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Castan Centre for Human Rights Law

Submission to Law Reform Committee's Inquiry into Sexting

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The Castan Centre for Human Rights Law thanks the Law Reform Committee for its invitation to comment on Victorian laws relating to 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 Centre will confine its comments to the human rights implications of the present law, and make just one recommendation (see page 3). Other aspects, such as the dubious efficacy of sex offender registers in reducing (re)offending, were amply covered by the Law Reform Commission in its report on Sex Offenders Registration of December 2011.¹

It is the Centre's understanding that the purpose of the Act, and related provisions of the *Crimes Act 1958*, is to protect people – especially children – from sexual abuse by tracking high-risk offenders.

In his Second Reading speech on the Sex Offenders Registration Bill, the former Minister for Police and Emergency Services stated that proportionality would be achieved by making certain serious sex offences 'registrable.' These include possession or production of child pornography alongside rape and other sexual assault. However, the Minister went on to state that the rule...:

...that persons otherwise found guilty of what would be a registrable offence are therefore required to report to police is subject to one exception. Juvenile sex offenders will not be obligated to do so unless ordered by a court. In this context the government readily acknowledges the need to retain discretion when dealing with young offenders.

However, in practice (and since amendments which took effect in June 2008),² the law has resulted in people being placed on the register for offences committed while they were teenagers, with courts declaring publicly that the discretion afforded them is inadequate to deal with cases of people in their late teens.³ In the Centre's view, such young offenders should be treated in line with the principles of the UN Convention on the Rights of the Child (CRC) – especially if their circumstances are not materially different from those of a younger offender who could be excluded from registration.

The CRC prohibits degrading punishment of children in article 37(a). As the Law Reform Committee Chairman has said "...teens who may be exploring their sexuality in a risky manner by sexting are grouped together with the reprehensible adult producers and distributors of child pornography,"⁴ and such association is unquestionably degrading for the teenager involved. The Centre agrees with the Chair that this is unlikely to have been what was intended by Parliament when it introduced legislation to outlaw child pornography. The CRC also affirms in article 40(1):

...the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and

¹ <<http://www.lawreform.vic.gov.au/inquiries/sex-offenders-registration>>.

² See *Justice and Road Legislation Amendment (Law Enforcement) Act 2007* (Vic), s 13.

³ See eg: *Sexting punishment is unjust says magistrate*, The Age, 14 August 2011:

<<http://www.theage.com.au/technology/technology-news/sexting-punishment-is-unjust-says-magistrate-20110813-1isa0.html>>.

⁴ See *Risky sexting by teens doesn't necessarily make them child pornographers*, National Times, 8 May 2012:

<<http://www.smh.com.au/opinion/politics/risky-sexting-by-teens-doesnt-necessarily-make-them-child-pornographers-20120507-1y8zj.html>>.

fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.⁵

The Committee on the Rights of the Child emphasises that children are clearly distinguishable from adults in terms of their psychological and emotional development, and that these differences constitute a clear basis for lesser culpability when they come into conflict with the law. The best interests of the child, which Australia is required to take into account in all its law and policy concerning children, require the prioritisation of rehabilitation over other goals of the criminal justice system such as retribution and deterrence.⁶ The Committee asserts that even recidivist children have the right to protection under article 40(1).⁷

Article 40(3)(b) of the CRC provides that States parties (including Australia) should 'seek to promote...[w]henver appropriate and desirable, measures for dealing with [children alleged as, accused of, or recognized as having infringed the penal law] without resorting to judicial proceedings.'

A statistical study of sexting cases recently published in the United States (US) revealed that, although young people involved in cases with no aggravating elements were usually not prosecuted (or at least not listed on sex offender registers), this was not always the case. The researchers found that "in some cases, it appeared that youth activity that might better be termed experimental had been criminalized."⁸ The study found that arrest rates were much higher where adults were involved, even if the adults in question were not much older than the persons depicted in the images – in half of the arrests studied, they were in the 18-24 age bracket, and in 10% they were "18- or 19-year-old high school students who legitimately belonged to adolescent peer groups that included minors."⁹

Children caught sexting should be counselled rather than prosecuted, and there should be policy guidelines to give strong consideration to showing offenders in their late teens the same leniency. Anecdotal evidence suggests that counselling and Police cautions are the norm in Queensland, but not necessarily in Victoria, NSW or WA.¹⁰ This is despite the relevant Queensland criminal law having a broad definition of child pornography¹¹ and an unusually narrow definition of 'child.'¹² Such evidence suggests that the attitudes of the relevant authorities are just as important as law reform.

