Tasmania and Western Australia)[29] to cover both child pornography and child abuse material, while others have adopted the term 'child abuse material' to cover both child pornography and abuse material (New South Wales and the Northern Territory)[30] or refer only to child pornography (the Australian Capital Territory, South Australia and Victoria).[31] There are also differences in the extent to which definitions are given of child pornography and abuse material. The Commonwealth definition of child pornography, combining the description or depiction of certain behaviour or body parts with an assessment of its offensiveness by reasonable persons, is relatively closely followed by New South Wales, Western Australia, Queensland, Tasmania and the Northern Territory.

New South Wales adopted the terminology and definitions in the *Criminal Code* (Cth) as recommended by the New South Wales Child Pornography Working Party.[32] A 'child' is now defined as 'a person under the age of 16'[33] and 'child abuse material' is defined as:

> material that depicts or describes, in a way that reasonable persons would regard as being, in all the circumstances, offensive … a child engaged in or apparently engaged in a sexual pose or sexual activity … or … a child in the presence of another person who is engaged or apparently engaged in a sexual pose or sexual activity, or … the private parts of a person who is … a child.[34]

For the purposes of determining whether material is offensive, the standard to be applied is 'the standards of morality, decency and propriety generally accepted by reasonable adults … the literary, artistic or educational merit … the journalistic merit … and … the general character of the material'.[35] In all instances, the material will be deemed child pornography even if the subject is not

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28 There are also a range of other offences which may apply to sexting scenarios, such as offences relating to indecency.

29 *Criminal Code Act 1899* (Qld) sch 1 s 207A ('*Criminal Code* (Qld)'); *Criminal Code Act 1924* (Tas) sch 1 s 1A ('*Criminal Code* (Tas)'); *Criminal Code Act Compilation Act 1913* (WA) sch 1 s 217A ('*Criminal Code* (WA)').

30 *Crimes Act 1900* (NSW) s 91FB(1); *Criminal Code Act 1983* (NT) sch 1 s 125A(1) ('*Criminal Code* (NT)').

31 *Crimes Act 1900* (ACT) s 64(5); *Criminal Law Consolidation Act 1935* (SA) s 62; *Crimes Act 1958* (Vic) s 67A.

32 New South Wales Department of Justice and Attorney-General, *Report of the Child Pornography Working Party* (January 2010) 3.

33 *Crimes Act 1900* (NSW) s 91FA.

34 Ibid s 91FB(1).

35 Ibid s 91FB(2)(a).

a child but appears or is implied to be under 16. The definition of child exploitation material/child pornography in Queensland, the Northern Territory ('child abuse material'), Tasmania and Western Australia is relatively similar. It encompasses material depicting, describing or representing a child (or, in Western Australia, a part of a child), or someone who appears to be a child, in a sexual context or engaged in a sexual act in a way likely to offend a reasonable person.[36] A different approach can be found in South Australia, the Australian Capital Territory and Victoria.

In South Australia and the Australian Capital Territory, rather than requiring a determination that the material is offensive to the ordinary or reasonable person, the material depicting or describing a child engaged in sexual activity or a body part of the child must be such that it is intended, or apparently intended, to excite or gratify sexual interest (South Australia) or substantially for the sexual arousal or sexual gratification of someone other than the child (Australian Capital Territory).[37] In Victoria, child pornography is defined as 'a film, photograph, publication or computer game that describes or depicts a person who is, or appears to be, a minor engaging in sexual activity or depicted in an indecent sexual manner or context'.[38] Although not expressly stated, an assessment of community standards would be incorporated within an assessment of indecency.[39]

Perhaps even more surprising, and of particular concern in the context of sexting, is the fact that three different age levels can be found in Australia for the definition of a child in relation to child pornography and abuse material. In New South Wales, Queensland and Western Australia the material must relate to a child who is, or who appears to be, under 16,[40] while in South Australia the relevant age level is under 17,[41] and in the remaining jurisdictions the material must relate to a child who is or appears to be under 18.[42] These age levels are generally higher than the age of consent, with the age of consent being 16 in all jurisdictions, except for South Australia and Tasmania where the age of consent is 17, and Queensland where the general age of consent of 16 is raised to 18 for anal intercourse.

III Ignorance of Children as Potential Offenders

The above review of the legal framework in Australia reveals that, despite differences in the approaches to criminalising child pornography, a wide range of activities undertaken by children and encompassed by the term 'sexting' could amount to a criminal offences due to the broad definitions given to child pornography. Given this possibility, it might be expected that provision would be made to prevent the prosecution of children for such severe offences as creation,

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36 *Criminal Code* (NT) s 125A(1); *Criminal Code* (Qld) s 207A; *Criminal Code* (Tas) s 1A; *Criminal Code* (WA) 217A.

37 *Crimes Act 1900* (ACT) s 64(5); *Criminal Law Consolidation Act 1935* (SA) s 62.

38 *Crimes Act 1958* (Vic) s 67A.

39 In relation to indecent assault, *Harkin v The Queen* (1989) 38 A Crim R 296 established that the appropriate test is whether the right-minded person would consider the conduct indecent.

40 *Crimes Act 1900* (NSW) s 91FA; *Criminal Code* (Qld) s 207A; 1; *Criminal Code* (WA) s 217A.

41 *Criminal Law Consolidation Act 1935* (SA) s 62.

