

New Voices / New Laws

Law
Reform
Research
Report

School-age young people in New South Wales
speak out about the criminal laws that
apply to their online behaviour

November 2012



Law

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Our Organisations

The **National Children's and Youth Law Centre** ("NCYLC") is Australia's national legal centre dedicated to working for and in support of children and young people, their rights and access to justice. NCYLC advances this mission by providing young Australians with meaningful advice and information about the law and their rights and responsibilities; advocating for changes to laws, policies and practices to advance their rights; creating opportunities for their participation in decision making; and promoting the implementation of the *United Nations Convention on the Rights of the Child*.

NCYLC actively promotes legal information for children and young people through *Lawstuff* (www.lawstuff.org.au), provides legal advice to them through *Lawmail* (www.lawstuff.org.au/lawmail/send-a-lawmail) and conducts research, law reform and policy development aimed at increasing young people's access to legal assistance and improving the legal status of children and young people in Australia.

The **Children's Legal Service** ("CLS") of **Legal Aid New South Wales** advises and represents children and young people under 18 involved in criminal cases in the Children's Courts. CLS runs the *Youth Hotline* (1800 10 18 10), which provides free and confidential legal advice and information to young people in NSW and facilitates the operation of the *Young Offenders Act 1997*.

CLS also runs a number of crime prevention and criminal law focused community legal education workshops for young people and their workers across NSW, provides a Visiting Legal Service to young people in NSW juvenile detention centres and undertakes policy and law reform work on issues of relevance to young people involved in the criminal justice system.

Supporters

Thanks to Legal Aid NSW for its generous financial support of this partnership project, and to the University of NSW Faculty of Law for its significant in-kind support in providing NCYLC with a home and administrative support.

Acknowledgements

We would like to acknowledge the National Indigenous Youth Leadership Academy, UTS: Shopfront, University of NSW Social Justice Intern Program and our wonderful volunteers for supporting this project. We would also like to express our gratitude to the educators who helped bring this project to their students and to all of the young people who shared their voices. This report is for you.

Disclaimer

While this report has been researched and written with due care, the National Children's and Youth Law Centre and Children's Legal Service of Legal Aid NSW do not warrant that it is free from errors or omission, or that it is exhaustive. The information was last reviewed on 19 October 2012. The report provides information about the law in NSW. It does not provide legal advice. If you need advice, or if you would like information about the law in a state or territory other than NSW, please send us a *Lawmail* at www.lawstuff.org.au/lawmail/send-a-lawmail.

A Note on Case Studies

In an effort to elucidate the many different types of sexting and cyber bullying, we have used case studies based on actual *Lawmails* sent to us by young Australians. These *Lawmails* have been de-identified and taken out of the clients' language to protect their confidentiality. All names, and some ancillary details, have been changed. As a further measure of protection, a majority of these examples have been taken from states and territories other than NSW, where the report's intended audience is based.

Trigger Warning



The case studies at pages 12–13 and 14–15 contain information about cyber bullying and sexting which may be triggering to young people who have experienced similar trauma.

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Child-friendly Version

A brief, child-friendly explanation of the main points in this report can be found at www.lawstuff.org.au.

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Letters from the Directors

NCYLC

Unlike any generation before them, today's children and young people are immersed in technology. They are surrounded by it every day, relying on it for everything from social interaction to shopping to education. It is no wonder, then, that we receive an ever-increasing number of questions from children and young people who are interested or concerned about technology and the internet. These children and young people want to know about their rights in the online world and often seek to learn about their responsibilities as well.

Through our research and provision of information and advice to children and young people on these issues, we have realised that there is a disconnect between the existing legal framework and the new reality to which it now applies. For instance, a teenage girl recently asked us "why is sexting illegal?". There is no simple answer to that question. Merely responding "because it is harmful" does not begin to cover how and why child pornography laws targeting the sexual abuse of children came to be applied to photos texted among young people, especially those produced in the context of an ongoing relationship.

The *New Voices/New Laws* project endeavours to offer meaningful answers to young people so they are empowered to make well-informed decisions. It also strives to give them a voice in the development and reform of the laws and policies that apply to their use of technology. I hope and believe that the resources produced through this project—particularly the prezi, available at <http://prezi.com/q6aih0jmsrhd/new-voices-new-laws-v5/>—will serve as useful tools for educators, youth advocates and young people as they continue to navigate the legal risks and responsibilities of digital life. As our survey results demonstrate, the prezi has a real effect on young people's behaviour and attitudes, with 68.3% of students saying they are less likely to engage in sexting and cyber bullying now that they know these actions can be crimes, and 66.3% saying they feel more confident about being able to deal with these issues.

I would like to acknowledge the financial support of Legal Aid NSW for this project. I would also like to thank NCYLC's Board, staff and volunteers, who have worked tirelessly to ensure that the voices of children and young people are heard. The principal researcher and author of this report is Ms Kelly Tallon, working under the direction of Ms Ahram Choi. I thank them for producing this, Australia's first significant research report in which young people's knowledge, attitudes and future expectations of the criminal laws applying to their online behaviour is reflected.



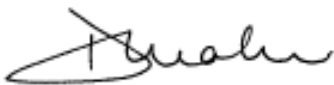
Matthew Keeley
Director, NCYLC

CLS

As advocates for children, we at the Children's Legal Service in Legal Aid NSW understand the importance of seeking the views of young people about things that affect them. In the area of technology and social media in particular, the knowledge and skills of young people often easily outstrips that of most adults, making their input even more valuable. This important research is consequently more relevant for the access it gives us to the views of young people.

Our input into this project was informed by our practical experiences of representing children at court, receiving calls on the Legal Aid Youth Hotline, visiting young people in detention centres and by our interactions with young people in our Community Legal Education sessions conducted in schools and youth centres. The feedback we were getting was that young people, while well versed in how to use the technology were not across the legal framework within which it operates. This project has worked to both receive the views of young people and also to highlight a way forward to increase education and awareness of rights and responsibilities in this area.

Children's Legal Service has been involved in this project from inception, through the workshops and consultation with young people and then the final report. Within Legal Aid the primary responsibility was shouldered by Julianne Elliott who worked in partnership with staff from NCYLC in completing this valuable project. I thank her and the NCYLC for their work on this project.



Debra Maher
Solicitor in Charge, CLS

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Executive Summary

This report provides a children's rights-based analysis and evaluation of the current criminal laws that can apply to peer-to-peer sexting and cyber bullying among young people in New South Wales (NSW). The report is the outcome of *New Voices/New Laws*, a project undertaken by the National Children's and Youth Law Centre (NCYLC) and Children's Legal Service of Legal Aid NSW (CLS). It offers insight on sexting and cyber bullying that we have garnered from our work as youth legal educators and advocates; examines the criminal law framework that applies to these behaviours in NSW; explains the need to reform these laws; surveys the views of young people on sexting, cyber bullying and the law; reviews some of the law reform efforts undertaken in other Australian and overseas jurisdictions; and on these bases, makes recommendations for law and policy makers in NSW.

The *New Voices/New Laws* project grew out of our concern that young people's use of social media, mobile phones and the internet can lead to serious and often disproportionate criminal penalties—of which most young people (and many adults) are unaware. The project aimed to:

- educate young people about the criminal laws that can apply to sexting and cyber bullying;
- encourage young people to voice their opinions on these laws;
- amplify the voices and opinions of young people; and
- facilitate advocacy for reform of inappropriate criminal laws and penalties.

In order to achieve these aims, we engaged directly with over 1,000 young people through school-based consultations. Between June and October 2012, we conducted 10 consultations at 8 schools in 7 regions—Wollongong, Dubbo, Sydney, Hunter, Tamworth, Broken Hill and Albury. The consultations generally consisted of a presentation on the laws and penalties that can apply to sexting and cyber bullying; a survey asking participants to share their knowledge and opinions of these laws and penalties; and a focus group discussion of the issues. The presentation and survey were also made available online.

Most participants were in their mid-teens—10.6% were 12-13 years old, 42.4% were 14-15 years old and 39.6% were 16-17 years old. 55.7% were female, 32.6% were male and 4% identified as transgender (with 7.7% reporting that they would rather not say). 11.6% were Aboriginal or Torres Strait Islander. 11.4% said that they or their parents were from a non-English speaking background, and 5% had disabilities.

The survey and focus groups revealed the following key points:

Young people...

- want and need education about the laws that apply to their use of mobile phones and the internet;
- agree that cyber bullying and sexting should be against the law, but they believe that there should be a more appropriate range of responses and penalties available;
- agree that the penalty should suit the offence, and should take into account the offender's awareness of the law, offending history and the level of harm caused to the victim;
- feel that sharing nude or sexy photos of a person without their permission is much worse than exchanging those photos where there is consent, and that the law should treat these situations differently;
- believe that people under the age of 18 should never be charged with sex offences or placed on the sex offender register for age-appropriate (peer-to-peer) sexting; and
- say that the age difference in the Commonwealth and NSW child pornography laws is confusing.

Based on these findings, we offer the following recommendations.

Recommendations

Police and Criminal Law Reforms

1. **Continue to consult with and listen to children and young people in the development of laws, policies, best practices and resources on sexting and cyber bullying.**

This will promote the development of more responsive, effective and youth-friendly responses that are “here to protect us”¹ and “[m]ore fair and appropriate for our age”.²

2. **Initiate a national conversation about amending Commonwealth child pornography laws as they relate to youth peer-to-peer sexting and ensuring that the applicable age limits are in line with state/territory-level laws.**

This could include incorporating the Tasmanian defence for depictions of lawful sexual acts (see pages 49–50), or providing that the applicable age for Commonwealth child pornography offences is to be determined by reference to the relevant state/territory law. This will alleviate the “confusing”³ nature of the current laws and pay respect to young people’s assertion that “[i]f you are allowed to have sex at 16, sexting should be legal”.⁴

3. **Amend the *Child Protection (Offenders Registration) Act 2000 (NSW)* to provide that no person under the age of 18 is ever to be registered as a sex offender for age-appropriate sexting.**

This will adhere to young people’s conviction that “[t]he sex offenders list should be for paedophiles and rapists, not for teenagers who made a stupid mistake”.⁵

4. **Add a close-in-age defence to NSW child pornography and indecency provisions to ensure that they are not applied to age-appropriate sexting.**

This will recognise that the laws were designed to combat the exploitation of children by adults, “[w]hereas they’re [currently capable of] calling someone a paedophile who put a photo up of his girlfriend who’s like a year younger than him”.⁶

5. **Amend corresponding NSW laws to mirror the Commonwealth requirement that child pornography proceedings cannot be commenced against people under 18 without the consent of the Attorney-General.**

This will help ensure that the circumstances of individual cases are “taken into account”,⁷ that “[e]ach person’s rights and opinions are regarded and taken under consideration”,⁸ and that prosecutors will have “[t]o have a good reason”⁹ for pursuing a conviction.

6. **Ensure that the laws respond differently and appropriately to consensual and non-consensual sexting.**

This could include providing a defence for consensual sexting or including consent to the creation or exchange of an image as a factor in determining whether an image is legally ‘offensive.’ This will reflect the widespread belief that “[i]f two people in a relationship under the age of 18, share sexy/naked pictures ONLY with each other, then it should not be considered a crime. If there is full consent from both of them then they should not be charged with anything”.¹⁰ It will also ensure that where images are disseminated without consent, we “[d]on’t charge the victims”.¹¹

7. Create official, publicly accessible police guidelines on how to respond to sexting and cyber bullying incidents.

This will ensure transparency and consistency in the way police exercise discretion as to whether to pursue charges. In relation to sexting, some of the factors that should be considered include the age(s) of those involved; the presence or absence of consent; “the relationship between the people sexting”;¹² and, if someone has been victimised through non-consensual sexting, the wishes of the victim. In relation to both sexting and cyber bullying, police should also consider whether local, non-criminal opportunities for resolution are available to deal with the issue, keeping in mind that criminal proceedings are not to be instituted against a child if there is an alternative and appropriate means of dealing with the matter.¹³ Where appropriate, young offenders should be referred to Youth Justice Conferencing in preference to the criminal court system to ensure they are “dealt with less severely without a jail sentence or anything on the permanent record”.¹⁴

If police determine that criminal charges are appropriate, the guidelines should encourage the application of less punitive offences, such as menacing, harassing or offensive use of a carriage service¹⁵ or publishing an indecent article,¹⁶ rather than the serious offences associated with long prison sentences and/or sex offender registration. This will accord with young people’s belief that “the penalties should not be so harsh on people under 18”.¹⁷ It will also adhere to the statutory principle that the least restrictive sanction is to be applied against a child who is alleged to have committed a crime.¹⁸

Education and Other Reforms

8. Provide education and more comprehensive resources on the legal consequences of sexting and cyber bullying, with a focus on practical solutions, early intervention, harm minimisation and the informed participation of the young people involved.

This will help fill the need for youth-friendly information about the legal “consequences that can happen and the long term effects”¹⁹ of sexting and cyber bullying, as well as the ways that these issues can be resolved. As our survey shows, young people who are equipped with legal knowledge are less likely to engage in these behaviours and are more confident about being able to deal with them (see page 38).

Our survey also demonstrates that a small but substantial number of 12-13-year olds have already experienced or know someone who has experienced some form of sexting and cyber bullying, and that these experiences increase with age (see pages 33–34). This suggests the need for age-appropriate education on the legal and emotional consequences of cyber bullying which begins in primary school and continues throughout adolescence.

Education must be coupled with advocacy and support, as “[m]any still see the stigma surrounding bullying, and it can often be seen as ‘weak’ and the ‘easy way out’ for victims to simply approach the authorities”.²⁰ Authorities and youth advocates must also have training to “show them how to deal with bullies and sexting”²¹ in an effective and supportive manner. Schools in particular need guidance on how to respond to these issues in a way that promotes the best interests of their students.

9. Encourage the development of innovative, non-criminal local responses to sexting and cyber bullying.

This will provide viable ways to address these issues “at some level lower . . . before it gets out of hand”²² and in a manner that suits young people. Interventions should be facilitated at every level, from websites’ terms of service to schools’ anti-bullying policies to administrative bodies’ complaints regimes. This may require initiating something akin to New Zealand’s proposed Tribunal, with the power to issue take down orders and require apologies or corrections. An effective and accessible dispute resolution mechanism will help ensure that more formal legal remedies or criminal prosecution remain a measure of last resort.

10. Support record-keeping and research on sexting, cyber bullying and the law.

This should include record-keeping and research on the current use of the law and legal services to respond to sexting and cyber bullying among young people and on the nature and prevalence of criminal law interventions associated with young people’s online behaviour. This will help gauge “the responsiveness of the legal system to the issues of sexting and cyber bullying”²³ and determine whether these issues are being “dealt with effectively”.²⁴

1. Introduction

a. Background

- 1.1 Over the past few years, NCYLC and CLS have observed an increase in the number of inquiries we receive concerning young people's online risks, rights and responsibilities. Last year, in response to the growing need for youth-friendly information in this area, NCYLC and CLS undertook a joint project called *To Tweet or Not to Tweet*. The project produced a series of plain English factsheets to help young people in NSW manage some of the most common legal risks they face on social media.²⁵ During the course of the project, it became apparent that young people's use of mobile phones and the internet implicates a variety of criminal laws with serious penalties—particularly in relation to the practices known as 'sexting' and 'cyber bullying'.
- 1.2 Many of the criminal laws that could apply to these practices—such as child pornography laws—were not created with young offenders or social media in mind. As a result, the laws often involve penalties that are disproportionate or otherwise unsuitable when applied to young offenders. This leaves young people struggling to understand which behaviours are illegal and why.
- 1.3 Sexting and cyber bullying are potentially harmful behaviours that must be addressed. However, the existing criminal law framework does not provide the nuanced and informed approach that is needed to respond to these practices. The laws are in need of reform, and young people should be engaged in the law reform process. For these reasons, NCYLC and CLS launched the *New Voices/New Laws* project.
- 1.4 The *New Voices/New Laws* project aims to educate young people in NSW about the criminal laws that can apply to sexting and cyber bullying; encourage them to voice their opinions on these laws and the issues they confront online; and amplify their voices and opinions through a report for law and policy makers. The present report is the result of this project.

b. Approach

- 1.5 This report takes a children's rights-based approach to law reform. The *United Nations Convention on the Rights of the Child* states that children not only have the right to be protected, but also the right to have a voice on issues affecting them.²⁶ This report's primary concern is whether the law is in the best interests of children and young people.²⁷ Our concern extends equally to victims of sexting and cyber bullying and to alleged offenders. Thus, our goal is to ensure that all victims and alleged offenders alike are afforded safety, support, age-appropriate treatment and a voice in the matter.
- 1.6 The report's assessment is based on the following well-recognised children's rights principles:
- The least restrictive sanction is to be applied against a child who is alleged to have committed a crime;²⁸
 - Criminal proceedings are not to be instituted against a child if there is an alternative and appropriate means of dealing with the matter;²⁹
 - Arrest and detention of children should only be used as a measure of last resort;³⁰
 - Children convicted of offences must be treated in a way that is appropriate for their age;³¹ and
 - Children have the right to express their views—and to have their views taken into account—in all matters affecting them.³²
- 1.7 In accordance with this last principle, the report's central means of assessing the law is through direct consultation with the children and young people to whom the law applies. The Law and Justice Foundation

of NSW recently recognised that “[p]articipation by citizens, and in particular disadvantaged people, in making laws that affect them holds not only the promise of more inclusive democracy but also more responsive and effective law.”³³ Similarly, the Commissioner for Children and Young People in Western Australia told the Joint Select Committee on Cyber-Safety that “[d]irectly involving children and young people in decisions that impact on them and taking their views into account in the development of laws, policies and programs results in better outcomes for children and young people”.³⁴


2. The Issues

2.1 This paper does not provide a comprehensive examination of the incidence of sexting and cyber bullying, the motivations behind these behaviours, the characteristics of participants and the full range of effects, but instead, endeavours to add to the sparse but growing knowledge base on the nature and prevalence of sexting and cyber bullying by outlining what we have learned from our work with children and young people across Australia in our capacity as their legal educators and advocates.

a. Sexting

i. The Nature of Sexting

- 2.2 Sexting is a term coined by the media to describe the practice of sharing nude or sexual images through mobile phones or the internet.³⁵ In this report, we are concerned only with peer-to-peer sexting among young people. We sometimes refer to this as ‘age-appropriate sexting’ to distinguish it from sexting that occurs between a young person and someone who is inappropriately older.
- 2.3 Typically, sexting is broken down into two steps: the consensual creation and exchange of images within a private relationship and the non-consensual distribution of those images to others.³⁶ In actuality, there are at least four stages of sexting that must be explored, as each has its own distinct consequences. These stages are:
1. requesting an image;
 2. creating an image;
 3. sharing an image with an intended recipient (consensually); and
 4. distributing an image to others (non-consensually). (This behaviour is also a form of cyber bullying.)
- 2.4 The following table outlines some of the negative social, emotional and psychological consequences that may flow from each of the four stages of sexting. It provides real life examples from NCYLC’s *Lawmail* practice,³⁷ through which we provide legal advice to children and young people, and BoysTown’s *Kids Helpline* service, which offers telephone and online counselling.³⁸ We emphasise that the harms identified below are not characteristic of all, or even most, sexting cases. In many cases involving just the first three stages, the subject of the image may not experience any harm.³⁹ Indeed, some experts have argued that consensual sexting can be a valuable and healthy way for young people to express their sexual agency.⁴⁰

The Stages	The Potential Negative Consequences	Examples 
requesting an image	Depending on the nature and the source of the request, the recipient may feel upset by it. He or she may also feel pressured to comply.	<i>Amy (13y/o) reported that her friend was being pressured by her 15 year old boyfriend to take a picture of her breasts and send it to him. While Amy was sure her friend wouldn’t do this, she expressed concern that this boy might hurt her friend if she didn’t as he had been hurtful in the past.</i> ⁴¹ (Kids Helpline)

