



**Australian
Privacy
Foundation**

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**Submission to the Senate
Standing Committee on Legal and Constitutional Affairs
regarding the inquiry into the Crimes Legislation Amendment
(Sexual Offences Against Children) Bill 2010**

Submission by the Australian Privacy Foundation

About the Australian Privacy Foundation

1. The Australian Privacy Foundation is the main non-governmental organisation dedicated to protecting the privacy rights of Australians. Relying entirely on volunteer effort, the Foundation aims to focus public attention on emerging issues which pose a threat to the freedom and privacy of Australians. The Foundation has led the fight to defend the right of individuals to control their personal information and to be free of excessive intrusions. The Foundation uses the Australian Privacy Charter as a benchmark against which laws, regulations and privacy invasive initiatives can be assessed. For information about the Foundation and the Charter, see www.privacy.org.au

General comments on the consultation

2. We welcome the opportunity to comment on this initiative.
3. We have no objections to this submission being made public.

4. The inquiry addresses several issues that lie outside what the Australian Privacy Foundation (APF) normally would comment upon. Our submission is focused on two issues only, and does not purport to endorse, reject or comment upon any issues other than those two issues.

5. The two issues we discuss are privacy and so-called 'sexting'.

The Privacy Aspects

6. The need for a strong approach against sexual offences against children is one of the few areas of law that has gained virtually universal acceptance. This highlights the severity of the issues addressed in the Crimes Legislation Amendment (Sexual Offences Against Children) Bill 2010. Consequently, what is said below, regarding the need for privacy, is not meant to downplay the significance of the goals pursued in the Bill.

7. Because of the strong consensus about the exceptional nature of 'child sex' offences, the normal relatively robust and detached assessment of benefits, risks and alternatives to policy options may naturally be in danger of being suspended.

8. This may not do justice to the complexity, ambiguity and implications of the policy context itself. In fact it may potentially lead to a range of people being treated unfairly and may even, paradoxically, weaken protection of children's and young peoples' real interests. For example, the hyper-criminalisation of any contact with potential 'child abuse material', may have the effect that some of those involved in the online industries are more reluctant and slower to remove and/or report such material than other forms of content like hate speech, defamation, IP infringement etc.

9. The starting point for any discussion of privacy in this context must necessarily be the observation that privacy is a fundamental human right, and thus a right that cannot be ignored in any context – not even in the context of the discussed Bill.

10. Taking account of the fact that privacy is a fundamental human right, and bearing in mind that identifying violations of the proposed amendments to the law in many cases will require access to the offender's personal information (e.g. through access to an e-mail account), we see a need for robust guidelines as to how investigations are carried out.

11. Most importantly, mass-surveillance must never be accepted, and can never be a substitute for targeted investigations based on some degree of reasonable suspicion. Otherwise, there is an obvious risk of function creep; that 'extreme measures' over-riding traditional protections against legal excess, but justified for the 'most exceptional circumstances' (such as those dealt with in the Bill), have the potential to become established as new norms and, without much further review, applied to incrementally wider situations.

The impact of so-called ‘sexting’¹

12. “Sexting” (a combination of the words “sex” and “texting”) is commonly defined as the practise of teenagers using mobile phones to capture and send sexual or nude images or videos of themselves or others.² However, a better definition may be that sexting means 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.

13. A study carried out by *Girlfriend Magazine* showed that 40% of the 588 Australian teenage girls that participated in the study had been asked to send a naked or semi-naked image of themselves over the Internet.³ Studies overseas give similar results. In the US, a study involving 653 teenagers found that 20% had engaged in sexting.⁴ Another US study involving 1,247 youths between 14 and 24 provided the following statistics:⁵

- 10% of the participants indicated that they had sent naked pictures of themselves to someone else;
- 11% of the participants indicated that they had been pressured by someone to send naked pictures or videos of themselves;
- 18% of the participants indicated that someone had sent them pictures or videos portraying the sender in the nude; and
- Of those who had received such pictures or videos, 17% indicated that they subsequently shared the pictures or videos with someone else.

14. The US has seen several controversial decisions where young people have been exposed to criminal prosecution, or threats thereof, as a result of engaging in sexting in the United States.⁶ For example, in 2008, around 20 teenage girls were found to have been involved in sexting at one particular school in Pennsylvania (US), after pictures of the girls were found on mobile phones belonging to other students. The District Attorney responded by announcing potential charges of possession and distribution of child

¹ This part of the submission draws heavily upon: Dan Svantesson, “Sexting” and the law – how Australia regulates electronic communication of non-professional sexual content (submitted 2 February 2010, not yet published).

² See Don Corbett, ‘Let’s Talk About Sext: The Challenges of Finding the Right Legal Response to the Teenage Practice of “Sexting”’ (2009) 13(6) *Journal of Internet Law* 3.

³ Kids Helpline <<http://www.kidshelp.com.au/teens/get-info/hot-topics/sexting.php>> at 12 January 2010.

⁴ *National Campaign to Prevent Teen and Unplanned Pregnancy, Sex and Tech: Results from a survey of teens and young adults* 1 (2008) <http://www.thenationalcampaign.org/SEXTECH/PDF/SexTech_Summary.pdf> at 12 January 2010.

⁵ MTV-Associated Press Poll, *Digital Abuse Survey conducted by Knowledge Networks September 23, 2009* <http://www.athinline.org/MTV-AP_Digital_Abuse_Study_Full.pdf> at 12 January 2010.

⁶ See Robert D. Richards and Clay Calvert, ‘When Sex and Cell Phones Collide: Inside the Prosecution of a Teen Sexting Case’ (2009) 32 *Hastings Comm. & Ent. L.J.* 1.

pornography.⁷ In this and similar cases, the 'victims' of, and the parties responsible for, the act of child pornography are the same.

15. Strong policy reasons speak in favour of an alternative approach being developed in such cases:

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 labeled [sic] a child pornographer is lasting. Few crimes carry such a pejorative marker, and members of the public often link child pornography with pedophilia [sic] and other heinous crimes - sometimes for good reason.⁸ (internal footnotes omitted)

16. As it stands, Australian law could produce a similar result to that produced by US law, and the inquiry into the Crimes Legislation Amendment (Sexual Offences Against Children) Bill 2010 represents a good opportunity to ensure that Australian law does not follow the same path as the law in the US in this regard.

17. In light of this, while the intention of the provision is sound, there may be a need to reconsider aspects of provisions such as the proposed 474.27A:

474.27A Using a carriage service to transmit indecent communication to 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.

18. While in some cases the behaviour aimed at in this provision may warrant an extreme response, or a very intrusive one, it is likely that the child sex offence process may also be an inappropriate and harmful legal response for a large number of such young people, and the criminal law may need to review the intent and target of child abuse material law in the light of this new development.

⁷ Vivian Berger 'Stop Prosecuting Teens for "sexting"', (2009) *The National Law Journal* <<http://find.galegroup.com/gtx/start.do?prodId=AONE&userGroupName=bond>>.

⁸ Robert D. Richards and Clay Calvert, 'When Sex and Cell Phones Collide: Inside the Prosecution of a Teen Sexting Case' (2009) 32 *Hastings Comm. & Ent. L.J.* 1, 35.

Conclusion

19. In our submission, we have only focused on what we perceive as the most important privacy issues, and on the issue of sexting. As to privacy, we emphasise that mass-surveillance must be avoided as a means of achieving the goals of the Bill. In relation to sexting, we encourage the Bill to be reconsidered in certain parts so as to take account of the practice of sexting.

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