42 *Legislation Act 2001* (ACT) pt 1; *Criminal Code* (NT) s 1; *Criminal Code* (Tas) s 1A; *Crimes Act 1958* (Vic) s 67A.

possession or dissemination of child pornography, particularly given media reports of the prevalence of sexting. This is, however, not the case. The only jurisdiction to provide a specific defence for children (only in relation to possession of child pornography) is Victoria, and this predates concern over prosecution of children in relation to sexting. According to *Crimes Act 1958* (Vic) s 70(2)(e), a defence applies to prevent a minor who appears in the material deemed to be pornographic from being charged with possessing child pornography. Also under *Crimes Act 1958* (Vic) s 70(2)(d) it is a defence to a charge of possessing child pornography that the accused who made or was given material by a minor was not more than two years older than the minor appeared to be. Victoria is also the only jurisdiction to date to launch an inquiry into the practice of sexting and this only occurred in 2011.[43]

None of the other jurisdictions provides any specific defence to prevent a child from being prosecuted for a child pornography/child abuse offence in relation to sexting. Indeed, a reading of reports on child pornography indicates that while there is a clear concern to protect children from exploitation by adults as subjects of child pornography, no thought was given until very recently to the chance that children might themselves be found to be offenders under these laws. For instance, no mention can be found of the possibility of children being the creators, possessors or distributors of sexualised images in the Commonwealth Attorney-General's Department's *Proposed Reforms to Commonwealth Child Sex-Related Offences* and the New South Wales Briefing Paper on child pornography laws (2008).[44]

One of the first times that attention was directed in the Australian Parliament to the issue of children being prosecuted under child pornography offences for sexting was in early March 2010 during debate on the Crimes Legislation Amendment (Sexual Offences Against Children) Bill 2010.[45] In evidence before the Senate Legal and Constitutional Affairs Legislation Committee inquiry into this Bill, Clarke and Svantesson, representing the Australian Privacy Foundation, drew on examples of children being prosecuted for pornography offences in the US for sexting and expressed concern over the possibility of children being prosecuted in Australia.[46] Svantesson stated that:

> The key task in relation to the bill would be to find some sort of exception, defence or something along those lines excluding sexting from child pornography offences while at the same time avoiding creating some sort of a loophole that can be used by serious child pornography offenders.[47]

Picking up on this concern, the Liberal member for Cowan, Luke Simpkins, commented:

> I agree that sexting is not in its original sending intentionally child pornography, yet it may be the next time it is transmitted or the time after that.

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43 Victorian Law Reform Commission, 'When Sex Goes Tech' (2011) 85(11) *Law Institute Journal* 79.

44 Attorney-General's Department (Cth), above n 11; Gareth Griffith and Kathryn Simon, 'Child Pornography Law' (Briefing Paper No 9/08, Parliamentary Library, New South Wales Parliament, 2008).

45 This Bill was mainly concerned with strengthening existing offences in relation to sexual offending against children overseas: see Commonwealth, *Parliamentary Debates*, House of Representatives, 24 February 2010, 1763 (Michael Keenan).

46 Legal and Constitutional Affairs Legislation Committee, Inquiry into the Crimes Legislation Amendment (Sexual Offences Against Children) Bill 2010, Commonwealth, *Parliamentary Debates*, Senate, 9 March 2010, 2–5 (Roger Clarke and Dan Svantesson).

47 Ibid 2.

> I think that, when you look at the intention involved, there could be an offence. I would, however, say that it is not healthy behaviour of teenagers to win favour with their friends by sending them fully or partially naked photos, nor is it right for so-called friends to pressure other young persons to have their photo taken and send it to others … I think there is a need for some penalties in these cases in order to discourage this unhealthy behaviour. I would, however, say that, given that the intention was not originally to be child pornography, the distinction can be made.[48]

Brendan O'Connor, Minister for Home Affairs, also noted these concerns but was not in favour of a blanket ban on the prosecution of children for sexting or the creation of a defence. He stated that the Bill under discussion did not change the offences available to prosecute transmission of child pornography, but rather sought to increase the maximum penalty for transmission from 10 to 15 years imprisonment:

> The changes to the maximum penalties are not targeted at sexting but are intended to ensure laws address the contemporary nature of online adult offending. Excluding the sending of child pornography or child abuse material by young people from the proposed offences would be inappropriate, as it might reduce protections for young people. For example, instances of young people sending sexually explicit images of themselves or other young people may in some cases be malicious or exploitative. Although the child pornography offences could potentially apply to young people, there is scope for law enforcement and prosecution agencies to take the circumstances of a particular case into account before proceeding to investigate or proceeding to prosecute.[49]

Following this debate, rather than excluding children from the reach of child pornography offences, an amendment was made to the Bill, which was included in the *Criminal Code* (Cth), to require the permission of the Attorney-General before a child under 18 can be prosecuted under child pornography laws.[50]

This neglect, until very recently, to reflect on how child pornography laws may apply to children as offenders, is surprising given the rate at which children make use of technology and the fact that it is acknowledged that '[t]he online environment is an essential tool for all Australians, including children'.[51] Indeed, as Arcabascio notes, '[i]t is unlikely that today's teenagers recognize or recall a world without cellular phones and texting.'[52] The curious, explorative and impulsive nature of children mean that '[i]t is no wonder that when you combine the natural state of a teenager with technology, something like "sexting" is born.'[53] The delayed reaction is all the more surprising considering that, at the same time as government reports on child pornography were being prepared, the media were

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48 Commonwealth, *Parliamentary Debates*, House of Representatives, 9 March 2010, 2046 (Luke Simpkins).

49 Ibid 2051 (Brendan O'Connor).

50 See Crimes Legislation Amendment (Sexual Offences Against Children) Bill 2010 (Cth); Commonwealth, *Parliamentary Debates*, House of Representatives, 18 March 2010, 3017 (Anthony Albanese). Sections 273.2A and 474.24C were inserted into the *Criminal Code* (Cth).

51 Joint Select Committee on Cyber-Safety, above n 1, 1.

52 Catherine Arcabascio, 'Sexting and Teenagers: OMG R U Going 2 Jail???' (2009–10) 16(3) *Richmond Journal of Law and Technology* 1, 5.