The Stages	The Potential Negative Consequences	Examples
creating an image	If the image is a self-portrait, its creator may be acting in response to peer pressure. If the image is captured by someone else, there are additional concerns, including possible lack of understanding or consent by the subject.	<p><i>Sarah (16y/o) recently had sex with Nathan (19y/o), who filmed it on his mobile phone. Sarah didn't want to be filmed, but Nathan insisted that nobody else would see it. Sarah contacted us to get some information about the laws that might apply. (Lawmail)</i></p> <p><i>Lila (17 y/o) wrote to us to ask for some advice about a problem that her friend, Jennifer (17y/o), was having with her ex-boyfriend, Stephen (19 y/o). While Jennifer and Stephen were dating, Stephen took naked photos of Jennifer. Some of these photos were taken without Jennifer's consent. Lila wanted to know what laws applied and if there was anything she and Jennifer could do to make Stephen delete the photos. (Lawmail)</i></p>
sharing an image with an intended recipient (consensually)	Again, peer pressure is the primary concern. The subject of the image may also feel restricted from doing anything that could upset the recipient (such as ending their relationship or refusing to send more images), for fear that the recipient might share the image with others. This may give the recipient a means of control over the subject. ⁴²	<p><i>Sam (19 y/o) contacted us to get some information for his friend, Bethany (age unknown). Bethany had texted nude photos of herself to her ex-boyfriend, John. After they broke up, Bethany became worried that John would send these photos to other people. Sam was wondering what the law says about this and what Bethany can do to prevent John from releasing the photos. (Lawmail)</i></p> <p><i>Gemma (13 y/o) recently sent some boys from school naked photos of herself. She contacted us for advice about how she can make the boys delete the photos. (Lawmail)</i></p>
distributing an image to others (non-consensually)	At this stage, harm is more probable and substantial. The subject of the image is likely to feel betrayed, humiliated, angry and upset. If the photo is shared widely, the subject is likely to feel a sense of helplessness and loss of control. The subject is also likely to worry about long-lasting damage to his or her reputation and even job prospects. If the image is passed around among the subject's peers, he or she may also experience bullying and harassment.	<p><i>Joshua (age unknown) recently filmed himself masturbating on a webcam and sent the video to someone else. The recipient posted the video to YouTube. Joshua contacted us to get information about whether his actions were illegal, and whether he could be charged or end up with a criminal record if someone reported the video to the police. (Lawmail)</i></p> <p><i>Angela (17 y/o) sent Michael (17y/o) a photo of herself posing in her underwear. Michael then logged into Angela's email account without her permission and, purporting to be Angela, sent the photos to some of her friends. Michael contacted us to ask if he had committed a crime. (Lawmail)</i></p>

- 2.5 Naturally, the examples from *Kids Helpline* and *Lawmail* exemplify the harms of sexting, as young people only seek out these services when they are experiencing distress. We reiterate that such harms are not always associated with sexting, and note that there is a growing body of scholarship suggesting that sexting is, in some cases, merely “a method of flirting and assessing whether further amorous advances might be welcomed”, as well as a way for teenagers to “take possession of their own bodies and sexuality, thus affording [them] a sense of power and control”.⁴³ Of course, where these images ‘go viral’, all sense of power and control is utterly lost. It is in these cases, where “sexting may be occurring in the context of cyber bullying behaviour”, that it has been linked to depressive symptoms.⁴⁴ Nevertheless, it is likely that there are many more cases of sexting in which images remain privately held by the senders and intended recipients.


ii. The Prevalence of Sexting

- 2.6 We do not know with any certainty how prevalent sexting is. Studies on sexting in Australia and overseas have produced disparate figures due to discrepancies in the way sexting is defined and differences in the age groups surveyed.⁴⁵ According to the most current Australian study, 15% of 11 – 16-year-old internet users in Australia have received ‘sexts’ (defined as sexual messages) and 4% have sent them.⁴⁶
- 2.7 NCYLC’s work in this area indicates that sexting is happening with some frequency. We conducted an online survey last year as part of our *To Tweet or Not to Tweet* project, which aims to educate young people about the laws that apply to their social media use. The respondents were 96 young Australians who volunteered to answer questions about their internet and mobile phone use. We asked whether they had ever sent a nude or semi-nude image of themselves or someone else in a text message or over the internet; whether they had ever received such an image; and if they had received such an image, whether they had shared the image with others. 10.8% said they had sent an image of themselves; 21.9% said they had received an image; and 8.1% said that they had shared the image with others.
- 2.8 In addition, the number of page hits to our *Lawstuff* website (which provides state and territory-specific legal information on a variety of topics relevant to children and young people), demonstrates that sexting is a heavily viewed topic. There have been over 11,000 unique visits to our sexting information pages since their establishment in late 2010. We also receive a small but growing number of sexting-related enquiries from children and young people through *Lawmail*.

b. Cyber Bullying

i. The Nature of Cyber Bullying

- 2.9 Cyber bullying is bullying carried out online or through mobile phones. Bullying, in turn, generally refers to a campaign of intentional harassment or abuse aimed at embarrassing, intimidating or otherwise hurting a particular person or group of people.⁴⁷ Unlike sexting, cyber bullying cannot be easily broken down into ‘stages’. However, there are some typical cyber bullying behaviours that can be grouped according to the type of harm inflicted. Below are several (overlapping) categories of cyber bullying, along with real life examples from NCYLC’s *Lawmail* practice.

The Categories	Specific Behaviours	Examples 
nastiness or cruelty	excluding, name-calling and taunting	<i>Zara (age unknown) reported that a girl at school had sent her hurtful emails. The girl and her friends had also written nasty comments on Zara’s Facebook page. Zara contacted us to find out whether anything could be done about this under the law.</i> <i>Elliott (age unknown) contacted us about being called gay and referred to in a derogatory manner on the internet. Elliott was sick of being bullied and publicly chastised about his perceived sexuality and wanted to know if anything could be done about it.</i>
damage to reputation	spreading lies or rumours	<i>Rose wrote to us about her daughter Claire (12y/o). Claire had been threatened and harassed by another girl at her school. The girl had also begun spreading lies about Claire on a blog. Rose asked if there was anything that could be done under the law.</i>

damage to reputation (cont'd)	spreading lies or rumours	<i>Tina contacted us about her daughter, Heather (14 y/o). Heather had been receiving harassing text messages for months. Recently, Tina had become aware of false rumours that were circulating online about Heather having a sexually transmitted disease. Tina wanted some advice about where to report the matter and what legal action she could take.</i>
identity theft	creating fake accounts about others or hacking into real accounts without permission	<i>Nicola (age unknown) recently learned of a Tumblr page that had been made about her. The page said 'for a good time call...' and included her real phone number. Nicola knew who was responsible for the page and contacted us to determine what legal action she could take to resolve this matter.</i> <i>Danielle (17 y/o) had hacked into someone else's email account and—acting as the real owner—had written and sent offensive messages to others. The real owner of the account then contacted the police to report the offence. Danielle contacted us for advice on what she should do.</i>
invasion of privacy	posting confidential photos or other information	<i>Karen (14 y/o) approached us after some girls had made a film of her while she was in the school showers. The girls had filmed her exposed private parts, then circulated the video online. Karen took the matter to the police, but felt that nothing was being done about it. She wanted to know whether there was anything else she could do.</i> <i>Mark (age unknown) reported that someone has taken a video of him being harassed by a group of boys as he walked home from school. He wanted to know whether the person could be punished for posting the video online.</i>
harassment or stalking	sending repeated unwanted communications or fixating on a person	<i>Michelle (10 y/o) had been receiving rude text messages saying things like 'I want to touch your body'. Michelle contacted us for advice about how she could stop the messages.</i> <i>Diana (16 y/o) reported that someone she knew had been following her, taking pictures of her and posting them on Reddit. People had been posting disgusting comments about the pictures. Diana asked us if these actions were legal.</i>
threats	threatening to harm or kill a person	<i>Craig (17 y/o) reported that someone he knew had threatened to bash him on Facebook. Craig had kept copies of all of the threatening messages and was getting ready to go to the police. He contacted us to find out what the police would do if he reported the threats.</i> <i>Joshua (15 y/o) contacted us about text messages he had received threatening to kill his best friend. Joshua felt very frightened for his friend's safety and asked if he could take legal action against the person who made the threat.</i>
incitement of self-harm	encouraging suicide or self-destruction	<i>Caitlin (15y/o) had been receiving text messages from a blocked phone number. The person said horrible things and told her she should hang herself. She was unsure who was making the calls, but believed it might be someone from school. Caitlin contacted us to ask how she could make this stop.</i> <i>Taylor (15 y/o) contacted us about the constant bullying and abuse she had been experiencing online. The bullies had posted secrets that Taylor had told them in confidence, and had said that the world would be a better place without Taylor in it. Taylor wanted to know if there was any way to make them stop.</i>

- 2.10 Often, cyber bullying involves a combination of the behaviours listed above. The severity of harm to victims may vary depending on the tactics employed by bullies, the ubiquity of the bullying and the presence or absence of victim support. Victims of cyber bullying are more likely than non-victims to experience impaired social and emotional adjustment, poor academic achievement, poor physical health, low self esteem, anxiety and depression.⁴⁸

ii. The Prevalence of Cyber Bullying

- 2.11 According to the Alannah and Madeline foundation, “[c]yber bullying has been and remains the most pervasive form of serious risk faced by young people when they use technology”.⁴⁹ The most recent Australian research, *AU Kids Online*, revealed that 29% of children and young people between the ages of 9 and 16 have been bullied, with 13% experiencing bullying on the internet.⁵⁰ This is more than double the average rate of cyber bullying reported in European countries (at 6%).⁵¹ The Parliamentary Joint Select Committee on Cyber Safety’s *Are you safe?* survey found that 10 - 15% of respondents had experienced cyber bullying more than once, with girls reporting higher levels of cyber bullying than boys.⁵²
- 2.12 Of the young people who responded to our *To Tweet or Not to Tweet* survey, 50.7% said they had been bullied online and 14.7% said they had used the internet to bully someone else, either by insulting them or spreading rumours about them. 29.1% said they had been threatened online before, with 57.7% of these threats occurring via Facebook and/or mobile phone text messaging. 22.6% of those threatened online did not report or tell anyone about the online threat they had received.
- 2.13 The pervasiveness of cyber bullying can also be gleaned from the large number of young people who use our services to learn about cyber bullying and the law. Our cyber bullying *Lawstuff* pages have received upwards of 12,000 unique page hits since their formation in late 2010, and we routinely receive cyber bullying-related *Lawmail* enquiries, as demonstrated above.

3. The Legal Framework

a. The Multiple Layers of Law and Policy Involved

- 3.1 There are several features of sexting and cyber bullying that make the applicable legal framework particularly complicated.
- 3.2 First, as indicated above, sexting and cyber bullying are amorphous labels applied to a wide range of behaviours with varying levels of harm. As a result, there is a broad array of criminal and non-criminal law that may apply to any given incident.
- 3.3 Second, these behaviours are often perpetrated by young people against young people. The involvement of young offenders and young victims creates entanglements with the juvenile criminal justice system, the child protection system and school policy.
- 3.4 Third, the behaviours are carried out through carriage (phone and internet) services, implicating Commonwealth law in addition to State law. Since individuals must contract with phone and internet service providers (as well as with apps, websites and the like) in order to use these services, the terms of use create yet another layer of regulation.
- 3.5 While the complex framework of laws that can apply to sexting and cyber bullying is often seen as a difficulty, it can also be viewed as a strength, with each layer of law providing distinct opportunities for local resolution. This report’s focus on the criminal law is not intended to minimise the importance of non-criminal resolution of online disputes. In fact, we urge educators, parents and youth advocates to take advantage of non-criminal avenues wherever possible.

b. The Criminal Law

i. Sexting

- 3.6 Sexting implicates a variety of criminal laws, the most notorious of which are child pornography offences. It is important to remember that these laws also apply to any form of cyber bullying that involves naked or sexual images of young people.
- 3.7 We endeavour in this section to describe these laws as succinctly and clearly as possible. This section—as well as our presentation—aims to lessen the confusion around the relationship between sexting and sex offences.
- 3.8 The discussion is limited to laws that can be applied against people under the age of 18. However, people over the age of 18 who engage in sexually suggestive interactions (including sexting) with people under the age of 16 may be violating a number of other NSW and Commonwealth laws.⁵³ Conversely, children under the age of 10 cannot be charged with any criminal offence,⁵⁴ and those between the ages of 10 and 14 are presumed incapable of committing a crime (though this presumption is rebuttable).⁵⁵ Accordingly, children under 14 years of age are less likely to be charged with the following crimes.

1. Voyeurism

- 3.9 In NSW, it is an offence to film (for sexual arousal or gratification) another person's private parts or acts in circumstances in which a reasonable person would expect not to be filmed and knowing that the person does not consent to being filmed.⁵⁶ Filming extends to any type of recording or transmitting of images that enables observation.⁵⁷ Private parts include a person's genitals or anal area, whether bare or covered by underwear.⁵⁸ Private acts include being in a state of undress, using the toilet, showering and engaging in sexual acts in circumstances that a reasonable person would expect privacy.⁵⁹ The maximum penalty is 2 years in prison, unless the filming takes place in circumstance of aggravation, in which case the penalty is up to 5 years in prison.⁶⁰ Aggravating circumstances include filming someone who is under the age of 16.⁶¹
- 3.10 We are not aware of any case in which voyeurism charges have been applied in the context of sexting. However, these offences would certainly apply to stage 2 sexting (creating the image) where the subject reasonably expects privacy and does not consent to the photo or video being taken. Voyeurism charges may also be laid in certain cyber bullying situations (eg Karen's story, see page 15).

2. Child Pornography

a. Offences

- 3.11 Child pornography (or child abuse material, as it is called in NSW) is material that depicts or describes, in an offensive way:
- the private parts (genitals, anus or female breasts) of a child;
 - a child who is or seems to be engaged in a sexual pose or activity; or
 - a child who is or seems to be in the presence of another person who is engaged in a sexual pose or activity.⁶²

- 3.12 Whether or not the material is 'offensive' is determined based on the views of reasonable persons, taking into account all the circumstances. The factors that must be considered include:
- the standards of morality, decency and propriety generally accepted by reasonable adults;
 - the literary, artistic or educational merit (if any) of the material; and
 - the general character of the material (including whether it is of a medical or scientific character).⁶³
- 3.13 Child pornography is prohibited at both the State and Commonwealth levels. Under NSW law, it is a crime to produce, disseminate or possess this material, with a maximum penalty of 10 years in prison.⁶⁴ It is also a crime to use a child to produce such material (or to cause, procure or consent to the child's use), with a maximum penalty of 14 years in prison.⁶⁵ In short, all stages of sexting (asking for, creating and sharing an image) are covered, with very high maximum penalties. The NSW criminal law defines a 'child' as a person under the age of 16,⁶⁶ which is also the age of consent to sex. Thus, NSW law allows those who are over the age of 16 to both engage in and record sexual activities.
- 3.14 Under Commonwealth law, it is a crime to use a carriage service (eg a phone or the internet) to access, transmit, make available, publish, distribute, advertise promote or solicit child pornography, with a maximum penalty of 15 years in prison.⁶⁷ It is also a crime to possess, control, produce, supply or obtain child pornography for use through a carriage service, again, with a maximum penalty of 15 years in prison. In other words, Commonwealth law also covers all stages of sexting, with even higher penalties than those imposed by NSW. In fact, the maximum sentence is increased to 25 years where offensive conduct takes place on three or more occasions and involves two or more people.⁶⁸ In addition to imposing higher maximum penalties, the Commonwealth law extends the definition of 'child' to include anyone up to the age of 18. As a result, a couple of 17-year-olds engaging in legal, consensual sexual exploration under NSW law may nonetheless be subject to Commonwealth child pornography laws simply by recording the act on a mobile phone—even if the image is intended only for private use amongst themselves.
- 3.15 Given that sexting, by definition, involves the use of a phone or internet service, Commonwealth law will always apply. As a result, any sexting incident involving an offensive image of someone under 18 engaged in a sexual pose or activity or displaying a private part could result in child pornography charges. This is particularly confusing to young people in NSW, many of whom assume that the age of consent is the same for sex and sexting (see pages 46–47).

b. Defences

- 3.16 There are a few layers of protection in place to prevent young people from being convicted under child pornography laws for sexting. First, NSW and Commonwealth laws provide multiple defences to child pornography-related crimes. While most are irrelevant in the context of sexting (eg possession for research, law enforcement or public benefit),⁶⁹ there are two NSW legislative defences that may be applicable in some sexting cases.
- 3.17 It is a defence that the accused did not know, and could not reasonably be expected to have known, that he or she produced, disseminated or possessed child abuse material.⁷⁰ This defence would apply where the defendant reasonably believed that the person with whom he or she was exchanging images was over the age of consent.

- 3.18 It is also a defence that the material came into the accused's possession unsolicited and he or she took reasonable steps to get rid of it upon becoming aware of its nature.⁷¹ This defence would apply where the defendant received an image from someone without asking for it and immediately deleted it.

c. Other Barriers to Prosecution

- 3.19 While these defences do not apply to charges under Commonwealth law, there is a second layer of built-in protection for young defendants at the Commonwealth level—proceedings for a child pornography-related crime cannot be commenced without the consent of the Attorney-General if the accused was under the age of 18 at the time he or she allegedly engaged in the offensive conduct.⁷² We are unaware of any case in which this consent has been sought or given; according to the Australian Federal Police, no person under the age of 18 has been charged “with ‘sexting’ type offences under the *Commonwealth Criminal Code Act (1995)*”.⁷³ However, we are hesitant to rely on this provision as a protective measure, as it explicitly provides that young defendants may be arrested, charged or remanded in custody or on bail before consent is given.⁷⁴
- 3.20 Finally, there is some measure of protection in the exercise of police discretion. NSW Police have indicated that the majority of sexting incidents that come to the attention of police are end-of-relationship cases, in which photos that were shared during the relationship (with the intent that they would remain private) are leaked to others after the relationship dissolves.⁷⁵ The police have indicated that, typically, they would not press charges in these situations, but would instead refer the matter to the Youth Justice Conferencing process (discussed in more detail below).⁷⁶ However, practical experience through the hotline and our court work tells us that this is not always the case.
- 3.21 Moreover, in a situation where the behaviour crosses the line from “stupid” to “malicious”, the NSW police have emphasised that they would be far more inclined to press charges.⁷⁷ For example, where the motive for dissemination is retribution or serious damage to a person's reputation, where the photo was the product of coercion or where the subject of the photo did not consent to being filmed, the offenders would likely be charged under child pornography laws.⁷⁸ While this unofficial policy may provide a useful rubric for police, and may have implicit public approval, it does not provide a great deal of certainty or transparency to young people. We encourage the creation and implementation of a formal set of police guidelines that could be shared with young people and their families, educators and other advocates (see page 9).

3. Indecency

- 3.22 Indecency applies to acts—generally of a sexual nature—which “right-minded persons would consider to be contrary to community standards of decency”.⁷⁹ In NSW, it is a crime to commit an act of indecency with or towards another person, or to incite someone else to engage in an indecent act.⁸⁰ Where the victim is over the age of 16, the maximum penalty is typically 18 months; however, where the victim is between the ages of 10 and 16, the maximum penalty increases to 2 years.⁸¹
- 3.23 Where the act is committed in circumstances of aggravation, these maximum penalties are raised to 3 years and 5 years, respectively.⁸² Such circumstances include victimising someone with a cognitive impairment or serious physical disability, under the offender's authority or in the company of others.⁸³ Where the victim is under the age of 10, the maximum penalty is elevated to 7 years,⁸⁴ and where the act is filmed for the purposes of producing child pornography, it reaches 10 years.⁸⁵ As a result, a conviction for indecency for sexting with someone under the age of 16 could, conceivably, result in a 10 year prison sentence.