A listing on the Sex Offenders Register may also have an impact on an individual's employment opportunities for the term of the listing (up to 7½ years for juveniles and life for young adults). This may be contrary to Australia's obligations under article 6(1) of the International Covenant on Economic,

⁵ Article 40(1).

⁶ See the Committee's General Comment 10 on the Rights of Children in Juvenile Justice: <<http://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.10.pdf>> [10].

⁷ Ibid, [23].

⁸ See Wolak et al, 'How Often Are Teens Arrested for Sexting?' 129 *Pediatrics* 1 (2012): <<http://pediatrics.aappublications.org/content/129/1/4.full.pdf>>, 10.

⁹ Ibid, 6.

¹⁰ See eg *Youth 'sexting' and the law*, Radio National, 3 April 2012: <<http://www.abc.net.au/radionational/programs/lawreport/youth-sexting-and-the-law/3923218>>.

¹¹ Criminal Code 1899 (Qld) ss 228B-H

¹² Those over the age of 17 are considered adults by default – see *Juvenile Justice Act 1992* (Qld), Schedule 4.

Social and Cultural Rights, which provides that everyone must be given the 'opportunity to gain his living by work which he freely chooses.'

Naturally, the rights mentioned above may be limited in certain circumstances, including for the purposes of protecting public order and morals (including crime prevention and punishment). However, any such limitation must be proportionate to the offence in question, and it must be the least restrictive means of achieving the social outcome sought. Listing on the Sex Offenders Register is a disproportionate measure for most sexting teenagers, and evidence about the efficacy of such listing compared with alternatives studied by the Law Reform Commission suggests its utility does not outweigh its impact on human rights – at least not for young offenders who pose little ongoing risk.

For the above reasons, the Castan Centre recommends that Parliament amend the *Sex Offenders Registration Act 2004* to give the courts (and Police) a wider discretion to exclude young people from the operation of the Act, and to include a presumption that they be so excluded unless there is strong evidence that they present an ongoing risk to the community. These beneficial changes should apply retrospectively as well as prospectively.

On a closely related subject, there have been calls for Victoria to follow the US and Western Australian example of 'naming and shaming' sex offenders by making full registry details available to the public.¹³ Victoria Police has already decided to release statistics from the register, which were previously classified.¹⁴ The Centre opposes the release of offenders' particulars, as it has serious implications for the right to privacy, which is protected under both the *Charter of Human Rights & Responsibilities Act 2006* and the International Covenant on Civil and Political Rights. In particular, those who have served their sentence are entitled to be treated on equal terms with any other member of the community. An open register would also put people's personal safety at risk from vigilante groups, as amply demonstrated by experience in the US,¹⁵ and this might implicate the Government in breaches of the right to personal security (also protected under both Victorian and international law).

¹³ See comments on *Police to publish details from sex offenders' register for first time*, Herald-Sun, 15 January 2012: <<http://www.heraldsun.com.au/news/more-news/police-to-publish-details-from-sex-offenders-register-for-first-time/comments-fn7x8me2-1226244465855>>.

¹⁴ Statistics now available at: <http://www.police.vic.gov.au/content.asp?document_id=34609>.

¹⁵ See eg *A vigilantes' charter? The bitter legacy of Megan's Law*, The Independent, 24 June 2006: <<http://www.independent.co.uk/news/world/americas/a-vigilantes-charter-the-bitter-legacy-of-megans-law-405254.html>>. Similar fears have been raised in WA - see eg *Vigilantes won't abuse sex offender register, says Premier*, Perth Now, 9 November 2011: <http://www.perthnow.com.au/news/western-australia/vigilantes-wont-abuse-sex-offender-register-says-premier/story-e6frg14c-1226190463438>