53 Ibid 7.

already reporting cases of children being prosecuted for sexting. For example, a year before release of the Commonwealth Attorney-General Department's paper it had been claimed in *The Age* that, in the previous year, 32 teenagers had been charged with child pornography offences as a result of sexting in Victoria.[54]

It may well be that initially governments did not anticipate this particular use of new technologies. The omission to consider the position of children may also be due to the profound discomfort that adults feel at children exploring their sexuality. As Jackson states, '[c]hildren are still not generally treated as sexual beings and the possibility that they might be makes many of us feel uneasy.'[55] Faulkner similarly notes that:

> The 'child' is reduced, in the common imagination, *to one without worldly experience or desire*: a passive object of *others'* protection, abuse and control. It is thus difficult for some to conceptualise the transition to the activity and knowledge of adulthood. And this is especially so concerning *sexual* activity and knowledge.[56]

This uneasiness combined with fervour to stamp out child abuse and exploitation appears to have resulted in a general unwillingness to examine whether and how the law should distinguish normal childhood experimentation and exploration of sexuality from child abuse and exploitation. The debate in the Australian Parliament when the issue was at last directly raised in 2010 also confirms these themes. There was a reluctance to eliminate the possibility of conviction because of the fear that it would weaken protection for children. Added to this was the desire to retain the possibility of conviction to deter children from this 'unhealthy behaviour'.[57] The result is that, in Australia, child pornography laws do apply to children (subject to permission of the Attorney-General under the *Criminal Code* (Cth) and a defence in relation to possession in Victoria) and, if media reports are to be believed, increasing numbers of children are being charged with these offences for sexting.[58] With this in mind, the following examines both what factors may trigger prosecution, and what factors might protect children from prosecution under child pornography laws.

IV Triggers and Protections

A *Definition of Child Pornography*

As we have demonstrated, the definition of child pornography makes it possible that children may be prosecuted not only for taking images of themselves or others involved in sexual activity or a sexual pose, but also, depending on the jurisdiction, an image of the genital, breast or anal region if 'reasonable persons' would find this offensive or if this has a sexual purpose or context. Given, as noted above, the

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54 Battersby, above n 2.

55 Stevi Jackson, *Childhood and Sexuality* (Basil Blackwell, 1982) 3.

56 Joanne Faulkner, 'Vulnerability and the Passing of Childhood in Bill Henson: Innocence in the Age of Mechanical Reproduction' (2011) 11 *Parrhesia* 44, 53, n 11 (emphasis in original).

57 Commonwealth, *Parliamentary Debates*, House of Representatives, 9 March 2010, 2046 (Luke Simpkins).

58 Although more recent reports cast doubt on the accuracy of these claims: see above nn 5–6.

general moral discomfort at children's expressions of, and experimentation with, sexuality,[59] it may well be that 'reasonable persons' would indeed find such images offensive. As Egan and Hawkes note:

> [if] the transgression (perceived or real) goes too far in breaching dominant cultural constructions of childhood and the mystique surrounding its innocence, children may find themselves outside the classification and protection of 'childhood' itself.[60]

Taking an adult view of the images may lead to a profoundly different conceptualisation or construction of the images to that of a young person. Indeed, some jurisdictions expressly state that the determination is to be made from the view of the adult, thus clearly ruling out any age appropriate modification of the standard to be applied.[61] Viewed with adult eyes, a naked image of a child's genitals might well be regarded as offensive, particularly if revealed as part of an act of flirtation to attract a boyfriend or girlfriend, or where the image-taking has been encouraged by a boyfriend or girlfriend. A child beginning to explore his or her sexuality, on the other hand, may well see consensually taking an image of his or her partner (or themselves) as simply 'a bit of fun'.[62] Particularly where consent is given to the creation, possession and distribution of the images, young people may not see anything at all wrong with this form of sexting. Indeed, the majority of respondents (58 per cent) in a survey from 2007 did not see posting personal information and images on internet sites as unsafe and 47 per cent were unconcerned about the unauthorised use of personal online material.[63] This may well be because, as the Joint Select Committee on Cyber-Safety notes: 'Sexting has become "normalised behaviour" in adolescent culture.'[64]

A United States example shows that where the definition of child pornography is satisfied, the courts may feel the need to convict even where the image taking is consensual and there is no distribution beyond the parties involved. In *AH v State*,[65] a 17-year-old boy took digital images of himself having consensual sexual intercourse with his 16-year-old girlfriend. They then emailed the images to another computer in the girl's house. Neither party showed the images to anyone else but when word got out about the photographs police obtained a search warrant for the computer. As a result both young people were

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59 Jackson, above n 55; Gail Ryan, 'Childhood Sexuality: a Decade of Study. Part I — Research and Curriculum Development' (2000) 24 *Child Abuse & Neglect* 33, 34.

60 R Danielle Egan and Gail L Hawkes, 'Imperiled and Perilous: Exploring the History of Childhood Sexuality' (2008) 21 *Journal of Historical Sociology* 355, 356–7.

61 See, eg, *Criminal Code* (NT) s 125A(1); *Criminal Code* (Qld) s 207A.

62 For example, the 'Sex and Tech' survey in the US found that 66 per cent of teen girls and 60 per cent of teen boys say they sent 'sexts' so as to be 'fun or flirtatious' — this was their most common reason for sending sexy content. 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), 4 <http://www.thenationalcampaign.org/sextech/PDF/SexTech_ Summary.pdf> ('*Sex and Tech Survey*').

63 Survey undertaken by Cox Communications in 2007, cited in Australian Institute of Criminology, Submission No 56 to the Joint Select Committee on Cyber-Safety, Parliament of Australia, *Inquiry into Cyber-Safety*, 2010, 9, which submission was quoted in Joint Select Committee on Cyber-Safety, above n 1, 144 [4.71].