- 3.24 It is also a summary offence in NSW to publish an indecent article.⁸⁶ An ‘article’ is broadly defined as anything that is or contains matter to be read or looked at,⁸⁷ and ‘publishing’ includes distributing, disseminating, circulating, delivering, exhibiting and exchanging, among other things.⁸⁸ This offence provides a low-penalty (12 months maximum)⁸⁹ alternative to child pornography offences—a person cannot be convicted of both types of offences in respect of the same matter.⁹⁰
- 3.25 There have been two well-publicised examples of indecency prosecutions for sexting in NSW. The first involved 18-year-old Damien Eades, who texted a 13-year-old acquaintance and requested a “hot steamy” photo.⁹¹ She responded with a full frontal nude photo, which her father later found on her mobile phone.⁹² Her father alerted police, and Eades was charged with possessing child pornography and inciting an act of indecency. Both charges were dismissed by the local magistrate, who was not convinced that the photo, when viewed in isolation from its context, was indecent.⁹³ The DPP successfully appealed the indecency charge to the NSW Court of Appeal, which found it “permissible to take matters of context into account in deciding whether an act that is incited is one of indecency”,⁹⁴ including “the terms of request”.⁹⁵ The case was referred back to the local court, where the magistrate found the offence proven and issued a good behaviour bond, but did not record a conviction.⁹⁶
- 3.26 The second case involved 20-year-old Ravshan “Ronnie” Usmanov, who had posted six nude photos of his ex-girlfriend (taken while they were still romantically involved, and when the ex-girlfriend was over the age of 18) to Facebook in order to “get back at” her for ending their relationship.⁹⁷ The ex-girlfriend reported the matter to the police, prompting Usmanov to remove the photos for a short time.⁹⁸ When he re-posted them later that day, police arrested Usmanov and charged him with publishing an indecent article, to which he pleaded guilty. The magistrate recorded the conviction and sentenced him to six months in home detention due to the severe “embarrassment, humiliation and anxiety” experienced by the victim, as well as “the need to prevent crime by deterring both the offender and the community generally from committing similar crimes”.⁹⁹ The sentence was later suspended.¹⁰⁰

4. Sex Offender Registration

- 3.27 NSW was the first state to introduce a child sex offender register.¹⁰¹ The aims of the register are to:
- Increase and improve the accuracy of child sex offender intelligence held by police;
 - Assist in the investigation and prosecution of child sex offences committed by recidivist offenders;
 - Provide a deterrent to re-offending;
 - Assist in the monitoring and management of child sex offenders in the community; and
 - Provide child abuse victims and their families with an increased sense of security.¹⁰²
- 3.28 The *Child Protection (Offenders Registration) Act 2000* (NSW) provides for two classes of offences.¹⁰³ Class 1 offences include the murder of or sexual intercourse with a child—defined as a person who is under the age of 18.¹⁰⁴ Class 2 offences include acts of indecency, voyeurism and child pornography.¹⁰⁵ These definitions extend to similar offences committed in other jurisdictions, including violations of Commonwealth law.¹⁰⁶
- 3.29 A person who is sentenced for one or more of these offences is required to register as a sex offender unless:
- the matter is dismissed under the *Crimes (Sentencing Procedure) Act 1999* or the *Children (Criminal Proceedings) Act 1987* or
 - he or she committed a single offence involving child pornography or an act of indecency while under the age of 18.¹⁰⁷

- 3.30 A 'single offence' can actually encompass multiple offences if they are of the same kind and arise from the same incident.¹⁰⁸ For purposes of the Act, offences only arise from the same incident if they are committed within a single period of 24 hours and are committed against the same person.¹⁰⁹ In other words, a person who is under the age of 18 does not become a registrable offender merely for sexting with one other person over the course of a single day, even if that person has been convicted of one or more child pornography, voyeurism or indecency offences for engaging in this behaviour. While this suggests that 'private' sexting that takes place over a prolonged period may lead to sex offender registration, NSW police have indicated that they place more emphasis on the 'same person' component than they do on the time period component in determining how many offences have been committed.¹¹⁰
- 3.31 Although the Act and its interpretation does provide some protection against sex offender registration for young people who engage in sexting—and the NSW police made clear that no one under the age of 18 has been registered for a sexting-related offence in NSW¹¹¹—it does not guarantee that every young person who shares nude or sexual images can avoid being placed on the register.
- 3.32 We believe that no child should ever be placed on the register for an age-appropriate, sexting-related offence. The Law Reform Commission of Western Australia noted that "the purpose of sex offender registration is not to further punish an offender; however, the reality is that registration and reporting obligations can be demanding and may have serious adverse consequences for the offender".¹¹² In NSW, the reporting obligations for registrants include, among other things, providing police with their names and addresses; details of their offences; the names and ages of any children with whom they live or have unsupervised contact; the details of any club or organisation with child participation or membership where they have an affiliation; and their email addresses and other internet user names.¹¹³ These obligations are particularly onerous for young people, who—due to their age—will constantly be interacting with other children.
- 3.33 In addition to imposing burdensome reporting requirements, the registration of young people has the effect of improperly stigmatising them:
- Children who commit sexual offenses generally have the same vulnerability and are in the same need of protection as the child victims whom the proponents of [sex offender registration] claim to protect. But [registration laws] have the unique propensity to gravely harm some children in the hope of protecting an unknown few. Many child sex offenders . . . engage in common sexual behaviour, sometimes healthy, sometimes inappropriate, that they will most likely learn to manage. [Registration laws] stigmatize and isolate these children, limiting their opportunities for normal growth and exacerbating the kinds of vulnerabilities that lead to future criminality, both sexual and nonsexual.¹¹⁴
- 3.34 Given the severe consequences of registering young people as sex offenders, the law should be amended to ensure that no young person is ever registrable for engaging in one or more incidents of age-appropriate sexting.

5. Youth Justice Conferencing

- 3.35 One avenue for diverting young people who have engaged in sexting away from serious criminal charges and penalties, including sex offender registration, is Youth Justice Conferencing. The principles, purposes and rules of conferencing are set out in Part 5 of the *Young Offenders Act 1997*.
- 3.36 According to the NSW Juvenile Justice website:

When police arrest a child they must first consider whether the child is 'eligible' for a caution or a youth justice conference. That is, they must decide whether the offence is one that is 'covered' by the Act, and that the child has admitted the offence and consented to be cautioned or participate in a conference. If so, they must apply a given set of criteria before deciding whether this child should be cautioned, referred to a youth justice conference, or charged. The criteria are: the seriousness of the offence, the degree of violence involved, the harm caused to any victim, the child's previous offending history and the number of times the child has been cautioned or participated in a youth justice conference, as well as any other appropriate matters.¹¹⁵

- 3.37 Offences that are eligible for conferencing include voyeurism and the production, dissemination or possession of child pornography.¹¹⁶ Accordingly, the NSW police indicated that the majority of sexting cases are referred to Youth Justice Conferencing.¹¹⁷ Unfortunately, the police database (COPS) does not readily capture 'conferencing' as an outcome, so the police do not have reliable statistics on the number of young people referred for sexting. However, the police were able to recall at least eight boys from two sexting incidents who had been referred to Youth Conferencing.¹¹⁸
- 3.38 We encourage the continued use of Youth Justice Conferencing to deal with sexting that has resulted in harm to one or more young persons. We also urge police to record the number and characteristics of young people being referred for sexting, the types of incidents for which they were referred, and the outcome plans that were developed through conferencing in order to better monitor the legal responses to sexting and their effectiveness.

ii. Cyber Bullying

- 3.40 As we have seen, sexting and cyber bullying can overlap—especially where private images are distributed without the subject's consent. Accordingly, some of the laws outlined below will also apply to sexting. However, many of the laws deal with particular categories of cyber bullying, such as violent threats or unauthorised access to online accounts.
- 3.41 It is a common misconception that the existing criminal law does not sufficiently cover cyber bullying.¹¹⁹ This section aims to dispel that myth by exploring the numerous laws that apply to cyber bullying behaviours.

1. Using a Carriage Service to Menace, Harass or Cause Offence

- 3.42 It is a crime under Commonwealth law to use a phone or internet service in a way that reasonable persons would regard as being, in all the circumstances, menacing, harassing or offensive.¹²⁰ The maximum penalty is 3 years in prison.¹²¹ The law does not define the terms 'menacing', 'harassing' or 'offensive'. However, the same factors that are used to determine whether a sexual image of a child is 'offensive' under child pornography law—the standards of morality, decency and propriety; the literary, artistic or educational merit; and the general character—apply.¹²²
- 3.43 There is very little case law providing interpretive guidance on these terms. Justice McClellan has noted that 'menacing' conduct "imports a threat to cause harm" and that 'harassing' conduct consists of "repeated attacks".¹²³ 'Offensive' conduct is the most difficult to delineate, and its criminalisation bears the greatest risk of infringing on the right to expression. Acknowledging this risk, Justice Bathurst has remarked that, in order to be 'offensive', "it is necessary that the use be calculated or likely to arouse significant anger, significant resentment, outrage, disgust, or hatred in the mind of a reasonable person in all the circumstances", adding "it is not sufficient if the use would only hurt or wound the feelings of the recipient, in the mind of a reasonable person."¹²⁴

3.44 Given its broad scope, this law has potential to cover every form of cyber bullying mentioned above (see pages 14–15), as well as every stage of sexting (see pages 12–13). According to the Explanatory Memorandum to the *Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Bill 2004*, “[e]xamples of the type of use of a carriage service the proposed offence may cover include use that would make a person apprehensive as to their safety or well-being or the safety of their property, use that encourages or incites violence, and use that vilifies persons on the basis of their race or religion”.¹²⁵ Since its enactment, the law has been applied in a wide array of cases involving harassing phone calls,¹²⁶ threatening¹²⁷ or sexually inappropriate¹²⁸ text messages, offensive Facebook pages,¹²⁹ and the non-consensual live-streaming of sexual encounters via Skype.¹³⁰

3.45 By contrast, the laws discussed below focus on more narrowly-defined forms of cyber bullying.

2. Threats and Intimidation

3.46 In addition to criminalising the menacing use of a phone or internet service, Commonwealth law makes it an offence to use these services for threats.¹³¹ A threat to kill someone carries a maximum penalty of 10 years,¹³² and a threat to cause serious harm carries a maximum penalty of 7 years.¹³³ The threat must be made with the intent that the recipient will fear that the threat will be carried out,¹³⁴ but it is not necessary to prove that the recipient was actually fearful.¹³⁵

3.47 Under NSW law, it is a crime to intimidate another with the intention of causing that person to fear physical or mental harm.¹³⁶ Intimidation can be harassment or molestation, an approach by any means (including phone, text message, email and other technology) that causes someone to fear for his or her safety or any other conduct that causes a reasonable apprehension of injury, violence or damage to a person or property.¹³⁷ The intent element is met if the offender knows that his or her conduct is likely to cause fear in the other person¹³⁸— it is not necessary to prove that the person was actually fearful.¹³⁹ The maximum penalty is 5 years in prison.¹⁴⁰

3.48 NSW is the only state with a separate criminal law for intimidation that occurs at school. The law states that any person who assaults, stalks, harasses or intimidates any student or staff of a school while they are on, entering or leaving¹⁴¹ school premises is liable to imprisonment for up to 5 years.¹⁴² The maximum penalty increases to 7 years in prison if an assault results in actual bodily harm,¹⁴³ and up to 12 years for grievous bodily harm.¹⁴⁴ While this law could capture an incident of cyber bullying that leads to a schoolyard brawl, it is unlikely to apply to bullying that occurs solely through electronic means, since this will most likely occur outside of school.

3.49 It is also a crime in NSW to threaten to destroy or damage someone else’s property (or one’s own property in a way that is likely to cause bodily injury or endanger the life of another).¹⁴⁵ The threat must be made without lawful excuse and with the intention of causing the recipient to fear that the threat will be carried out.¹⁴⁶ The maximum penalty is 5 years.

3.50 Finally, it is a crime under NSW law to send, deliver or cause the receipt of a document that threatens to kill or inflict bodily harm on someone.¹⁴⁷ The sending or delivering can be done knowingly or recklessly,¹⁴⁸ and it does not matter whether anyone actually received it.¹⁴⁹ The maximum penalty is 10 years in prison.¹⁵⁰ Apparently, the term ‘document’ encompasses electronic communications, as a 17 year old boy was charged under this provision in 2006 for threatening to kill two of his teachers and a 14 year old girl on his MySpace page.¹⁵¹ According to The Sydney Morning Herald report, he was granted bail at his initial hearing.¹⁵² The outcome of the case is unknown.

3. Stalking

- 3.51 Similar to intimidation, it is a crime in NSW to stalk someone with the intention of causing that person to fear physical or mental harm.¹⁵³ Stalking is defined as following someone or approaching, watching or frequenting the places he or she commonly visits.¹⁵⁴ According to the NSW Police website, it also includes repeated unwanted phone calls, emails, text messages and messages left on social networking sites.¹⁵⁵ Stalking (and intimidation) carries a maximum penalty of 5 years in prison, and can also be grounds for an Apprehended Personal Violence Order (“APVO”).¹⁵⁶
- 3.52 An APVO is a court order that aims to protect people from others who cause them to fear for their safety.¹⁵⁷ A court can make an APVO for anyone who reasonably fears that a particular person will stalk, intimidate or commit a violent crime against him or her¹⁵⁸—including by technological means.¹⁵⁹ Every APVO prohibits the defendant from stalking, intimidating, assaulting, molesting, harassing, threatening or otherwise interfering with the protected person and his or her close ties.¹⁶⁰ The court may impose other restrictions on the defendant’s behaviour that are necessary to ensure the safety of the protected person.¹⁶¹ While the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) does not specifically refer to cyber bullying or non-consensual sexting as prohibited behaviours, these actions could presumably constitute “specified behaviour by the defendant that might affect the protected person”, which could be prohibited or restricted through an APVO.¹⁶²
- 3.53 Although an APVO appears to be a less onerous sanction than a criminal conviction, we are hesitant to recommend the use of APVOs in this context. APVOs were formulated to prevent and address violence in adult relationships. As such, they carefully restrict contact between the defendant and the protected person. When the defendant and the protected person are both children, and they attend the same school or are part of the same social circles, it becomes very difficult for the defendant to carry on with his or her studies and other day-to-day activities without violating the order. A violation of an APVO is a serious criminal offence. Consequently, while the initial imposition of the order may not cause serious detriment to the young defendant, its enforcement may cause considerable hardship, and an inadvertent violation of the order could result in serious penalties.

4. Unauthorised Access

- 3.54 Under both NSW and Commonwealth law, it is an offence to access or modify restricted computer data without authorisation.¹⁶³ Computer data (which includes data held on other technologies, such as mobile phones)¹⁶⁴ is ‘restricted’ if it is protected by an access control system¹⁶⁵ (for example, it requires a password or pin). The person must intend to cause the access or modification,¹⁶⁶ knowing that he or she is not authorised to do so.¹⁶⁷ For the Commonwealth law to apply, the person must access the data by phone or internet service.¹⁶⁸ The maximum penalty under both NSW and Commonwealth law is 2 years in prison.¹⁶⁹ However, where the offender accesses or modifies the data with the intention of committing a serious offence, the maximum penalty for the serious offence applies in lieu of the 2 year maximum.¹⁷⁰ A ‘serious offence’ is one punishable by imprisonment for 5 or more years—such as the threats, intimidation and stalking offences explored above.¹⁷¹
- 3.55 While we are not aware of any cyber bullying cases in which these laws have been applied, the Attorney-General’s Department has made clear that the Commonwealth laws against unauthorised access do encompass “conduct such as hacking into a person’s Facebook account and altering it”.¹⁷² As our survey results demonstrate, this is an increasingly popular method of cyber bullying (see pages 28–29).

5. Misuse of Identification Information

- 3.56 It is also a crime under NSW and Commonwealth law to possess or use identification information with the intention of committing an offence.¹⁷³ 'Identification information' is any information related to a person that is capable of being used to identify that person, including his or her name or address.¹⁷⁴ The maximum penalty varies from 3 to 10 years' imprisonment, depending on the nature of offence (i.e. possessing identification information as opposed to 'dealing' in such information) and whether the charge is laid under NSW or Commonwealth law.¹⁷⁵ While these provisions are typically linked to financial crimes, the legislation does not limit the type of offence that may be committed with this information to those involving theft or fraud. Therefore, these crimes could also apply to the creation of webpages that display a person's photo, name, mobile number, school, or other information as a means of harassment or abuse. Indeed, identity theft charges have been brought against young people in the United States for creating fake Facebook pages about others in order to disparage them.¹⁷⁶

6. Serious Vilification

- 3.57 Under NSW anti-discrimination law, it is an offence to incite hatred towards, serious contempt for, or severe ridicule of a person or group of persons by a public act.¹⁷⁷ A 'public act' includes any form of communication to the public, including speaking, writing and broadcasting.¹⁷⁸ The offence is limited to certain means of, and grounds for, incitement. The means must consist of threatening physical harm to the person(s) or their property, or inciting others to threaten such harms.¹⁷⁹ The grounds can include race, transgender identity, homosexual orientation or HIV/AIDS status.¹⁸⁰ While the maximum penalty is 6 months in prison,¹⁸¹ vilification complaints are typically handled as a civil matter by the Anti-Discrimination Board rather than police,¹⁸² and a person cannot be prosecuted for this offence without the consent of the Attorney-General.¹⁸³

7. Defamation

- 3.58 Under NSW law, it is a crime to publish defamatory material about another person, knowing that the material is false and with the intent to cause serious harm.¹⁸⁴ The maximum penalty is 3 years in prison.¹⁸⁵ There are numerous defences to criminal defamation, and proceedings cannot be instituted without the consent of the Director of Public Prosecutions.¹⁸⁶ While defamation is still commonly invoked as a tortious cause of action,¹⁸⁷ it is rarely prosecuted as a criminal offence.¹⁸⁸

8. Incitement of Suicide

- 3.59 It is a crime under NSW and Commonwealth law to intentionally incite suicide.¹⁸⁹ Under Commonwealth law, the incitement must involve the use of a phone or internet service.¹⁹⁰ Under NSW law, the victim must actually commit or attempt to commit suicide.¹⁹¹ The maximum penalty under Commonwealth law is 1,000 penalty units, and under NSW law, it is 5 years.¹⁹²
- 3.60 We are not aware of any cases in which these laws have been applied against cyber bullies, although there have been several teenage suicides in Australia linked to cyber bullying.¹⁹³

c. Summary

- 3.61 Sexting and cyber bullying implicate a variety of laws and penalties at both State and Commonwealth levels. Over the past few years, as our work in this area increased, it became clear to us that young people are not aware of these laws and penalties. It also became clear that these laws and penalties are not appropriate for

the majority of young offenders, and that they do not reflect the knowledge, opinions and realities of the young people they aim to protect.

4. The Voices of Young People in New South Wales

a. Overview

- 4.1 The *New Voices/New Laws* project grew out of our concern that young people's use of social media, mobile phones and the internet can lead to serious criminal penalties—of which most young people (and many adults) are unaware. The project therefore aimed to:
- educate young people about the criminal laws that can apply to sexting and cyber bullying;
 - encourage young people to voice their opinions on these laws;
 - amplify the voices and opinions of young people; and
 - facilitate advocacy for reform of inappropriate criminal laws and penalties.
- 4.2 To achieve these aims, NCYLC and CLS developed an educational presentation ("prezi") at <http://prezi.com/q6aih0jmsrhd/new-voices-new-laws-v5/> about the relevant criminal laws, as well as a survey to gauge young people's knowledge and opinions of these laws. The presentation included two scenarios, 'putting the ex in sexy text' and 'putting the post in imposter'. The scenarios incorporated stories about young people who get caught up in sexting and cyber bullying with information about the laws and penalties that could apply at each stage of the stories' development. 95.9% of students said they understood the prez, 79% said they liked it and 73.4% said it was useful.
- 4.3 In 'putting the 'ex' in sexy text', a 15-year-old boy asks his 15-year-old girlfriend for a naked photo. Trusting that he will not share it with others, she sends him a photo. A few weeks later, they break up, and he sends the photo to a friend, who sends it to others, and so on. A couple of girls who receive the photo post it on Facebook, where it spurs cruel comments. When the Facebook page comes to the attention of their school principal, the girls who created the page become nervous about getting into trouble, and send the subject of the photo a text message threatening to hurt her if she dubs on them.
- 4.4 In 'putting the 'post' in imposter', a teenage boy logs into a teenage girl's Facebook account without her permission and posts something offensive about her. She retaliates by creating a Facebook page about him—including his photo and mobile number—that suggests he is gay and open to encounters with strangers. Another student posts a comment on the page, urging violence against the boy. Upset, the boy sends a series of text messages to the girl who created the page, threatening to hurt her if she does not take it down.
- 4.5 A discussion of the laws outlined above was incorporated into these scenarios except for voyeurism, defamation and incitement of suicide. Voyeurism was excluded for the sake of clarity, as we wanted to emphasise that sexting is against the law, regardless of whether consent is given. Defamation was excluded because its continued use as a criminal offence (as opposed to a tort) has become rather unlikely. Finally, incitement of suicide was excluded to avoid normalising suicide as a response to cyber bullying.
- 4.6 NCYLC also created informational handouts for students and educators dealing with these issues, which were distributed along with the *To Tweet or Not to Tweet* factsheets¹⁹⁴ on these topics.

b. Methodology

- 4.7 Our primary means of engaging with young people was through school-based consultations. Between 22 June and 19 October 2012, we conducted 10 consultations at 8 schools (7 public co-educational schools and 1 Catholic girls' school)¹⁹⁵ in 7 regions—Wollongong, Dubbo, Sydney, Hunter, Tamworth, Broken Hill and Albury. Over 1,000 young people participated. The consultations generally consisted of:
- **A presentation on the laws and penalties that can apply to sexting and cyber bullying.** In most cases, we presented only the first scenario ('putting the 'ex' in sexy text'), due to time constraints and our wariness of presenting an overwhelming amount of information. Over 1,000 students viewed this presentation.
 - **A written survey asking participants to share their knowledge and opinions of these laws and penalties.** Surveys were distributed in 8 out of 10 consultations. Around 800 students took the survey.
 - **A focus group with a smaller subset of participants (typically a Legal Studies class) to engage in a more in-depth discussion of the issues.** Focus groups were held in 6 out of 10 consultations. Around 75 students participated.
- 4.8 We also posted the presentations and survey online. As of November 2012, 'putting the 'ex' in sexy text'¹⁹⁶ had almost 800 views, 'putting the 'post' in imposter'¹⁹⁷ had almost 500 views and a combined version of the two presentations¹⁹⁸ had over 300 views. About 70 young people took the survey online.¹⁹⁹

c. Ethics

- 4.9 Given that a primary purpose of *New Voices/New Laws* was to educate and inform young people, and that the consultations consisted of a survey and group discussion that were not part of a broader research design, we were not required to undergo the State Education Research Approval Process (SERAP).²⁰⁰ Nonetheless, we endeavoured to operate in accordance with the *National Statement on Ethical Conduct in Human Research*. Thus, the project was grounded in the principles of respect, merit, integrity, justice and beneficence, as well as in the best interests of the child.

i. Respect

- 4.10 Young people's rights to expression and participation were central to the project. We opened every discussion with an acknowledgment of the value and importance of different points of view and with the stipulation that everyone would be free to share their opinions and to agree or disagree with what was said in a respectful and conscientious manner.

ii. Merit and Integrity

- 4.11 In relation to merit and integrity, we believed the project would contribute to young people's knowledge and understanding of the law. We also hoped it would result in more fair laws and outcomes for young people who get caught up in sexting and cyber bullying. The presentation sought to inform participants about the relevant laws and behaviours in an honest and frank manner, and the surveys and focus groups were intended to promote youth participation and to ensure that their voices were heard.

iii. Justice

- 4.12 To achieve just results, we selected schools located throughout NSW to ensure that students in regional and remote areas were represented in the survey and focus group results, and that they had access to information about the law. Most of the schools were public, co-educational institutions with students from a variety of backgrounds and socio-economic statuses.

iv. Beneficence

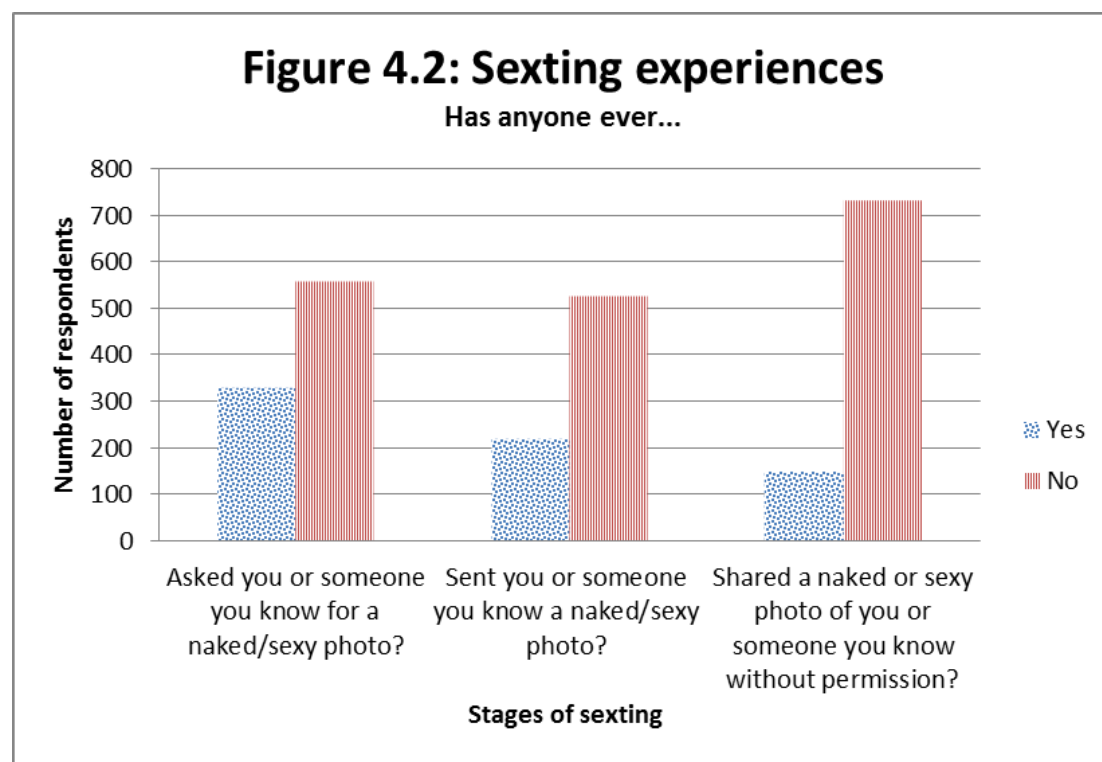
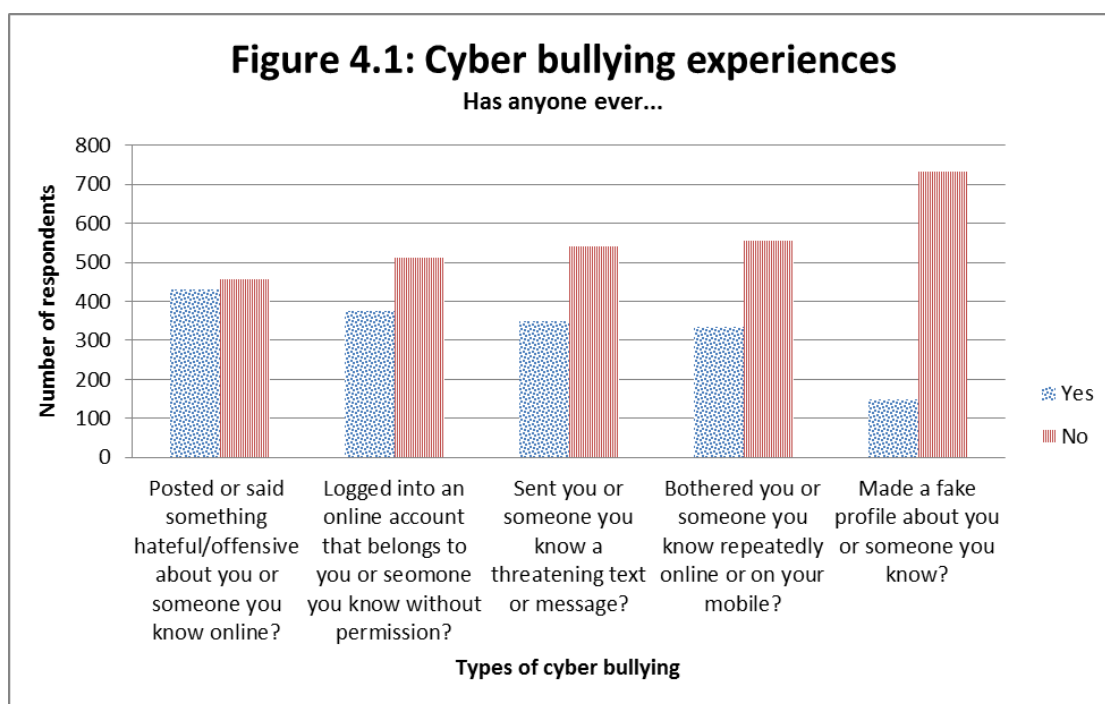
- 4.13 Finally, we undertook measures to minimise risks to participants. The potential risks we identified included self-incrimination from participants inadvertently admitting that they had committed a crime; breaches of privacy from participants sharing information about incidents of sexting or cyber bullying that were meant to be kept secret; and emotional distress from participants who had personally experienced these issues. In order to minimise these risks, we framed the survey questions in a way that would not incriminate respondents (by asking if they *or someone they knew* had done or experienced any of the behaviours) and asked the discussion participants not to share stories about their own experiences or about people they knew. Before we arrived at the schools, we asked teachers to let us know whether they were aware of any sexting or cyber bullying-related issues among the students. We also provided students with information about where they could get help if they were experiencing problems online.

d. Survey Results

- 4.14 The first version of the survey included 50 questions about respondents' knowledge and opinions of the laws that can apply to sexting and cyber bullying. A number of students told us that the survey was too long, and many skipped questions. As a result, the survey was shortened to 30 questions after the first two consultations. The wording or format of some of the questions was changed slightly in the second version, and demographics questions were added. 150 students filled out the first version of the survey and nearly 800 students (including online respondents) completed the second version.

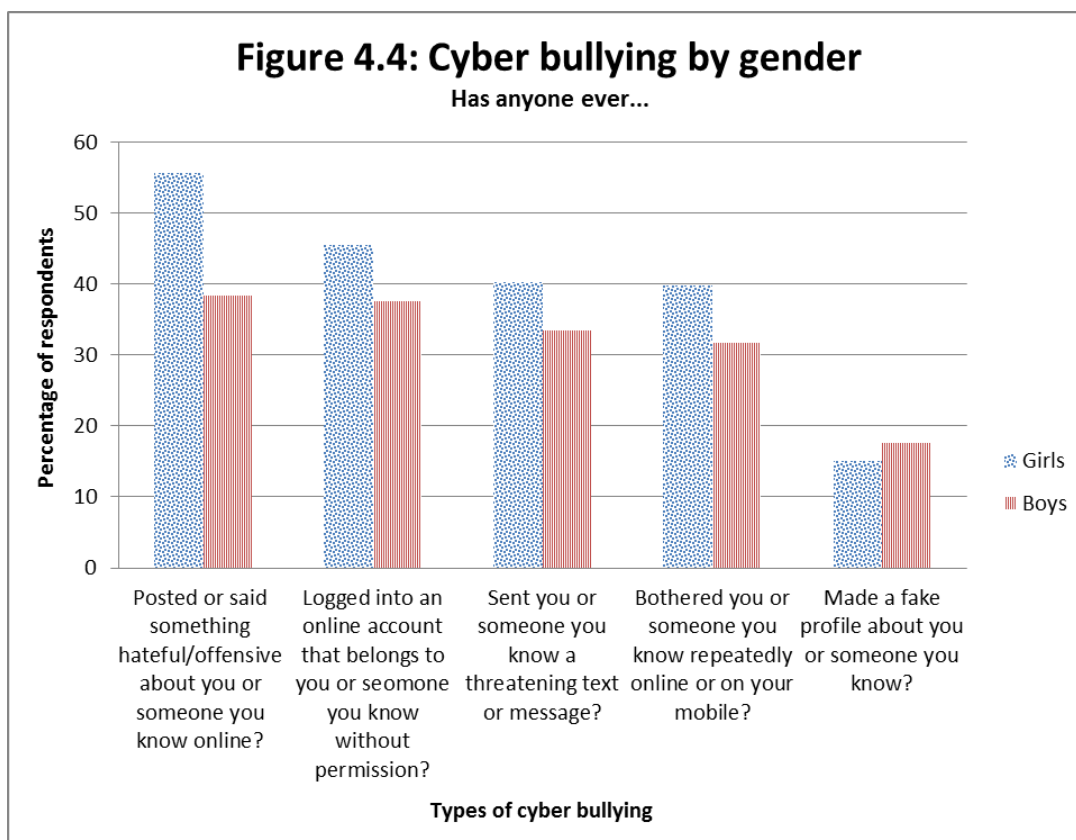
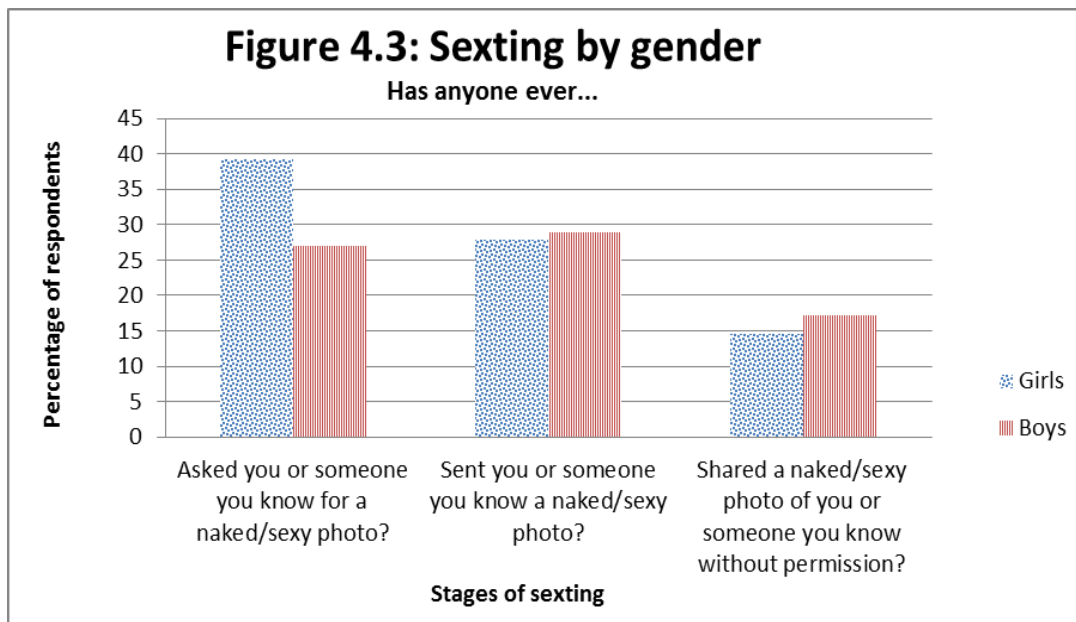
i. Respondents

- 4.15 The vast majority (96.4%) of respondents came from NSW, though a handful of online respondents (28) were from other states and territories. Most were in their mid-teens—0.1% were under 12 years old, 10.6% were 12-13 years old, 42.4% were 14-15 years old, 39.6% were 16-17 years old and 1.9% were 18 or older (with 5.4% not specifying an age). 55.7% were female, 32.6% were male and 4% identified as transgender (with 7.7% reporting that they would rather not say). 11.6% were Aboriginal or Torres Strait Islander. 11.4% said that they or their parents were from a non-English speaking background. 5% said they had disabilities. Most (94.8%) had seen all or part of the prezzi 'putting the 'ex' in sexy text', some (13.1%) had seen all or part of the prezzi 'putting the 'post' in imposter' and some of the online respondents (5.4%) had seen neither.
- 4.16 Respondents were asked whether they or someone they knew had ever been involved in specific types of cyber bullying and sexting. The most common cyber bullying experience was having something hateful or offensive posted about them or someone they know online (48.4%), followed by having an account logged into without permission (42.3%), receiving a threatening text or message (39.2%), being bothered repeatedly online or on a mobile (37.8%) and having a fake profile made about them or someone they know (17%). The most common sexting-related experience was being asked for a photo (37.1%), followed by being sent a photo (29.5%) and having a photo shared without permission (17.2%).