64 Joint Select Committee on Cyber-Safety, above n 1, 138 [4.54].

65 *AH v State*, 949 So. 2d 234 (Fla. 1st Dist, 2007).

charged and found guilty of producing, directing or promoting a photograph or representation that they knew to include the sexual conduct of a child.[66] The young man was also charged with possession of child pornography.[67] The young woman appealed against conviction but the majority of the District Court of Appeal dismissed the appeal because it was recognised that there is 'a compelling state interest in protecting children from sexual exploitation'.[68] Furthermore, '[t]his compelling interest exists whether the person sexually exploiting the child is an adult or a minor and is certainly triggered by the production of 117 photographs of a minor engaging in graphic sexual acts.'[69] Criminal prosecution was therefore determined to be the 'the least intrusive means of furthering the State's compelling interest.'[70] The interplay of the anxiety over child pornography and concerns about new technologies offering a vehicle for the uncontrolled distribution of such images is clearly evident in this case. Although the images were not shared with anyone else, the *potential* for the images to be widely distributed concerned the Court:

> In addition, the two defendants placed the photos on a computer and then, using the internet, transferred them to another computer. Not only can the two computers be hacked, but by transferring the photos using the net, the photos may have been and perhaps still are accessible to the provider and/or other individuals. Computers also allow for long-term storage of information which may then be disseminated at some later date. The State has a compelling interest in seeing that material which will have such negative consequences is never produced.[71]

This case reveals that the zeal to protect children from the dangers of sexual exploitation can override any reasonable balancing of this method of protection against other less intrusive means.

As yet in Australia there have been few reported and verified cases of prosecutions under child pornography laws for sexting behaviour. It is therefore difficult to say with certainty whether Australian courts are also taking such a rigid approach. However, it seems more likely that Australian courts are swaying away from finding the consensual creation of naked images by children to amount to child pornography, which can operate as a protection from conviction. The following case is somewhat in contradiction to news media reports, and has been described as Australia's first sexting case. It suggests that courts may well be cognisant of children's different rationale for, and perception of the wrongfulness of, making and distributing such images — although subsequent legislative change places a question mark over this. In *Eades*,[72] an 18-year-old incited a 13-year-old girl to take a nude image of herself and send it to him by mobile phone. The decision of the magistrate to dismiss a charge of possession of child pornography was confirmed by the Supreme Court of New South Wales on the basis that:

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66 In violation of Fla Stat § 827.071(3) (2005).
67 In violation of Fla Stat § 827.071(5) (2005).
68 *AH v State*, 949 So. 2d 234 (Fla 1st Dist, 2007) 236.
69 Ibid.
70 Ibid.
71 Ibid 239.
72 [2009] NSWSC 1352.

> 'the sexual context' had to be determined from the photograph itself. The magistrate found that there was no sexual activity depicted in the photograph. The photograph was simply a photograph of the complainant standing naked in a bedroom 'and there is no posing, no objects, no additional aspects of the photograph which are sexual in nature or suggestion.'[73]

This case was, however, decided at a time when child pornography had a narrower definition in the *Crimes Act 1900* (NSW) and required either the depiction or description of actual or apparent sexual activity or a sexual context in a manner that would cause offence to a reasonable person.[74] However, in response to the concern to tighten up child pornography laws, a wider definition of child pornography, based on the Commonwealth model, was introduced in New South Wales in September 2010. The definition now includes the depiction or description of 'the private parts of a person who is, appears to be or is implied to be, a child'.[75] Thus, if *Eades* were decided today, it could readily fall under the new definition, provided that it is considered that reasonable persons would find the image of a child's naked private parts offensive. There is no requirement in New South Wales that a depiction of the private parts must be for a sexual purpose.

While the definitions of child pornography appear flexible enough to exclude many examples of sexting behaviour, much turns on the question of whether a reasonable adult would be offended by the material and not necessarily whether there was a sexual element. This key factor, which in some jurisdictions cannot be modified to take a young person's view of the material into account, could either lead to or hinder conviction for offences of child pornography. Until more research is done on prosecutions of children for child pornography offences, it is difficult to say how the definition of child pornography is being applied to sexting.

B *Discretion*

In the face of such blunt laws there may well be a reliance on the use of discretion as a protection against reporting, investigating, and prosecuting or convicting children. Like most crime, it is highly likely that only a small proportion of teen sexting cases will come to official attention. Incidents of sexting may be under-reported because the children involved are consensually taking, distributing and possessing the images and therefore do not consider that a crime has been committed. Moreover, most cases will require a third party to detect and report the crime given the consensual nature of the act. Even where the image is distributed without consent and the child feels that this is wrongful, he or she may not want to report this to an adult because of feeling 'not altogether blameless or wish[ing] certain activities to remain secret.'[76] A recent US study has found that 21 per cent of youths who appeared in or created 'images reported feeling very or extremely

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73 Ibid [13]; see also *Eades v DPP (NSW)* (2010) 77 NSWLR 173, 179 [33].

74 *Crimes Act 1900* (NSW) s 91H(1) (pre-17 September 2010 version).

75 The 'private parts' of a person are the genital or anal area, or the breast of a female: *Crimes Act 1900* (NSW) s 91FB(4).

76 Katherine S Williams, *Textbook on Criminology* (Oxford University Press, 7th ed , 2012) 83.

upset, embarrassed, or afraid as a result'.[77] A child who feels shame about being the subject or recipient of such an image may well not want the further embarrassment of official attention. While a child may feel that sexting is wrong, a realisation that sexting may potentially fall under such serious offences as those relating to child pornography remains unlikely. Where there is such knowledge it may actually deter children from reporting incidents because they do not wish to see anyone punished so severely, or they may fear their own criminalisation or reprisals if they report the behaviour.