- 4.17 The rates of sexting and cyber bullying varied across different demographic groups. In relation to sexting, more girls than boys were asked or know someone who has been asked to share a nude or sexy photo (39.3% cf. 27%). However, more boys than girls have experienced or know someone who has been sent a nude or sexy photo (28.9% cf. 27.8%) and have experienced or know someone whose photo has been shared without permission (17.2% cf. 14.5%).
- 4.18 In relation to cyber bullying, girls were far more likely than boys to report experiencing or knowing someone who has experienced cyber bullying in every category except for fake social media profiles, which was more common among boys (17.6% cf. 15.1%). Within the other categories, 55.7% of girls (cf. 38.4% of boys) have

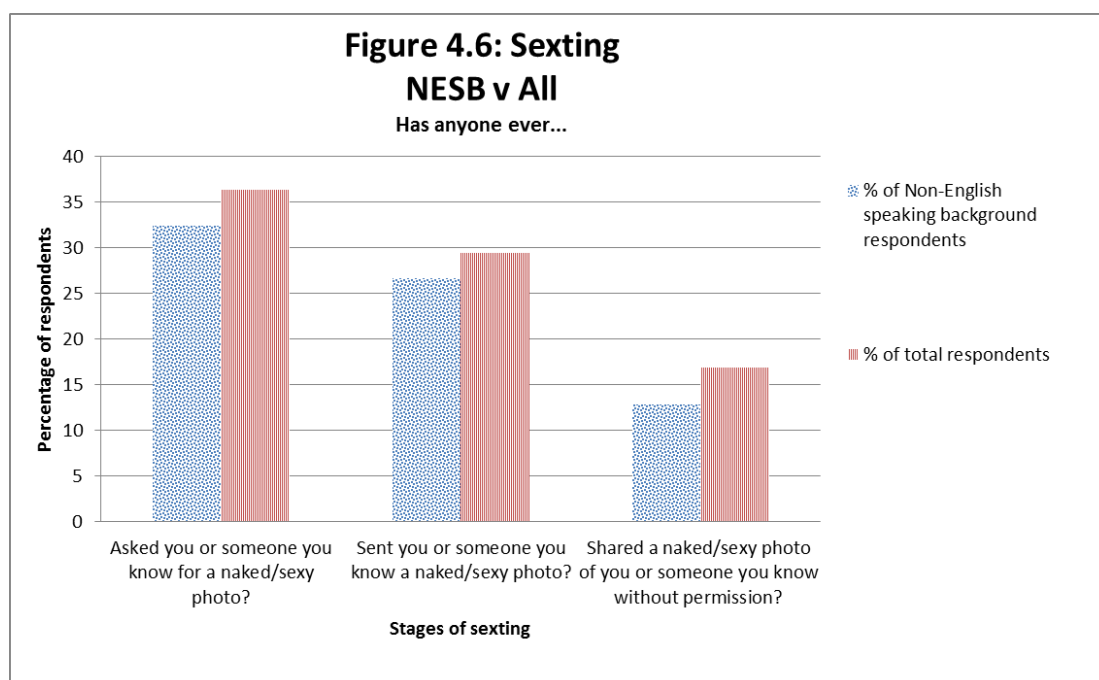
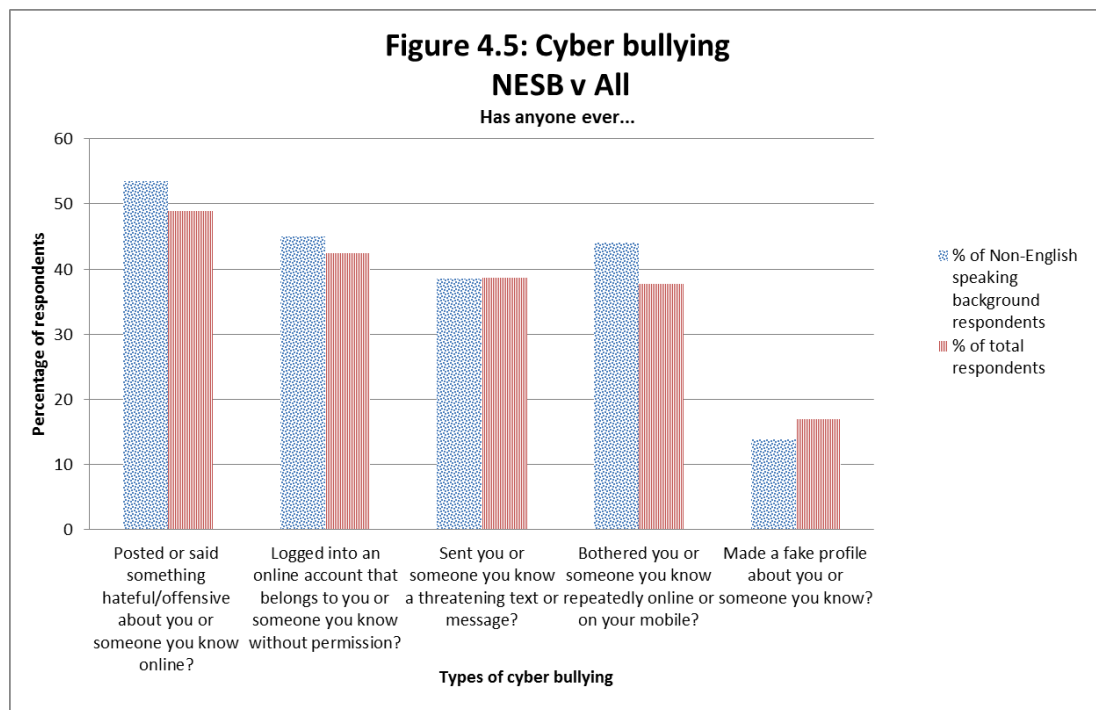
experienced or know someone who has had something hateful or offensive posted about them online; 40.3% of girls (cf. 33.5% of boys) have experienced or know someone who had been sent a threatening text or message; 39.8% of girls (cf. 31.7% of boys) have experienced or know someone who has been bothered repeatedly online or on a mobile; and 45.6% of girls (cf. 37.6% of boys) have experienced or know someone whose online account had been logged into without permission.

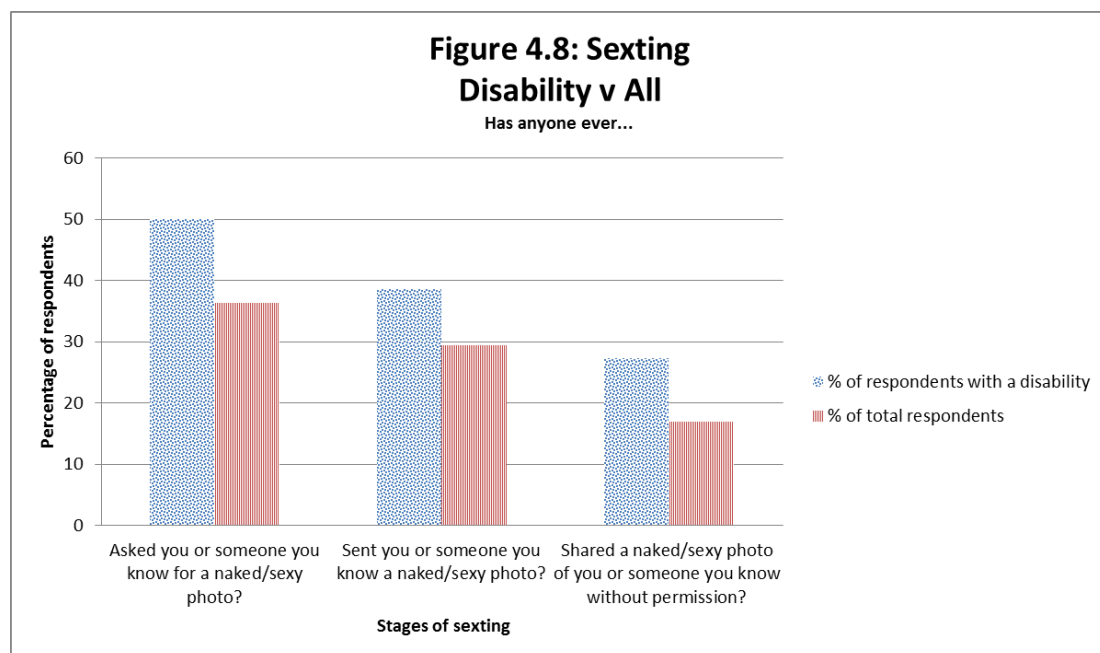
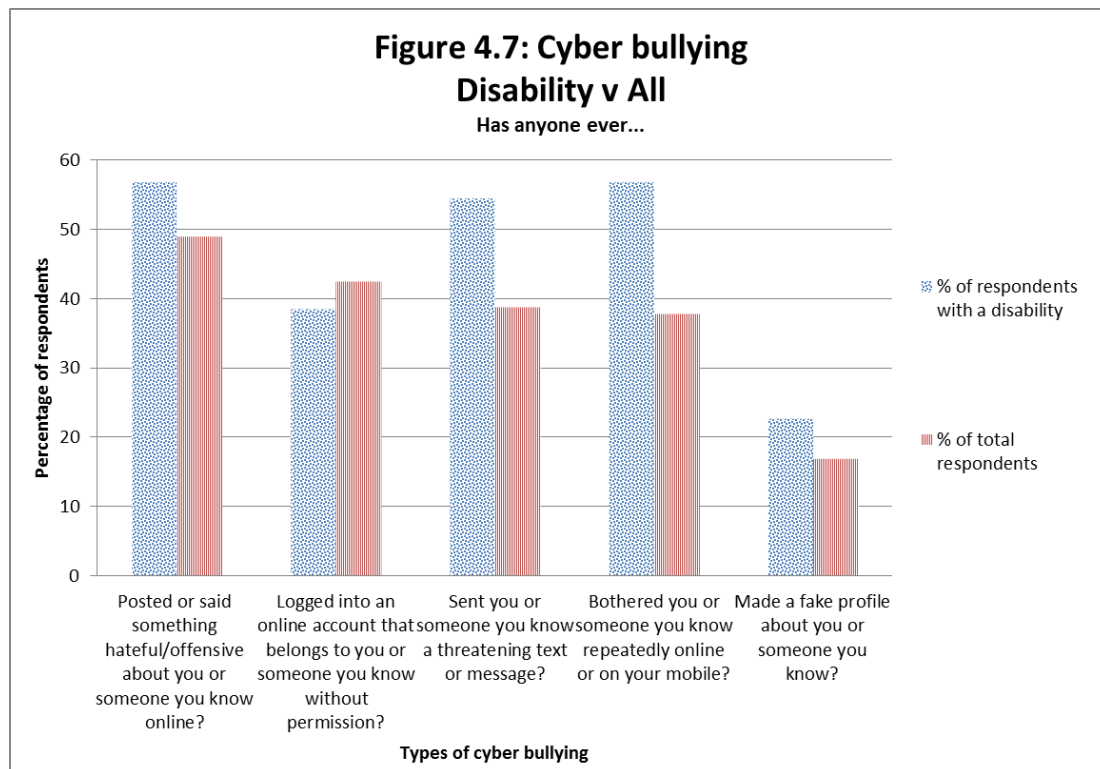


- 4.19 Young people from non-English speaking backgrounds were more likely to experience or know someone who has had something offensive or hateful posted about them online (53.5% cf. 49% of all respondents), to

experience or know someone who has been bothered repeatedly online or on a mobile (44.1% cf. 37.8%) and to experience or know someone who had an account logged into without permission (45.1% cf. 42.5%).

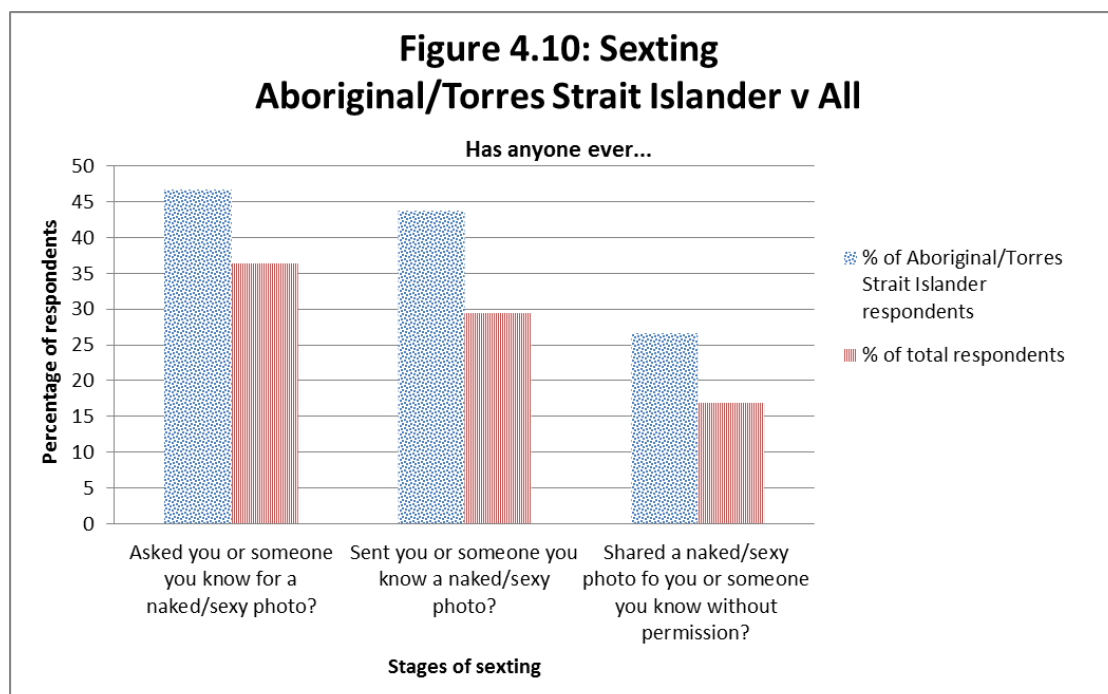
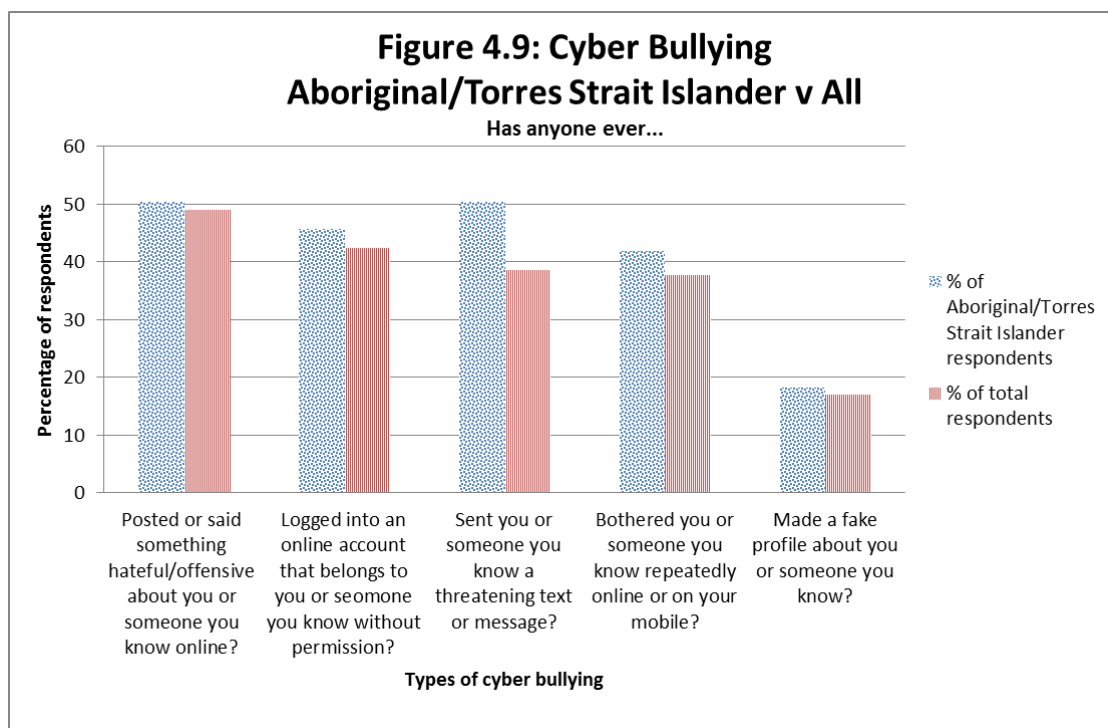
- 4.20 Respondents with a disability were more likely to experience or know someone who has experienced every form of sexting and cyber bullying other than having an account logged into without permission. Respondents with a disability reported particularly high rates of experiencing or knowing someone who has had something hateful or offensive posted about them online (56.8%); of experiencing or knowing someone who has been bothered repeatedly online or on a mobile (also 56.8%); and of experiencing or knowing someone who has been sent a threatening text or message (54.5%).



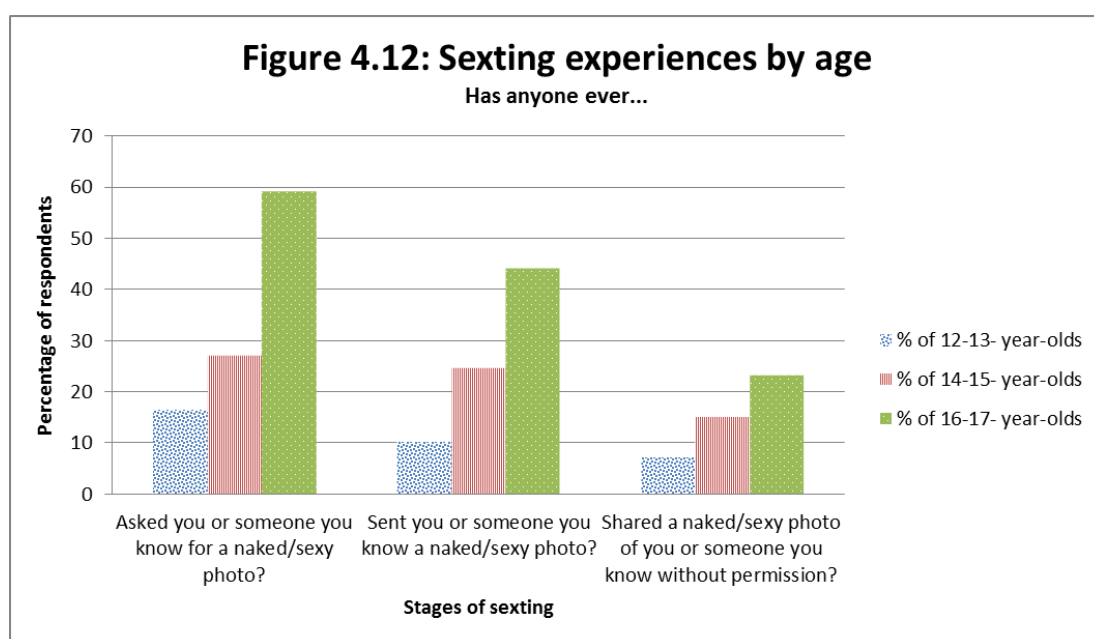
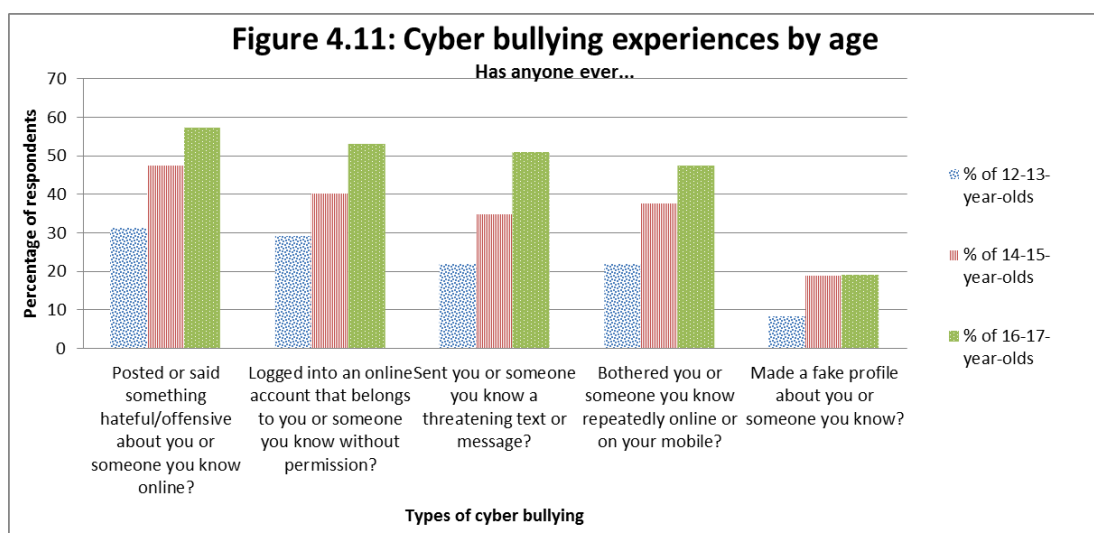


- 4.21 Aboriginal and Torres Strait Islander respondents reported higher rates of sexting and cyber bullying in every category. In terms of sexting, 46.7% of Aboriginal and Torres Strait Islander respondents (cf. 37.1% of all respondents) have experienced or know someone who has been asked for a nude or sexy photo; 43.8% (cf. 29.5%) have experienced or know someone who has been sent such a photo; and 26.7% (cf. 20.3%) have experienced or know someone who has had a photo shared without permission.
- 4.22 In terms of cyber bullying, 50.5% of Aboriginal and Torres Strait Islander respondents (cf. 48.4% of all respondents) have experienced or know someone who has had something hateful or offensive posted about

them online; another 50.5% (cf. 39.2%) have experienced or know someone who has been sent a threatening text or message; 45.7% (cf. 42.3%) have experienced or know someone who has had their online account logged into without permission; 41.9% (cf. 37.8%) have experienced or know someone who has been bothered repeatedly online or on a mobile; and 18.3% (cf. 17%) have experienced or know someone who has had a fake profile made about them.

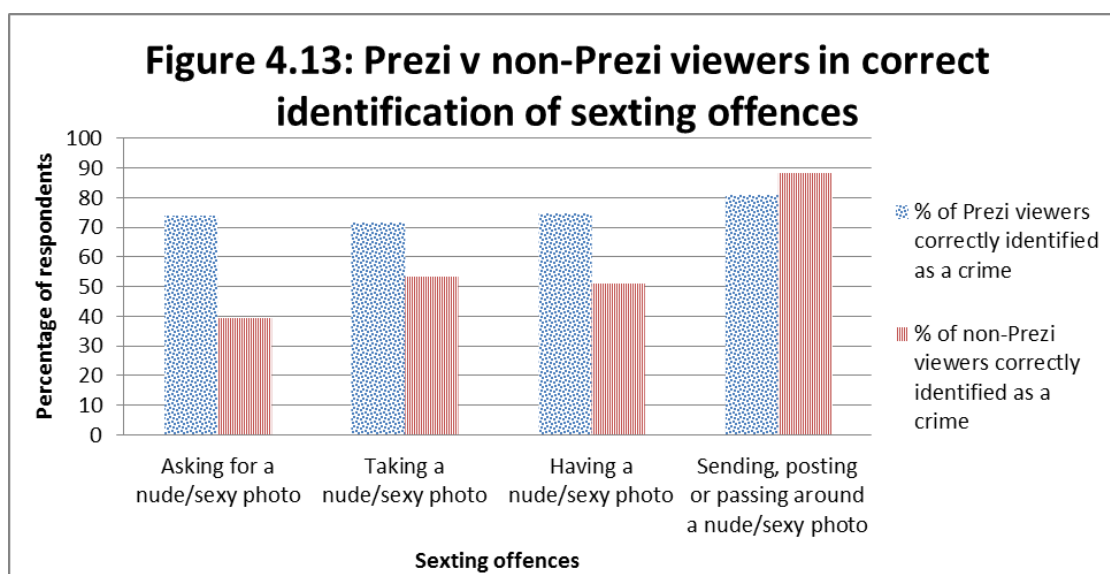


- 4.23 The rates of sexting and cyber bullying also increased with age. 16-17-year old respondents were more than 3 times as likely as 12-13-year-olds and almost twice as likely as 14-15-year-olds to have experienced or know someone who has experienced any stage of sexting. They were also more likely than their younger counterparts to have experienced or know someone who has experienced every form of cyber bullying.

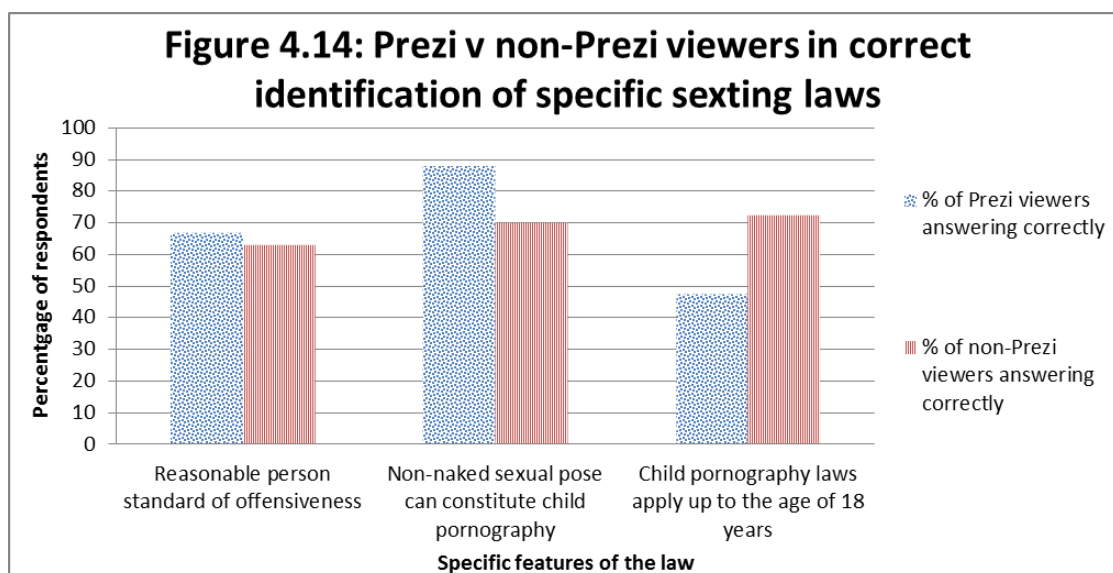


ii. Knowledge

- 4.24 After respondents were asked about themselves, they were asked about their knowledge of the laws outlined above. Specifically, they were asked whether particular behaviours could be crimes, and if so, which offences and penalties could apply. A majority of respondents answered these knowledge-based questions correctly. Generally, respondents who had viewed the prezis were more knowledgeable than those who had not, though there were some notable exceptions.
- 4.25 Prezi-viewers outperformed non-viewers in correctly identifying that asking for a nude or sexy photo could be a crime (73.9% cf. 39.5%), that taking a nude or sexy photo could be a crime (71.7% cf. 53.5%) and that having a nude or sexy photo could be a crime (74.7% cf. 51.2%). However, a slightly higher proportion of non-viewers (88.4% cf. 81%) correctly said that sending, posting or passing around a nude or sexy photo could be a crime. We believe this is either the result of student fatigue or ambiguity in the presentation.



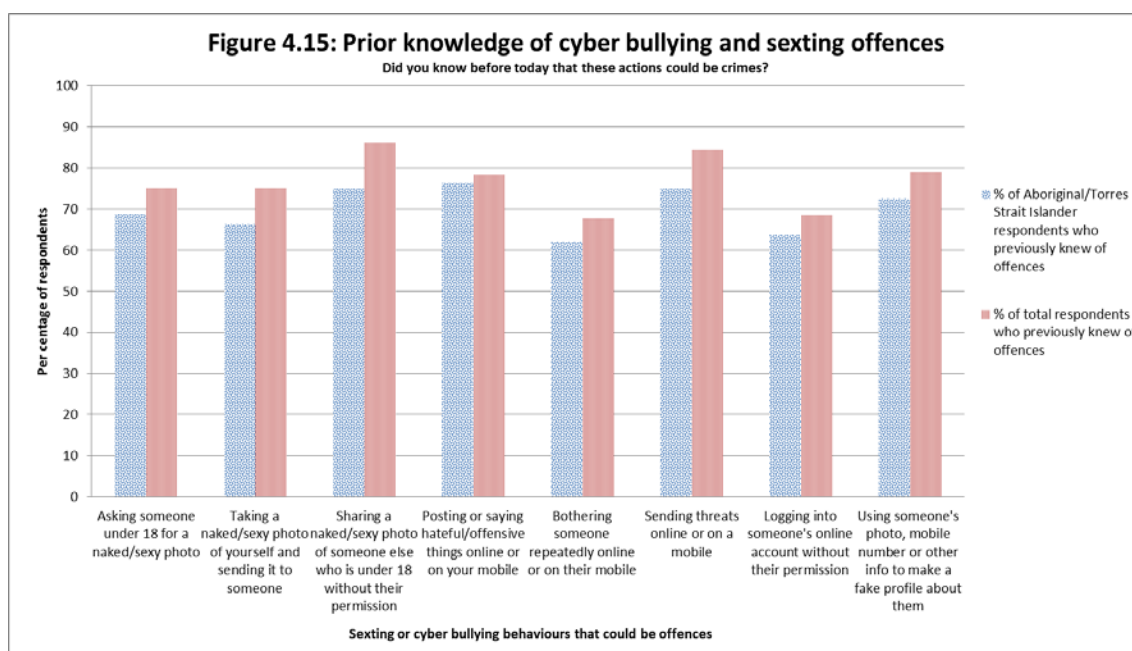
- 4.26 Prezi viewers were also better than non-viewers at identifying the specific laws (eg child pornography, indecency and misuse of mobile phone services) that could be broken in the context of sexting. In addition, more prezi-viewers than non-viewers recognised that photos do not necessarily have to depict nudity to constitute child pornography (87.9% cf. 69.8%) and correctly identified the ‘reasonable person’ standard for offensiveness (66.6% cf. 62.8%). However, non-viewers actually outperformed prezi-viewers in recognising that child pornography laws apply up to age 18 rather than age 16 (72.1% cf. 47.1%). This leads us to believe that either our survey question was poorly phrased, or that our explanation of the age difference between NSW and Commonwealth child pornography laws lacked the clarity required to untangle this complex legal issue, resulting in misunderstanding among students.



- 4.27 In terms of cyber bullying law knowledge, prezi-viewers were generally better than non-viewers at identifying online behaviours that could constitute crimes. However, results were mixed in terms of identifying specific laws that may be broken.
- 4.28 Respondents were asked whether they knew that these behaviours could be crimes before that day. In version 1, 31.9% reported that they already knew all of these actions could be crimes, 56.7% said they knew that some of these actions could be crimes and 11.3% said they did not know any of these actions could be

crimes. Version 2 of the survey was more specific, and asked respondents whether they knew that each particular behaviour could be a crime. A majority of respondents reported that they already knew that each of these actions could be a crime, ranging from 67.5% knowing that bothering someone repeatedly online or on their mobile could be a crime to 86.1% knowing that sharing a nude or sexy photo without permission could be a crime. School was the most commonly reported source of this knowledge. We believe that this relatively high level of self-reported prior knowledge may be the result of hindsight bias.

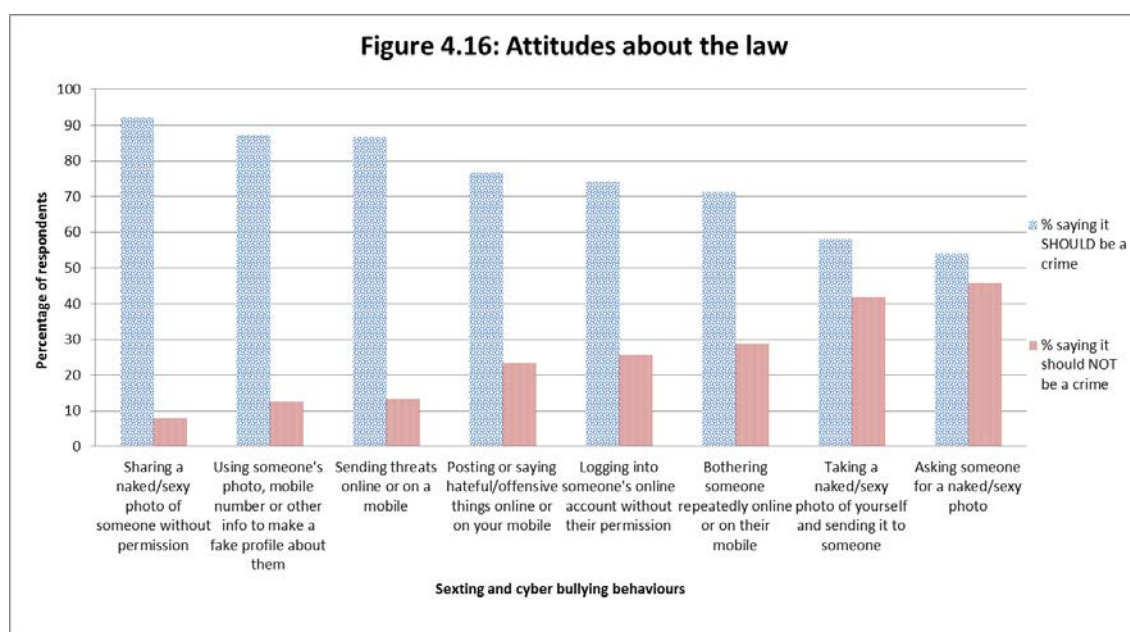
- 4.29 A notably lower proportion of Aboriginal and Torres Strait Islander respondents said that they had known that these behaviours could be crimes before that day.



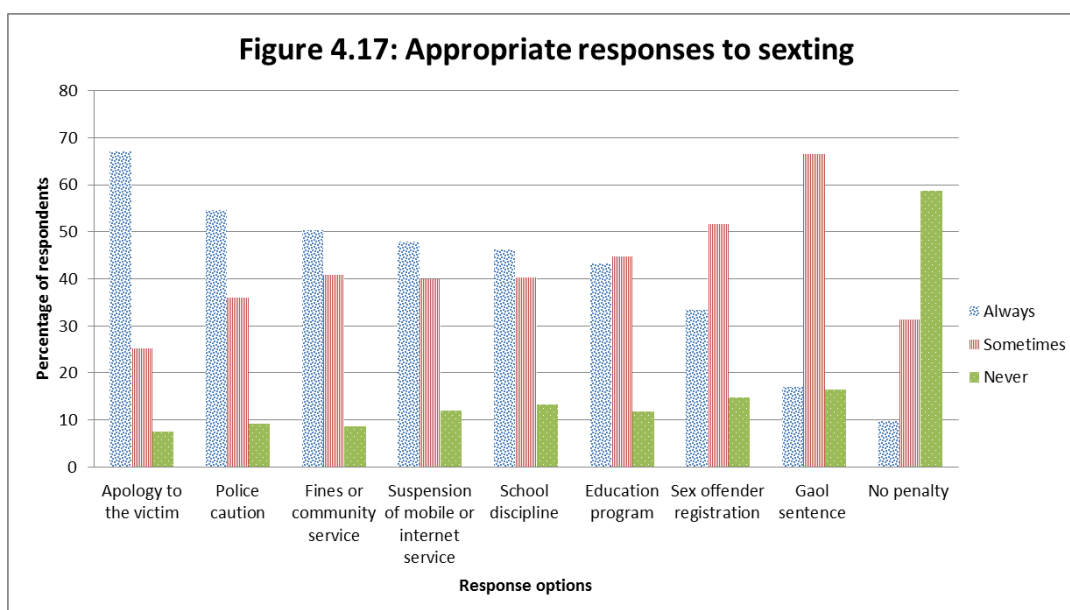
iii. Attitudes

- 4.30 After they were tested on their knowledge, respondents were asked to share their opinions. First, they were asked whether particular behaviours are harmful. Sharing a nude or sexy photo of someone else without their permission was seen as the most harmful cyber behaviour (71.3% said it was very harmful and another 19.6% said it was harmful), followed by sending threatening messages (54.6% said it was very harmful and another 33% said it was harmful), making a fake profile (51.9% said it was very harmful and another 26.4% said it was harmful), and, interestingly, sending a nude or sexy photo of yourself to someone else online (46.3% said it was very harmful and another 26.8% said it was harmful).
- 4.31 In version 1 of the survey, around 50% of respondents said it was fair or very fair that it is a crime to ask for, take or send a nude or sexy photo. A much higher majority of respondents said it was fair or very fair that sharing a nude photo without permission, posting hateful or harassing comments, sending threats, hacking into someone's accounts or making fake profiles could be criminal acts.
- 4.32 In version 2 of the survey, respondents were asked at the start whether certain behaviours should or should not be crimes. In relation to sexting, 92.1% said that sharing a nude or sexy photo of someone else without their permission should be a crime, followed by 58.1% saying that taking a nude or sexy self-photo and sending it to someone else should be a crime and 54.1% saying that asking for a nude or sexy photo should be a crime. In terms of cyber bullying, a majority of respondents felt that all of the cyber bullying behaviours

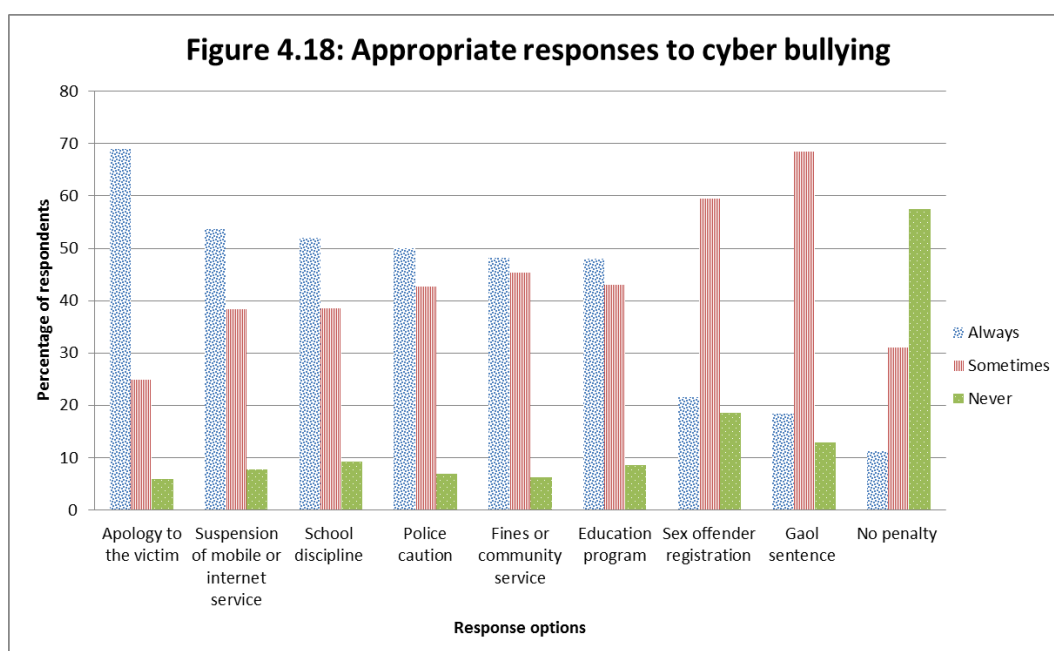
should be crimes, ranging from 71.2% saying that bothering someone repeatedly online or on their mobile should be a crime to 87.3% saying that making a fake profile about someone should be a crime.



- 4.33 After it was revealed (or reiterated, as the vast majority of respondents had seen the presentation) that these actions could be crimes, respondents were asked whether the criminalisation of these actions and the imposition of gaol sentences or sex offender registration was fair. A majority of respondents thought criminalisation was fair or very fair for all of the actions covered. Criminalising the sharing of a nude or sexy photo without permission was seen as the most fair (with 46.9% saying this was very fair and 32.1% saying it was fair) and criminalising the taking of a nude or sexy self-photo and sending it to someone else was seen as the least fair (with only 24.6% saying it was very fair and 32.8% saying it was fair).
- 4.34 In version 1, when asked to choose the best responses to these behaviours, the most popular responses were education and an apology. Police cautions and community service were also popular responses. The imposition of a prison sentence was always the least popular response—interestingly, sex offender registration was seen as a better response than prison.
- 4.35 In version 2, the question was modified to ask whether certain penalties were ‘always’, ‘sometimes’, or ‘never’ appropriate for young people who engage in these behaviours. 67.2% of respondents said that an apology to the victim was always an appropriate penalty for young people who engage in sexting, followed by police caution (54.6% said it was always an appropriate response) and fines or community service (50.4% said it was always an appropriate response). 16.4% said that gaol sentences and 14.8% said that sex offender registration were never appropriate responses, but interestingly, a much higher proportion (58.8%) said that ‘no penalty’ was never an appropriate response.



- 4.36 Also interesting was the way responses differed for cyber bullying behaviours. Again, apology to the victim was the most popular response (69% said it was always appropriate), but unlike sexting, the next most popular responses to cyber bullying were suspension of mobile or internet service (53.7% said it was always an appropriate response to cyber bullying) and school discipline (52% said it was always an appropriate response). This was closely followed by police caution, fines or community service and education.



iv. Behaviour

- 4.37 After they were surveyed on their knowledge and attitudes, respondents were asked whether what they had learned would affect their behaviour going forward. 68.3% of respondents said that knowing these actions could be crimes made them less likely to do them, and 66.3% said that it made them feel more confident about being able to deal with them if they happened.

v. Reactions

4.38 Finally, respondents were asked: “What's the most important change that you'd like to see made to the laws and penalties that apply to sexting and cyber bullying?” About 42% of respondents answered this final, open-ended question. Of those who commented, about 40% called for some type of law reform, whereas about 9% said that the laws were fine as they are and about 8% called for harsher penalties or stricter implementation of existing laws. We suspect that a number of these latter responses, including those calling for “death sentences”, were satirical.