Where sexting does come to the attention of adults, there may be reluctance to report it to the police where it is viewed as normal childish (if inappropriate) behaviour and there are no circumstances suggesting coercion, exploitation or abuse. Adults who are aware of the potentially serious child pornography charges may also be reluctant to report because they do not think the behaviour fits the criminal law or deserves such a severe reaction. However, mandatory reporting requirements may mean that teachers and those with special responsibilities towards children may not feel that they have a choice in whether or not to report sexting behaviour that comes to their attention.[78]

Once sexting has come to official attention, discretion may be exercised to avoid the pursuit of prosecution. Recent research in the United States into how police are dealing with cases of sexting suggests that police use discretion not to prosecute children for child pornography offences unless there are other factors which are less readily assigned to childish misbehaviour or normal childhood experimentation with sexuality.[79] Such factors may include whether the image was distributed without the consent of the subject — for instance, as an act of revenge, or where the image depicted a criminal offence, such as a sexual assault. An example is the United States case of *State v Vezzoni*,[80] where a 16-year-old boy took pictures of his naked girlfriend with her consent after they had had sexual intercourse. A week after the two broke up he showed the pictures of his ex-girlfriend, which included images of her naked breasts and genitals, to several classmates.[81] Vezzoni argued that his conviction should be overturned 'because the legislature did not intend for child pornography statutes to apply in situations where teenagers, who are capable of consenting to sexual activity, take nude photographs of each other.'[82] The court upheld the conviction, finding that:

> the child pornography statutes are unambiguous and do not make age-based distinctions when defining specific criminal conduct. As the court stated in *D.H.*, '[t]he Legislature is well aware of how to create different degrees of criminal liability on the basis of a specific age disparity between the offender and the victim.' … When the legislature declines to make distinctions based on

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77 Kimberly J Mitchell et al, 'Prevalence and Characteristics of Youth Sexting: A National Study' (2012) 129 *Pediatrics* 13, 16.

78 For a summary of legal reporting requirements throughout Australia, see Daryl Higgins et al, *Mandatory Reporting of Child Abuse and Neglect* (Australian Institute of Family Studies, August 2010) <http://www.goodstart.edu.au/files/file/Resources/005._MandatoryReportingofChildAbuseandNeglect.pdf >.

79 Janis Wolak, David Finkelhor and Kimberly J Mitchell, 'How Often Are Teens Arrested for Sexting? Data from a National Sample of Police Cases' (2012) 129 *Pediatrics* 4.

80 *State v Vezzoni*, 127 Wash. App 1012 (Was. Ct. App. 2005).

81 This case does not actually fit the paradigm of sexting because the pictures were distributed in hard copy rather than electronically. Nevertheless the principles involved apply also to sexting cases.

82 *State v Vezzoni*, 127 Wash App 1012 (Was. Ct App 2005) 1.

> age in the statute, '[t]here is no room for judicial interpretation … beyond the plain language of the statute.' …The legislature did not intend to exclude juvenile offenders from the child pornography statutes.[83]

Closer to home, a case in Bunbury, Western Australia, concerned the sexual penetration of a girl aged 14 and digital recording of the incident. The boys who committed the assault pleaded guilty to sexual penetration without consent and one boy who recorded the incident on his mobile phone was reportedly charged with possession of child pornography.[84]

Evidence given by the Acting Commander of Victoria Police, Neil Paterson, to the Victorian Law Reform Committee's Inquiry into Sexting confirms that police (at least in that State) are exercising discretion:

> **The CHAIR** — But are police exercising a judgement call as to whether or not to charge them with child pornography in the first case when it comes down to consensual sexting?
>
> **Acting Cmdr PATERSON** — Absolutely. We have gone back over the data in particular to look at the number of juveniles who have ever been investigated for the offences that I outlined earlier on, and through a manual search of the data we can certainly identify that there are six juveniles who have been investigated in the context of a 57A offence — that is, the transmission of child pornography — which best fits the sexting scenario. Only one matter proceeded to the Children's Court, but that matter was also complicated by the young person downloading child pornography from the internet, completely separate to the sexting-type offence. Of the remaining five juveniles, one was cautioned and four were subject to no further police action, which means that the matter was dealt with by police but no charges were laid and no caution was given for the young person. So from what we are seeing, whilst we understand the concept of sexting out there, there are not too many matters that are coming to police attention, and certainly of any of the juvenile matters that are coming to our attention, they are not being charged. We are exercising our discretion of the office of constable and dealing with the matters outside of the court process.[85]

The Acting Commander also noted that the preference was for the use of discretion rather than 'another … softer charge' because that 'may actually see more children charged and fronting the Children's Court rather than police exercising their current discretion on the charges that exist'.[86]

A further situation in which police will more readily pursue prosecution is where an adult is involved either as the recipient or the solicitor of the image.[87] Nonetheless, aside from these 'aggravated' cases, the United States research also found that arrests were made in 18 per cent of cases where the sexting was deemed to be experimental, that is, there were no adults involved and no indication of a

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83 Ibid 2.

84 ABC South West WA, *Underage Sex Case Triggers 'Sexting' Warning*, ABC News (online), 25 January 2011 <http://www.abc.net.au/news/stories/2011/01/25/3121304.htm?site=southwestwa>.

85 Evidence before the Inquiry into Sexting, Victorian Law Reform Committee, 18 September 2012, 12–13 (Acting Commander Neil Paterson, Victoria Police).

86 Ibid 13.

87 Wolak, Finkelhor and Mitchell, above n 79, 6.

malicious intent or reckless misuse.[88] The conclusion is therefore 'that some youth may be facing exposure to criminal treatment in cases that might be better handled informally'.[89] Until more research is conducted in Australia, it is difficult to determine the extent to which police are using discretion not to investigate cases of sexting where there are no aggravating factors, such as a malicious intention or adult involvement.