- **34 students said the laws were fine as they are.**

I think it's perfectly fine

14-15 y/o girl, NSW

Leave the penalties as they are. If people have been educated and then still do it then face the consequences. These laws make it harder for real paedophiles to be let off the hook therefore making the community much more safe

16-17 y/o girl, NSW

I'm pretty happy with the responsiveness of the legal system to the issues of sexting and cyber bullying

16-17 y/o girl, NSW

none. Offenders deserve to be reprimanded

Anonymous, NSW

I believe that all the laws brought up today were legitimate and appropriate

14-15 y/o girl, NSW

I think the laws are fine as they are. No body actually goes to jail for 27 years for sharing a photo anyway

14-15 y/o girl, NSW

i quite like the laws and penalties in place

Anonymous, NSW

The laws are very fair in these situations and should not be treated lightly, sexting and cyber bullying is a major offence and should be dealt with effectively

14-15 y/o girl, Tas (online)

- However, 62 students said that the penalties were too harsh for young people.

Making them has less serious consequences, they are too harsh

14-15 y/o girl, NSW

Keep the laws for people over 18, but maybe relax the laws a bit for people under 18

16-17 y/o girl, NSW

The penalties should not be so harsh on people under 18

16-17 y/o transgender person, NSW

More fair and appropriate for our age laws

16-17 y/o boy, NSW

Make them less harsh but still reasonable if something dangerous happens

14-15 y/o girl, NSW

The penalties for cyber bullying should be less severe when you are a minor because they can go on and affect you for the rest of your life

14-15 y/o girl, NSW

Making the penalty less harsh

14-15 y/o girl, NSW

Fairer and more appropriate punishments More mentally accessible responses to cyber bullying

16-17 y/o boy, NSW

A few of the penalties that apply are a little harsh for children

16-17 y/o boy, NSW

Maybe less harsh because we are just stupid

12-13 y/o girl, NSW

I think that certain situations should be dealt with less harshly, if people are unaware, or if they do it unintentionally then I think the punishment should be less severe

16-17 y/o girl, SA (online)

- More specifically, 28 students felt that long gaol sentences and sex offender registry were inappropriate penalties for young people.

the laws need to be less serious, without the registry or prison

Anonymous, NSW

less or no jail time for kids under 16 or 18

Boy, NSW

sex offender registration should not be placed on people under the age of 18, who sext pictures of others.

Boy, NSW

No jail time for under 18's. It's normal to want to see titties!

16-17 y/o boy, NSW

Not dramatically ruining people's lives like putting them on a sex offenders list

16-17 y/o girl, NSW

Don't ruin a young person's life by putting them on a sex offender's registry when making mistakes due to immaturity and peer pressure is so common in young people

14-15 y/o girl, NSW

Adjusting penalties and laws so that they can be fair for young people

14-15 y/o boy, NSW

Not a ridiculous amount of gaol charges

16-17 y/o boy, NSW

Teenagers shouldn't get put on sex offenders

16-17 y/o girl, NSW

Make the gaol time less or replace it or something else because you can lose half your life for something stupid when they were younger

14-15 y/o girl, NSW

Sexting should not be a crime, everyone deserves second chances, we all make stupid mistakes, we're only human after all. The sex offender's list should be for paedophiles and rapists, not for teenagers who made a stupid mistake

14-15 y/o girl, Vic (online)

- 19 students recommended substitute penalties or responses.

The most important thing that I would like to see made would be that we do not get a 'harsh' penalty if we do break any of these laws and that we get a caution or a warning when it is our first offence... I believe if you are under the age of 18 you should not be on the sex offender registry or gaol for that matter. Maybe just being banned from social media and mobile phones etc.

16-17 y/o girl, NSW

Suspension of internet
for people who cyber
bully

14-15 y/o girl, NSW

reduced laws on young children since
they don't know the law so well

14-15 y/o girl, QLD (online)

that maybe they are more aware the first
time around. Good behaviour bond?

12-13 y/o girl, NSW

Perhaps warnings for
two people
exchanging under 18
instead of gaol

14-15 y/o boy, NSW

Fines

16-17 y/o boy, NSW

The consequences would
be more suited to the
punishment e.g.
education programs
instead of jail time

Anonymous, NSW

The sentences for young people should be a focus of reform in the law as the penalties (20-30) years of jail and sex offender list would ruin the life of a young person who thinks they are doing a harmless act, they are actually unaware they are breaking the law. Sexting and cyber bullying should still be punished, however their sentences should be less harsh – community fines, programs

16-17 y/o girl, NSW

- **27 students noted the need for education or awareness raising efforts.**

**Make the penalties
more known**

16-17 y/o girl, NSW

**Making the rules
clearer – knowing the
exact repercussions**

16-17 y/o girl, NSW

**More publicity because
people are not aware of
these laws, I wasn't. Better
reform to actually ensure
these laws are enforced and
followed up a lot would go
under noticed**

16-17 y/o girl, NSW

**There needs to be
more awareness that
the punishments are
very serious**

14-15 y/o girl, ACT (online)

**I do think that
people will regret
their actions and
such harsh
punishments should
eventually weaken
as the sexting and
cyberbullying
problems do as well.
In the meantime the
advertising of these
laws are very poor
and should be
reassessed**

14-15 y/o girl, NSW

**They become more known
around schools, so people
are less likely to do them**

14-15 y/o girl, NSW

**More awareness that it is so
common and more education
about how harmful it can be**

14-15 y/o girl, NSW

**I would like it to be compulsory for students
to be aware that their situations could lead
them to gaol, this will help students to
understand and less likely to do something
that's reckless**

14-15 y/o girl, NSW

**More people are aware of the
consequences that can
happen and the long term
effects**

16-17 y/o, NSW

- **20 students said that a 'victim' of sexting should not face charges...**

I think that for these laws to apply to people under 18 or the 'victim' is a bit harsh

16-17 y/o, NSW

The victim not being charged

14-15 y/o girl, NSW

Don't charge the victims in situations like these

14-15 y/o girl, NSW

If someone asks for a photo that shouldn't be a crime. Sending a photo shouldn't either because it's their choice

14-15 y/o girl, NSW

Looser penalties on the person posing for the photo

14-15 y/o, NSW

that the person who sends it shouldn't be charged

14-15 y/o boy, NSW

The more fairer laws are put in place for the victim, some aren't specific or they seem a bit harsh for minors

14-15 y/o girl, NSW

- **...but 18 students disputed this.**

People who willingly send the photo should be prosecuted. They didn't have to send it!

14-15 y/o girl, NSW

That the girl who made her OWN decision to send it should be charged not just the guy its not fair

14-15 y/o girl, NSW

Think it is unfair that the person asking for a photo can get charged but the person who took the photo of themselves goes away charge free. If anything it's their own fault they had the option to say no. Laws should only apply if the photo got sent around and only under the age of 18

16-17 y/o girl, NSW

If they take a picture of themselves and send it they should get a penalty

14-15 y/o girl, NSW

Victims, (the person who takes a sexy/naked photo) should be charged as much as the person asking for the photo depending if they threatened them about not sending it

14-15 y/o girl, NSW

- 28 students said that the consensual exchange of photos within a relationship should be legal or a lesser offence, while non-consensual sharing should be illegal or a greater offence.

nude pictures aren't a crime sharing them definitely is

Anonymous, NSW

If people are in a relationship then they can send photos and nothing happens but if they break up and send them around then they get in trouble

Anonymous, NSW

Something don't really seem to take into account situation for instance. If my Girlfriend is bored and she sends me sexy photos or what not, why should that be a crime? That's a little drastic tbh, I think if I spread them around if we broke up or something sure, but as long as they are not being used to harm people, let them have their fun

18+ y/o boy, NSW

An intimate couple should be allowed to send each other photos! But definitely should be dealt with if shared around!

16-17 y/o boy, NSW

If people who both agree to it, should not be a crime

16-17 y/o girl, NSW

That it's only illegal to share it without permission

16-17 y/o boy, NSW

That if two people under 18 give consent it is not charged as child pornography

14-15 y/o boy, NSW

Make the laws apply more to consent and age

14-15 y/o girl, NSW

If two people in a relationship under the age of 18, share sexy/naked pictures ONLY with each other, then it should not be considered a crime. If there is full consent from both of them then they should not be charged with anything as they have not shared the photos with anyone else

14-15 y/o girl, NSW

That sending a receiving and asking for a photo between two people is okay but when the photo is shared around without permission should not be okay

14-15 y/o girl, NSW

- 8 students remarked that sexting should be legal at age 16...

you cant be charged with child pornography if you are the legal age to have sex (should be the same age) and if you are the person taking the photo

Anonymous, NSW

teens over 16 should have more legal rights

Anonymous, NSW

if your 16 and want to sext you should be legally able to as it legal for 16 yos to have sex

16-17 y/o girl, NSW

- ... with 2 more students saying that the NSW and Commonwealth ages should be the same.
- Finally, 23 students called for more flexibility in the laws and greater consideration of the circumstances in each case.

To consider other aspects such as age and whether they will repeat the crime if they more formally warned

Anonymous, NSW

The laws to be less serious and take into account the relationship between the people sexting

Anonymous, NSW

For age & gender to be taken into account and excepted

16-17 y/o girl, NSW

I think it is very important that the laws be recalibrated slightly, so that there's more flexibility in how people who fall foul of them are dealt with. At present I have the impression that there is very little opportunity to deal with things on a case by case basis depending on the facts of each specific matter, and the people involved

18+ y/o boy, QLD (online)

penalties should depend on the relationship

18+ y/o boy, NSW

Each person's rights and opinions are regarded and taken under consideration

14-15 y/o girl, NSW

e. Focus Group Results

- 4.39 The main issue that students highlighted in our focus groups is the lack of knowledge and understanding among young people about the legal and social consequences that flow from sending a naked or sexual photo. They emphasised the importance of education over punishment, though each group said that young people who continue to engage in sexting after being educated about the consequences should be subject to punishment. As one student remarked, “I think it’s a little bit harsh—some of the penalties—seeing as though not a lot of younger society would be aware . . . so I think that should be more broadcasted out there . . . maybe then that’s when there should be harsher penalties—when they’re all aware of it”.
- 4.40 Each set of students was surprised that the definition of child pornography extends beyond naked photos and can encompass photos of clothed young people striking sexual poses if the images are deemed offensive. As one student noted, “there are so many photos of girls in bikinis and . . . in their bra and undies”. Students were also surprised at the age disparity between NSW child pornography laws, which only apply to depictions of people under 16, and Commonwealth child pornography laws, which apply to depictions of people up to 18. Most students agreed that “they need to collaborate” and “when it comes to age, it needs to be the same”, with most positing that “they should limit the age to 16”. However, some students pointed out that this is not the only area of law where age inconsistencies leave young people in confusing or vulnerable positions—“that’s like when you’re 16 your parents can legally kick you out but you’ve got to be 18 to sign a lease”.
- 4.41 The general consensus was that it does not make sense to allow 16-year-olds to consent to sexual activity and then label them child pornographers for taking photos of that activity (or their body more generally). However, there were a few students who said that 16-year-olds may be able to comprehend the consequences of sexual activity more readily than they can understand the long-term consequences of sharing a sexual photo—according to one student, “you can do it; you just can’t advertise it”.
- 4.42 Interestingly, all groups of students saw child pornography laws as a means to protect children against themselves, even though they were designed to protect children from abusive adults. At first glance, they did not differentiate between these laws and other laws that prohibit young people from engaging in potentially harmful behaviours, like smoking, drinking alcohol or engaging in sexual activity. However, a few expressed consternation at the idea that merely taking a photo can constitute self-abuse—“it’s *your* body, it’s yourself”—and some felt that the laws unfairly discriminated against the young—“why is it when you’re 16 it’s bad—you’re, you know, bad if you do it—but then when you’re older, that’s ok? Like your parents can do it, but your parents are supposed to be the role models”.
- 4.43 Generally, students saw a clear distinction in terms of harm and wrongdoing between consensually sharing photos in a private relationship and distributing them outside of that relationship without consent—“I don’t think you should be in trouble for taking the photo” but “if they send it on, that’s different”. Most agreed that “sharing without consent should be a more serious charge”. However, there was at least one student in each group who expressed that young people who are “idiotic enough to do it in the first place” deserve what comes to them—“if anything, I think the person who took the photo from the very beginning should get a higher consequence. It’s their choice to take it”. These students raised the question “why take the photo in the first place if they don’t want it to be spread around?”, which typically elicited a response from other students to the effect of “some people are just naïve”.
- 4.44 A vast majority of students saw sex offender registration as an inappropriate response to sexting, concluding that “it’s not fair to compare a 60 year old paedophile to an under 18 year old who made a bad decision”. As

one student remarked, “we look at paedophiles like a 40 year old man who rapes an our-age girl. Whereas they’re calling someone a paedophile who put a photo up of his girlfriend who’s like a year younger than him . . . and now that guy’s gotta live for the rest of his life with people calling him a paedophile. Everyone’s going to look him up and down now. No one is going to look at him the same”.

- 4.45 Many students said the law should take into account the age of the offender, the age difference between the people exchanging the photo, the context in which the photo was sent, and how ‘bad’ the photo itself was. One student suggested that “if the two people are within 3 years of age to each other and there’s consent given and it isn’t publicly shared then there shouldn’t be charging as a sex offender”.
- 4.46 When asked about alternative ways to respond to or address sexting, students recommended mediation or youth conferencing, fines or community service, police cautioning and suspending the use of social media or mobile phones. They recommended flexible responses based on the level of harm to the victim. For example, one student said “fines can be changed depending on what you did. If you post it up and took it straight down it should be like \$100”. Another remarked, “if it’s just between one person and another, then the penalty should be maybe a caution . . . but if one of them shares that photo to someone else, then they should be penalised and maybe banned from social media for awhile”. However, some students were sceptical of the idea that young people could be kept off of social media.
- 4.47 Finally, many students recommended educational responses. As one student said, “maybe like in year 7 when you first come to the high school they [should] have someone from the government actually come in and discuss it like you’ve discussed it with us about it”. According to another, “maybe an education program about safe sex and stuff like that and maybe about safe texting . . . we should run it in like health or something”.

f. Key Findings

- 4.48 The *New Voices/New Laws* survey and focus groups revealed the following key points:

- **Young people want and need education about the laws that apply to their use of mobile phones and the internet.**

Given that young people do not typically differentiate between their online and offline lives, it does not necessarily make sense to implement a program on cyber safety and the law that is isolated from their other areas of learning. For example, young people tend to see sexting education as a natural extension of sex education. Likewise, education about cyber bullying and the law should be worked into existing programs or curricula around bullying and relationships.

- **Young people agree that cyber bullying and sexting should be against the law, but they believe that there should be a more appropriate range of responses and penalties available to address these offences.**

Young people recommended that fines, community service, police cautions and conferencing or other means of alternative dispute resolution be considered before more serious forms of punishment.

- **Young people agree that the penalty for the offender should be based on his or her awareness of the law, offending history and the level of harm caused to the victim.**

They see those who have knowledge of the legal and social consequences and a record of offending as far more culpable.

- **Young people feel that sharing nude or sexy photos of a person without their permission is much worse than exchanging such photos consensually, and that the law should treat these situations differently.**

While many think that asking for and privately sharing a nude or sexual image should be against the law, they do not think it is fair that these actions could lead to a criminal conviction, prison sentence or sex offender registration.

- **Young people feel strongly that no one should ever be charged with sex offences or placed on the sex offender register for age-appropriate sexting.**

They see the label of sex offender as highly stigmatising and completely incongruous to the typical teenager who engages in sexting.

- **Young people say that the age difference in the Commonwealth and NSW child pornography laws is confusing, with some saying that the applicable age should be 16.**

Many also say that child pornography offences should only be applied against people who exchange photos with others who are significantly younger than they are.

5. Laws and Law Reform Efforts in Other Jurisdictions

- 5.1 Acknowledging some of these gaps, inconsistencies and absurdities, law and policy makers in jurisdictions around the world have initiated law reform in the sphere of sexting and cyber bullying. This section briefly reviews several relevant developments from Australia, New Zealand and the United States.

a. Sexting

i. Australia

- 5.2 The child pornography laws in other Australian states and territories are fairly similar to those of NSW and the Commonwealth, though they vary slightly in their definitions, applicable ages and defences. Two of these sexting-related defences will be discussed below, as will the two law reform initiatives around child pornography and/or sex offender registration laws that have been initiated in Australia to date.

1. Tasmania

- 5.3 In Tasmania, it is a crime to produce (or involve a child in producing), distribute, possess or access child pornography, referred to as 'child exploitation material'.²⁰¹ Child exploitation material includes any offensive material that depicts or describes a person who is under the age of 18 engaged in sexual activity or in a sexual context.²⁰²
- 5.4 There are a range of defences, most of which are not likely to apply in a typical sexting scenario.²⁰³ However, there is one defence that may be of particular relevance. It is a defence to a child pornography charge to prove that the material depicts sexual activity between the accused person and a person under the age of 18 that is not an unlawful sex act.²⁰⁴

- 5.5 The age of consent in Tasmania is a bit more complex than in NSW. Strictly speaking, the age of consent to sexual activity is 17.²⁰⁵ However, there are a number of age-based defences to the crime of unlawful sexual intercourse with someone under age 17.²⁰⁶ Essentially, the result is that a person who is 12 or older may consent to sex with a person within 3 years of his or her age; a person who is 15 or older may consent to sex with a person within 5 years of his or her age; and a person who is 17 or older may consent to sex with a person of any age.²⁰⁷ Accordingly, a person who is charged with a child pornography crime for a photo that depicts consensual sexual activity within these parameters can raise the defence that the depicted act is not unlawful. In effect, if you can lawfully agree to engage in the activity, you can agree to record it.
- 5.6 The defence serves to reduce the tension in Tasmanian law between the differences in the age of consent to sex (12, 15 or 17, depending on the age of the young person's partner) and the age of consent to sexting (18). Likewise, this type of defence could be incorporated into Commonwealth law to reduce the tension between the states' and territories' age of consent laws (eg NSW's provision that a person who is 16 years of age can consent to sex) and the Commonwealth's definition of child pornography as material that depicts or describes a person who is or appears to be under the age of 18. In other words, the Commonwealth law could maintain its definition of child as a person under the age of 18, but provide a defence to child pornography charges where the image depicts sexual activity that is not unlawful in the state or territory in which it occurred. This would eliminate the situation in which two young people engaging in lawful sexual activity are converted into child sex offenders through the flash of a camera.
- 5.7 Of course, given that the Tasmanian defence is silent about young people depicted in a sexual *context*, as opposed to a sexual *activity*, it does not guarantee that child pornography laws will never be applied against young people who engage in sexting. Therefore, the Tasmania Police have drafted guidelines to prevent the criminalisation of teens involved in age-appropriate sexual exploration.²⁰⁸ The guidelines have not yet been finalised, but are already being implemented as part of the department's unofficial policy against charging a young person with a child pornography offence absent some aspect of exploitation—such as an inappropriate age difference between participants which results in an older teenager taking advantage of a younger teenager or child (with the age of consent law serving as a benchmark).²⁰⁹
- 5.8 The Tasmania Police have indicated that the exploitative element would not be met merely because a sexted image had been distributed without the consent of the person depicted.²¹⁰ In other words, even in cases of stage 4 sexting (see page 12), the police would not generally apply child pornography laws; rather, if the matter was serious enough to warrant criminal charges, the police would likely apply the Commonwealth law against menacing, harassing or offensive use of a carriage service.²¹¹
- 5.9 In addition, the Tasmania Police have made submissions to the Tasmania Law Reform Institute's review of *Sexual Offences Against Young People* and the Victorian Parliament's *Inquiry into Sexting* (discussed in the next section), recommending that "youths involved in sexting that is consensual [should] be provided with a defence as long as both parties are within a specified age range".²¹² As Police Commissioner Hine explained:

With regards to children, Tasmania Police do not consider the current legislation to be an appropriate tool for managing young people who are involved in consensual sexting. In situations where children take pictures of themselves, pictures of other children, or forward pictures to others, Tasmania Police advocate that these matters should be dealt with by parents or social workers The mere involvement of police is likely to cause the child to feel shame, guilt and embarrassment, which may lead to detrimental social and psychological outcomes for the child and other family members.²¹³