C *Presumption of* Doli Incapax

Another form of legal protection available to children is the presumption of *doli incapax* for children aged 10 but not yet 14 years old.[90] According to this presumption (which has a legislative basis in some jurisdictions), a child does not have the capacity to be criminally responsible and so cannot be found guilty of an offence unless the prosecution brings proof that the child understood the wrongfulness of the behaviour alongside all the other offence elements. This requires proof that the child knew, according to the standards of ordinary people, that the behaviour was wrong and not merely naughty.[91] It is possible that this requirement means that there will be very few prosecutions of children within this age group because such understanding may well be lacking. However, from the age of 14 there is no special assessment of the child's understanding or level of development and a child is assumed to be as criminally responsible as an adult.

There is in fact much to suggest that children, even those over the age of 14, may very well lack understanding that the consensual taking and distribution of 'naughty pictures' of one another may be viewed as wrong in the required sense and constitute a criminal offence. Indeed, it can be questioned whether sexting really does represent some new form of behaviour or rather merely children exploring their sexuality as they have always done, but making use of new technologies to do so. As Cummings questions: 'Are there differences between youth playing face-to-face versus online "Strip Poker," or between children investigating each other's body parts while playing "Doctor" and teens sharing cell phone images of their naked bodies?'[92] Similarly, Bond notes that 'the mobile phone has become embedded in children's social worlds in later modernity.'[93] Hence the virtual space provided by the mobile phone has replaced the bike-shed

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88 Ibid 9.

89 Ibid.

90 *Criminal Code* (Cth) s 7.2; *Criminal Code 2002* (ACT) s 26; *Criminal Code* (NT) s 38(2); *Criminal Code* (Qld) s 29(2); *Criminal Code* (Tas) s 18(2); *Criminal Code* (WA) s 29. The conditional presumption for children aged 10 but not yet 14 is a matter of common law in New South Wales, South Australia and Victoria. All states also have a conclusive presumption that a child under the age of 10 cannot be criminally responsible: *Criminal Code* (Cth) s 7.1; *Criminal Code 2002* (ACT) s 25; *Children (Criminal Proceedings) Act 1987* (NSW) s 5; *Criminal Code* (NT) s 38(1); *Criminal Code* (Qld) s 29(1); *Young Offenders Act 1993* (SA) s 5; *Criminal Code* (Tas) s 18(1); *Children, Youth and Families Act 2005* (Vic) s 344; *Criminal Code* (WA) s 29.

91 *R v M* (1977) 16 SASR 589.

92 Peter E Cumming, 'Children's Rights, Children's Voices, Children's Technology, Children's Sexuality' (Paper presented at Roundtable on Youth, Sexuality, Technology, Carleton University, 26 May 2009) 9 <http://www.yorku.ca/cummingp/documents/TeenSextingbyPeterCummingMay262009.pdf>.

93 Emma Bond, 'The Mobile Phone = *Bike Shed?* Children, Sex and Mobile Phones' (2011) *New Media and Society* 587, 590.

as the place where fumbling adventures into sexual and romantic relationships take place.[94]

It seems that the concern to protect children from pornography means that there may be an overreaction to otherwise relatively normal forms of childish interaction. Young people have always experimented with their sexuality. The major difference with sexting is that when such experimentation is undertaken it is digitally stored and possibly transmitted.[95] Thus alongside the traditional adult discomfort with children exploring their sexuality is the added concern about the impact of new technologies and the risks that these pose for children.

Ironically, a child can lawfully have sexual intercourse in most jurisdictions at the age of 16. The idea that such behaviour is permitted but the comparatively innocent act of consensually taking a naked image could expose the parties to prosecution as child pornographers would be difficult for a child to grasp. Furthermore, a child who receives a naked image of another child could be liable for possession of child pornography even if he or she did not consent to receiving the image. It is, however, most unlikely that a child would understand that simply ignoring the image and leaving it on his or her phone could lead to a conviction for possession. A defence only applies where the material came into the person's possession unsolicited and he or she took reasonable steps to get rid of the image as soon as he or she became aware of its pornographic nature.[96]

D *Protections under the* Criminal Code *(Cth) and the* Crimes Act 1958 *(Vic)*

Only two Australian jurisdictions provide specific protection for children from prosecution for child pornography offences. As noted above, the defence which applies to children for possession of child pornography in Victoria predates concern over sexting. During the Victorian Law Reform Committee's inquiry into sexting, the anomaly of only allowing a defence to possession was noted and there have been calls for this defence to extend to the offences of creation and transmission of child pornography.[97] The only jurisdiction to amend child pornography laws in response to concerns over the prosecution of children for sexting is the Commonwealth. Rather than provide a defence or a blanket ban on prosecution, it was decided that the ability to prosecute children should be available upon permission of the Attorney-General in order to maintain the protection of children. Thus prosecution should be allowed where the sexting was malicious or exploitative[98] and also to deter sexting behaviours.[99]

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94 Ibid 587.

95 Although a recent US study found that in nearly two-thirds of cases images were confined to mobile phones and were not posted on the internet: see Wodak, Finkelhor and Mitchell, above n 79, 9.

96 See, eg, *Crimes Act 1900* (NSW) s 91HA(2).

97 Evidence before the Inquiry into Sexting, Victorian Law Reform Committee, 18 September 2012, 17 (Acting Commander Neil Paterson, Victoria Police).

98 Commonwealth, *Parliamentary Debates*, House of Representatives, 9 March 2010, 2051 (Brendan O'Connor).

99 Ibid 2045 (Luke Simpkins).

V Sexting is Generally Different to Child Pornography

It is questionable whether the underlying rationales for child pornography laws apply to sexting by young people and whether the harms associated with sexting are not outweighed by the harms of prosecution. The Commonwealth Attorney-General's Department notes: 'It is widely accepted that child pornography and child abuse images are more than just pictures. The production of such images requires the abuse of actual child victims'.[100] Similarly, the *United Nations* ('UN') *Convention on the Rights of the Child* calls on nations to protect children from sexual abuse, sexual exploitation, coerced sexual activity, unlawful practices including child prostitution and being used in pornography.[101] Yet, as Cumming notes, this focus on protection overrides consideration of children's rights to explore their sexuality.[102] Indeed, while the focus in the UN Convention is on children's participation rights and full and harmonious development of the child's personality, there is no mention of the child's 'rights to healthy sexual being and participation rights in exploring and expressing that sexual being'.[103] In a similar vein, Albury and colleagues argue that criminalising sexting precludes sexually active 16- and 17-year-olds (in some jurisdictions) from any visual representation of their sexual life, even to one another, and ask whether this irrationally excludes young people from the rights and forms of citizenship enjoyed by adults.[104] Karaian also notes how the criminalisation of teen sexting effectively silences the voices of participants, and allows for only adult conceptualisations of the practice.[105] Criminalising such behaviour, which if undertaken by consenting adults would not amount to an offence, could actually be harmful to the development of young people's intimate citizenship by denying them the ability to represent themselves in images and explore their sexuality. As Kimpel notes: '[b]randing sexually active minors who seek to memorialize their private intimate conduct as criminal delegitimizes the relationships and sexual autonomy of adolescents.'[106]

This is problematic particularly for those over the age of consent but under the age categorising them as a child for child pornography laws. In relation to the divergence between these age levels, the report of the Commonwealth Attorney-General's Department notes that it is appropriate that the age threshold for the child pornography should 'be higher than the age of consent because child pornography involves the exploitation (often for commercial purposes) of

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100 Attorney-General's Department (Cth), above n 11, 43 [237].

101 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 34.

102 Cumming, above n 86, 9.

103 Ibid 10.

104 Kath Albury, Nina Funnell and Estelle Noonan, 'The Politics of Sexting: Young People, Self-Representation and Citizenship' (Paper presented at Australian and New Zealand Communication Association Conference: Media, Democracy and Change, Old Parliament House, 7–9 July 2010) <http://www.confuciusinstitute.unsw.edu.au/media/File/AlburyFunnellNoonan.pdf>.

105 Lara Karaian, 'Lolita Speaks: "Sexting", Teenage Girls and the Law' (2012) 8 *Crime, Media, Culture* 57, 57–73.

106 Amy F Kimpel, 'Using Laws Designed to Protect as a Weapon: Prosecuting Minors under Child Pornography Laws' (2010) 34 *New York University Review of Law & Social Change* 299, 332.

children.'[107] Where the images are taken consensually it is questionable whether there is abuse, or at least whether the abuse is of a kind and degree envisaged by the legislation. Research is showing that children increasingly integrate new technologies into their lives and that '[t]he mobile phone is imperative in the formation, maintenance and manipulation of close, intimate relationships.'[108] Thus it is hardly surprising that sexual experiences are also mediated through new technologies. As Bond notes, 'the sharing of sexual material, both downloaded from the internet and user generated … illustrates how the technology provides an alternative space in human sensory experience.'[109]

Further, children generally do not take these images for commercial purposes; rather, as the 'Sex and Tech' survey conducted in the United States found, the most common reason for sending sexy images was to be 'fun or flirtatious'.[110]

The fact that many cases of sexting do not appear to fall under the rationale of child pornography laws does not, however, mean that this behaviour should simply be condoned and accepted as harmless. Young people may lack sufficient maturity to understand the long-term harmful consequences of sexting and the fact remains that, once digitally sent, little control remains over how and to whom the image may be distributed. This can, of course, have negative impacts for the young person's privacy and reputation and lead to 'real life' and 'cyber' bullying.[111] Wide distribution of naked and sexualised images can therefore result in 'poor self-esteem and self-image, isolating behaviours, school avoidance, eating disorders, self-harm and suicidal ideation and behaviours.'[112] This is not to mention the negative consequences that this may have on future personal relationships and employment prospects with such images becoming an enduring part of a person's digital foot-print.[113]

Research also points to gendered aspects of sexting, with teenage girls feeling pressured by teenage boys to send 'sexts'[114] and girls suffering more negative impacts from sexting.[115] Thus children may be harmed by the creation of the images, even if they give apparent consent, where they feel coerced into making or distributing the image either directly by a girl/boyfriend exerting pressure or through peer group pressure. Indeed, pressure to send a 'sext' may also play on both underlying gendered power relations and other individual insecurities around the need for acceptance and popularity.

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107 Attorney-General's Department (Cth), above n 11, 6 [17].

108 Bond, above n 93, 599.

109 Ibid.

110 Sex and Tech Survey, above n 62.

111 For a discussion of the issues surrounding cyber-bullying, see Joint Select Committee on Cyber-Safety, above n 1, ch 3.

112 BoysTown, Submission No 29 to the Joint Select Committee on Cyber-Safety, Parliament of Australia, *Inquiry into Cyber-Safety*, 25 June 2010, 14, quoted in Joint Select Committee on Cyber-Safety, above n 1, 141 [4.60].

113 Joint Select Committee on Cyber-Safety, above n 1, 142 [4.62].

114 For example, the Sex and Tech Survey found that '51% of teen girls say pressure from a guy is a reason girls send sexy messages or images; only 18% of teen boys cited pressure from female counterparts as a reason': Sex and Tech Survey, above n 58.

115 Shelley Walker, Lena Sanci and Meredith Temple-Smith, 'Sexting and Young People' (2011) 30(4) *Youth Studies Australia* 8, 14.

The key question, however, remains whether these harms are best addressed through the threat of prosecution under child pornography laws. Other approaches may involve an educative focus on risky behaviours, helping the young to navigate the risks posed by new technologies. Moran-Ellis notes, for example, that while United Kingdom child pornography laws allow for prosecution (as in Australia and the United States), the approach so far has been to focus on non-legal mechanisms of control 'organized around ideas of risk and the future well-being of the young person as opposed to criminality.'[116] In Australia, an internet safety program 'ThinkUKnow' has been mounted by the Australian Federal Police and Microsoft Australia to deliver interactive information on online safety tailored to young people[117] as well as concerned parents and teachers.[118] This program is based on a similar educational campaign in the United Kingdom created by the Child Exploitation and Online Protection Centre. While there may be some problems with the approach of many current education campaigns,[119] they can help young people to be aware of risks associated with online communication and to develop methods to reduce those risks. Research does show that children are aware of the risks associated with sexting and do modify their behaviour to manage those risks,[120] although whether this is a direct result of educational campaigns is not clear. For adults there is information on how to protect children in the online world. For young people the website has sections explaining what is appropriate online, what can go wrong, what to do if things go wrong and how to develop strategies to manage risk when using online and digital technology.

A further concern causing a reluctance to shift from the possibility of criminalisation under child pornography offences is that once images are created and 'go viral' they may get into the hands of adults and this may feed the appetites of paedophiles. The availability of such images could therefore increase demand, which may lead to more abuse where images are taken or solicited by adults.[121] But even so, this does not mean that a criminal law response to sexting by the young is appropriate to combat such harm. Children should not be criminalised based on the risk of subsequent adult deviancy. Moreover, the current child pornography laws are adequate to pursue adults who solicit, possess or further distribute such images.

More problematic are those cases which are less readily associated with young people exploring their sexuality; for instance, where there is no consent to the distribution or creation of the material. Images may be created with consent and then distributed without consent as an act of bragging or as revenge following the break-up of a relationship.[122] In these instances, while a malicious intention

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116 Moran-Ellis, above n 1, 125.

117 Australian Federal Police, *ThinkUKnow Australia Youth Site*, ThinkUKnow Australia, <http://www.thinkuknow.org.au/kids>. For discussion of the educational campaign, see Michael Salter, Thomas Crofts and Murray Lee, 'Beyond Criminalisation and Responsibilisation: "Sexting", Gender and Young People' (2013) 24 *Current Issues in Criminal Justice* 301.

118 Australian Federal Police, above n 117.

119 See, eg, Salter, Crofts and Lee, above n 117.

120 Bond, above n 93, 600.

121 See Griffith and Simon above n 44, 8, with further references.

122 These were factors leading the court in *AH v State*, 949 So. 2d 234, 240 (Fla 1st Dist 2007) to find that criminalising the behaviour was appropriate. The court was concerned that, given the immaturity of the partners, there was no expectation that the relationship would last and that the images would not be shown to anyone else, whether as an act of revenge or bragging. For a

may be ascertained and a criminal response may be warranted in some cases, it is still questionable whether child pornography offences are appropriate. Those cases where an image is taken and distributed without the consent of the subject are far from the paradigm cases of sexting. Where an underlying criminal offence has been committed, it may more readily be akin to the rationale of child pornography laws and the chances that the young person will have an understanding of the wrongfulness of such behaviour are higher.[123] The harm associated with the original act may be significantly added to and perpetuated by the recording and redistribution of such images.[124] As noted by the Canadian Supreme Court, children who have had their abuse recorded 'must live in the years that follow with the knowledge that the degrading photo or film may still exist, and may at any moment be being watched and enjoyed by someone.'[125]

VI Conclusion

Concern about child pornography and new technologies is leading to existing kinds of behaviours being labelled and criminalised in dramatically new ways. While children have always explored sexuality in ways that might be concerning or uncomfortable to much of the adult population, new technologies have meant that such behaviours have found expression through digital media and, as such, also have the potential to be more harmful given their permanency and the lack of control over the digital footprint. This combination of new technology and the potential for abuse and exploitation of children means that much attention is given to how precisely to define child pornography in such a way that all deserving cases can be captured. However, the cases of 'sexting' show that little attention was given to the possibility of children being the creators of sexualised images. Taking a rigid approach may therefore be leading to an overreach of the criminal law, especially because few of the laws in Australia make allowance for children having a different level of understanding and motivation for the creation and distribution of naked and sexualised images. Thus, the main protections against prosecution for children over the age of criminal responsibility turn on how the term 'child pornography' is interpreted and whether discretion is used not to pursue prosecution once sexting comes to official attention.

It is clear from the example cases discussed above that underage or teen sexting may cover a wide range of behaviours, with common scenarios ranging from children consensually taking nude images of one another and only sharing these images electronically with another child (usually a boyfriend/girlfriend or potential boyfriend/girlfriend), to children taking consensual images while in a relationship and one of the parties non-consensually distributing these images to others in an act of bragging or as an act of revenge after the relationship breaks

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discussion of the various behaviours which are often labelled 'sexting' see, eg, Moran-Ellis, above n 1, 117.

123 For further discussion of images taken of sexual assaults see Anastasia Powell, 'Configuring Consent: Emerging Technologies, Unauthorised Sexual Images and Sexual Assault' (2010) 43 *Australian and New Zealand Journal of Criminology* 76.

124 Ibid.

125 *R v Sharpe* [2001] 1 SCR 45 [92].

down. A more extreme situation, which is better not viewed as a case of sexting due to the absence of consent, involves images taken of the victim of a criminal offence (for example, an indecent or sexual assault) and the subsequent distribution of these images to others. The possibility that such widely varying scenarios may all fall under child pornography laws reveals that these laws are not nuanced enough to differentiate cases of childish playfulness and sexual experimentation from cases of exploitation. Without specific protections and alternative forms of resolution, there is the danger that children may become collateral damage — more seriously harmed by the very laws designed to protect them.