2. Victoria

- 5.10 In Victoria, it is a crime to produce, procure or possess child pornography.²¹⁴ Child pornography includes any film, photo, publication or computer game that depicts or describes a person under the age of 18 engaging in sexual activity or in an indecent sexual manner or context.²¹⁵
- 5.11 It is a defence to the possession of child pornography that the accused is a child depicted in the image.²¹⁶ It is also a defence that the accused made the image or was given the image by the depicted child if, at the time the image was made or given, the accused was not more than 2 years older than the that child.²¹⁷ In other words, these defences apply to the young person who takes a self-portrait, the young person who receives a self-portrait from a peer and the young person who takes a photo of a peer. Thus, they attempt to de-criminalise age-appropriate sexting within a private relationship.
- 5.12 In actuality, the attempt does not succeed because the defences do not apply to any of the other sexting-related offences, such as procurement of child pornography, production of child pornography, incitement of indecency or invitation to be involved in a sexual performance. As a result, it remains a crime for one young person to ask another for a sexy photo, and for the recipient of that request to take a sexy photo. Consequently, where a 15-year-old girl asks a 15-year-old boy for a photo and he complies, neither of them can be charged with possession, but she can be charged with procurement (among other things) and he can be charged with production.²¹⁸
- 5.13 We identified these gaps in a submission to the Law Reform Committee of the Parliament of Victoria for its Inquiry into Sexting.²¹⁹ The Inquiry, which was still being conducted at the time of writing, was referred to the Committee by the Legislative Assembly in September 2011, after an onslaught of media reports about young Victorians who had been convicted of child pornography offences for sexting.²²⁰ The Inquiry's Terms of Reference included the prevalence and nature of sexting in Victoria; the existing awareness and education about the social and legal effects of sexting; and the appropriateness and adequacy of existing laws, especially criminal offences and the application of the sex offenders register.²²¹
- 5.14 The Inquiry received 60 submissions from individuals and organisations across Australia. Most submissions highlighted the lack of awareness concerning the legal and social implications of sexting, and the need to educate young people and their parents about the potential consequences.²²² Many also emphasised the need for more research on the nature, prevalence and effects of sexting,²²³ and on the effectiveness of existing educational campaigns.²²⁴ A number of submissions concluded that the laws should be amended to exclude young people who engage in age appropriate sexting from child pornography offences or sex offender registration,²²⁵ and to provide responses that are more nuanced, flexible and proportionate.²²⁶
- 5.15 While the Inquiry was underway, the Victorian Law Reform Commission released its final report on Sex Offenders Registration.²²⁷ The report was written in response to the Attorney-General's request in April 2011 that the Commission review the laws governing the registration of sex offenders and the use of information about registered sex offenders by law enforcement and child protection agencies.²²⁸
- 5.16 Under the existing *Sex Offenders Registration Act 2004* (Vic), a person is not a registrable offender merely because he or she, as a child, committed an offence relating to child pornography (a Class 2 offence).²²⁹ However, the court may order the young offender being sentenced for a Class 1 or 2 offence to comply with the Act's reporting obligations if it is satisfied, beyond reasonable doubt, that the person poses a risk to the sexual safety of one or more persons in the community.²³⁰

- 5.17 The Commission recommended a re-ordering of offences into 3 categories, according to the type of offending.²³¹ It placed non-contact offences, including child pornography offences, into proposed Category 3, but noted that the types of offenders within this category would be diverse:²³²

Some of the offences in Category 3, such as possessing child pornography, can occur in a diverse range of circumstances. The offence of possessing child pornography applies to young people who take photographs of naked, underage partners with their permission, and to members of paedophile rings that collect graphic child abuse and child pornography material. Registering the former offenders might be of little benefit, while registering the latter might assist in protecting children from the risk of sexual abuse.²³³

- 5.18 The Commission emphasised that “children and young people should be included in the Register in exceptional circumstances only”. It recommended “that the court not make a registration order for a child or young person unless it is satisfied that it would serve a useful purpose and all other reasonable protective responses have been exhausted”.²³⁴

3. Western Australia

- 5.19 Similarly, in April 2009, the Law Reform Commission of Western Australia received a reference from the Attorney General to examine and report on the application of the *Community Protection (Offender Reporting) Act 2004* to reportable offenders who are children, or to those who commit an offence in exceptional circumstances.²³⁵ In January 2012, the Commission released its final report.²³⁶ The Commission noted that the provisions of the Act can “capture consensual sexual activity between two young people, experimental behaviour by young children and teenage practices such as ‘sexting’”.²³⁷
- 5.20 Similar to NSW, Western Australia provides an exception to mandatory registration for juvenile offenders who commit a single offence (or multiple offences with one person within 24 hours) relating to child pornography.²³⁸ Like NSW, Western Australia has not yet registered anyone under the age of 18 as a sex offender for engaging in sexting.²³⁹ However, the Commission found the existing law inadequate to ensure that young people would not be placed on the register for age-appropriate sexting:

The Commission recognises that currently there is a limited statutory exception under the CPOR Act for juvenile offenders who are dealt with for a ‘single’ offence of child pornography. However, if the person is charged with two or more child pornography offences and these offences did not occur within a 24-hour period or they did not relate to the same complainant this statutory exception is not applicable. In April 2011 it was stated in the Western Australian Parliament that no juvenile reportable offenders have been subject to sex offender registration as a consequence of engaging in ‘sexting’; however, it appears that a number of juveniles have been spoken to or investigated by the police or otherwise dealt with for such behaviour. In November 2010 it was reported in the media that a 13-year-old girl had been cautioned by police for sending a text message with a nude photo of herself to a 17-year-old boy. The boy also received a caution. In another case, it was reported that a 14-year-old boy who received images on his phone of a 14-year-old girl having sex with other teenagers was referred to the juvenile justice team. Given the apparent increasing prevalence of this type of behaviour it seems inevitable that young people in Western Australia will find themselves subject to sex offender registration as a result of charges arising from sexting.²⁴⁰

- 5.21 The Commission put forth several recommendations to address this concern. Its first recommendation was that the Act be amended to provide that “a person is not a reportable offender merely because he or she as a child committed a reportable offence”. Also within this recommendation, the Commission provided that the court may only order a juvenile offender to comply with reporting obligations “if it is satisfied that the offender poses a risk to the lives or the sexual safety of one or more persons, or persons generally”.²⁴¹ Such an order would be subject to appeal.

- 5.22 In its second recommendation, the Commission found that the Western Australia Police should continue to monitor changes to sex offence laws to ensure that juvenile offenders convicted of a single child pornography-related offence continue to be excluded from the definition of a reportable offender.²⁴²
- 5.23 Finally, the Commission also recommended that the “government monitor on a regular basis the effectiveness of education strategies employed by government agencies in delivering age and culturally-appropriate information about the legal consequences of unlawful sexual behaviour, in particular the potential for the imposition of registration”.²⁴³

ii. United States

- 5.24 In response to several highly publicised prosecutions of teenagers in the United States (US),²⁴⁴ many states have engaged in sexting-related law reform.²⁴⁵ The most common legislative response has been to establish non-criminal, misdemeanour or summary offences for age-appropriate sexting.²⁴⁶ These offences apply to young offenders in lieu of child pornography offences, and offer less serious forms of punishment, such as fines,²⁴⁷ community service²⁴⁸ or participation in counselling²⁴⁹ or diversionary education programs.²⁵⁰ Typically, proceedings under these offences are excluded from sex offender registration²⁵¹ and expunged from criminal records.²⁵²
- 5.25 Another response has been to add affirmative defences to existing child pornography laws.²⁵³ Like the Victorian defences discussed above, these provisions typically provide that if the accused is either the subject of the image or someone close in age to the subject who took or received the image with the subject’s consent, he or she is not guilty of a child pornography offence.²⁵⁴
- 5.26 Other states have focused on the cyber bullying aspects of sexting in their law reform efforts.²⁵⁵ These states generally decriminalise consensual sexting, but provide penalties for young offenders who distribute a sexually explicit image without the subject’s consent and with the intent to cause emotional harm of humiliation.²⁵⁶
- 5.27 Some states have also mandated sexting-related educational outreach.²⁵⁷
- 5.28 Professor Julia Halloran McLaughlin, of the Florida Coastal School of Law, has proposed the following model law for teen sexting, which incorporates aspects of all of the law reform efforts discussed above, and demonstrates the complexity of legislating on this topic:²⁵⁸

Teen Sexting Conduct

I. Statutory Intent.

A. The intent of this statute is to:

- a) exempt Teen Sexting Images from the state and federal definition of child pornography;
- b) to create a consistent legal response;
- c) to educate teens regarding the creation, possession, and distribution of Teen Sexting Images;
- d) to promote early intervention;
- e) to create a diversionary program for teens who create and share Teen Sexting Images without the intent to harm those depicted;
- f) to punish and deter teens who create, possess, or distribute Teen Sexting Images with the intent to cause emotional harm, to embarrass, or to stigmatize those depicted; and
- g) to require that Teen Sexting is redressed within the juvenile justice system.

II. Definition of a Teen Sexting Image

A. Teen Sexting Image is an image:

- a) that is of one or more individuals between the ages of 13 and 18 (depicted person or persons);
 - b) that is captured in a traditional or digital photographic or video format;
 - c) that, if shared, is shared among teens between the ages of 13 and 18; and
 - d) that is not obscene as defined under applicable state and federal law.
- III. Permitted Conduct.
- A. Teens between the ages of 15 and 18 may voluntarily create and privately possess Teen Sexting Images so long as they do not violate Section IV of this Statute.
 - B. Teens between the ages of 13 and 14 may voluntarily create and privately possess Teen Sexting Images so long as they do not violate Section IV of this Statute. However, the court shall have the discretion to direct the state agency designated to supervise children in need of services or deemed dependant to initiate an investigation regarding the need for supervision.
- IV. Violation.
- A. A person who is between the ages of 13 and 18 commits a delinquent act if, the teen recklessly and without the consent of any depicted person,
 - a) the actor creates a Teen Sexting Image;
 - b) the actor possesses a Teen Sexting Image; or
 - c) the actor:
 - 1) distributes a Teen Sexting Image to a person not depicted;
 - 2) posts on a public web page a Teen Sexting Image;
 - 3) electronically shares a Teen Sexting Image with a person not depicted; or
 - 4) otherwise shares a Teen Sexting Image.
- IV. The consequences of statutory violation shall be determined based on the scienter involved.
- A. If the actor intentionally creates, possesses, or distributes a Teen Sexting Image the actor:
 - a) shall be enrolled in a mandatory diversion program;
 - b) shall not be adjudicated delinquent; and
 - c) the actor shall not be required to register as a sex offender.
 - B. If the actor creates, possesses, or distributes a Teen Sexting Image with the intent to cause emotional harm, to embarrass, or to stigmatize any depicted person, the actor:
 - a) Shall be adjudicated delinquent;
 - b) Shall have phone and internet use monitored for a reasonable period of time;
 - c) Shall undergo education regarding privacy rights, the internet, and the legal meaning and importance of consent in relationship to matters of sexual intimacy;
 - d) Shall not be tried as an adult; and
 - e) Shall not be required to register as a sex offender.
- V. Subsequent violations of this Statute by the same teen shall be handled by the judge in juvenile court under Section IV(B).
- VI. If the teen actor is under the age of 13 or the depicted person is under the age of 13, then the matter shall be referred to the state agency designated to supervise children in need of services or deemed dependant to determine the appropriate action to be taken.
- VII. If the actor is 19 years old or older, this statute no longer applies and the matter shall be determined according to applicable law.
- VI. Teen Sexting Images are excluded from the state and federal definition child pornography law and any record of adjudication under this section shall be expunged upon the actor's nineteenth birthday.
- VIII. Each County within the State shall create and implement a preventative education program and a diversionary program to carry out the intent of this statute.
- IX. This statute shall not apply if:
- a) The Teen Sexting Image is obscene;
 - b) The actor is under the age of 13 or over the age of 18;
 - c) The actor profits financially or through extortion from the creation or distribution of the Teen Sexting Image;
 - d) The Teen Sexting Image is created without the consent of those depicted.

5.29 While we appreciate the intent behind the model law, we are not convinced that this approach would sit well within the Australian legal context, or that the creation of a *new* offence for sexting is the best way to ensure a proportionate and adequate response. These goals may be better accomplished by amending existing legislation to exclude age appropriate sexting from child pornography offences and sex offender

registration; by adding all of the sexting-related offences to the list of crimes that may be referred to Youth Justice Conferencing; and by making official the de facto NSW Police policy on only pursuing charges in sexting cases involving coercion or malicious, non-consensual distribution.

b. Cyber Bullying

i. Australia

- 5.30 In March 2010, the Australian Parliament established the Joint Select Committee on Cyber-Safety.²⁵⁹ The Committee was appointed to inquire into and report on several terms of reference, including the online environment in which Australian children currently engage; the nature, prevalence, implications and risks of cyber safety threats (including cyber bullying and sexting); Australian and international responses to these threats; opportunities for cross-agency and cross-border cooperation; ways to support schools; and the merit of establishing an Online Ombudsman to investigate, advocate and act on cyber safety issues.²⁶⁰
- 5.31 The Committee tabled its Interim Report, *High-Wire Act: Cyber-Safety and the Young*, in June 2011. The report reviewed the criminal laws that can apply to cyber bullying at both the Commonwealth and state/territory levels. At the Commonwealth level, it noted that “the *Criminal Code Act 1995* (Cth) already contains comprehensive offences dealing with the misuse of telecommunications”,²⁶¹ including “using a ‘carriage service’ in the online environment to menace, harass or cause offence, threats to kill or cause harm to a person, or to use such a service for child pornography”,²⁶² as well as “[o]ffences such as hacking into another person’s Facebook account”.²⁶³ The report also highlighted that “criminal legislation at State/Territory level allows for the prosecution of harassing, threatening and intimidatory behaviour through a combination of assault, threatening and stalking offences. These jurisdictions can also rely on offences in the Commonwealth Criminal Code which directly address these abuses”.²⁶⁴
- 5.32 Thus, as Professor Marilyn Campbell told the Committee, “[e]ven though there are not so-called specific anti-cyberbullying laws, there are enough criminal justice laws on cyberstalking, harassment and telecommunications that, if you wanted to criminalise a child’s behaviour, the laws are there”.²⁶⁵
- 5.33 Nevertheless, the Committee found that “it is not clear that the current statutes include a range of effective cyber-safety protection.” It recommended that “the Attorney-General in conjunction with the National Working Group on Cybercrime undertake a review of legislation in Australian jurisdictions relating to cyber-safety crimes”,²⁶⁶ concluding that “a review of what has been enacted in the various jurisdictions would be a means of assessing what is effective, and where additional legislation is required”.²⁶⁷
- 5.34 The Committee also acknowledged that “[l]aw reform in this area presents a number of challenges due to the rapidly changing digital environment and the transnational and highly adaptable nature of online criminality”.²⁶⁸ Other challenges to law reform include a lack of consistency and cooperation across Australian states and territories. As Ms Hetty Johnston, Founder and Executive Director of BraveHearts, pointed out:

The most frustrating thing about Australia in the way that we do things is this lack of consistency...We have different laws right across the country. We cannot agree on the definitions of what a child is. We cannot agree on an age of consent, and here we are talking about cybersafety and all of these other elements. I think trying to get people around the same table from the states and territories is notoriously hard and trying to get them to agree on anything is even harder. Starting to work collaboratively at the top level, by taking on an issue, particularly as this is a new one relatively speaking, might help us as a nation to pull

together and understand that we are all dealing with the same people. This lack of consistency and the unwillingness for the states to engage and do the same things everywhere is very frustrating from the child protection point of view.²⁶⁹

- 5.35 Submissions to the Committee also emphasised the importance of “[d]irectly involving children and young people in decisions that impact on them and taking their views into account in the development of laws, policies and programs”.²⁷⁰ As the Commissioner for Children and Young People in Western Australia commented:

This is true for all areas that impact on children and young people but is especially the case when considering their engagement with technology and the online environment – no one knows more about the ways they are engaged, the issues they face and, therefore it follows, solutions that are most likely to work for them.²⁷¹

- 5.36 In addition to surveying the laws, the Committee examined “the merit of establishing an office of online ombudsman to investigate, advocate and act on cyber-safety issues”.²⁷² Submissions to the Committee revealed highly divergent views:

Those in favour saw the ombudsman as providing investigative and advocacy functions as well as presenting an opportunity for a more visible and centralised reporting place. Those opposing the proposal raised concerns about duplication of existing facilities, the actual functions of the office, jurisdictional considerations and timeliness of procedures. Some participants remained undecided, perhaps because of uncertainty about the role of the ombudsman.²⁷³

- 5.37 One group supporting the Ombudsman proposal was the Young People Big Voice group, whose members recommended that “one of the functions of an Online Ombudsman be to facilitate Australian children to share their views on developing effective responses in relation to issues of cyber safety”.²⁷⁴ Another supporter was the Office of Youth South Australia, which stated that “police responses are not always adequate and often when people do seek help, there is little that can be done and the individual is left feeling frustrated that there is no one to follow up and resolve their concerns”.²⁷⁵
- 5.38 Groups opposing the Ombudsman included the Association of Independent Schools South Australia, which pointed out that “[i]f an external body such as an Online Ombudsman is readily available to handle complaints, parties may be less willing to resolve the matter at a local school level”, and may “escalate matters unnecessarily”.²⁷⁶
- 5.39 While we agree with the Association of Independent Schools South Australia that most matters should be resolved locally (as this will typically be in the best interests of the children involved), we often receive complaints from students who feel that their schools are not responding adequately to cyber bullying. Thus, we also concur with the Office of Youth South Australia’s opinion that the existing system is leaving young people frustrated, vulnerable and without a voice.

ii. New Zealand

- 5.40 In October 2010, the Law Commission of New Zealand was asked to review the adequacy of the regulatory environment surrounding the news media in the digital age.²⁷⁷ In December 2011, the Commission released an Issues Paper, *The News Media Meets ‘New Media’*,²⁷⁸ which considered the problem of harmful digital communications by citizens as well as the press. The Commission made a number of proposals, including changes to existing legislation and the establishment of new bodies for adjudicating new media-related complaints.²⁷⁹

- 5.41 In response to growing concerns about cyber bullying, the Commission fast-tracked the part of its review dedicated to this issue.²⁸⁰ In August 2012, it released a Ministerial Briefing Paper, *Harmful Digital Communications: The adequacy of the current sanctions and remedies*.²⁸¹ Although the Committee concluded that “by and large New Zealand’s existing criminal and civil law is capable of being applied to digitally mediated communications”, it recommended a number of reforms.²⁸² The “fundamental planks” of the Commission’s proposed reforms include the creation of a new criminal offence for indecent or grossly offensive digital communications; amendments to existing harassment, human rights, privacy and criminal laws to ensure that they apply to digital communications; the establishment of a Communications Tribunal to provide citizens harmed by digital communications with speedy, efficient and cheap access to remedies; and new legal requirements for schools to help combat all forms of bullying.²⁸³
- 5.42 The new criminal law proposed by the Committee makes it a summary offence to use a communications device to send a communication that is grossly offensive, knowingly false or of an indecent, obscene or menacing character, knowing or intending that the communication would reasonably cause the person substantial emotional distress.²⁸⁴ The proposed offence does not require proof that the communication was directed specifically at a particular person, but it is necessary to show that the person actually saw the communication.²⁸⁵ The proposed maximum punishment is 3 months’ imprisonment or a fine of \$2,000.²⁸⁶
- 5.43 According to the Committee, “[w]hile criminalising young people is to be avoided, in egregious cases, this new offence could be applied to anyone over the age of 14, with those aged between 14 and 17 being tried in the Youth Court”.²⁸⁷ The offence would cover “comments on websites, message boards and blogs, and in the social media (e.g. Facebook and Twitter), and also emails and texts”.²⁸⁸
- 5.44 The Committee also recommended amendments to several existing criminal laws. First, it proposed extending the offence of incitement of suicide—which currently only applies if a victim *actually* attempts or commits suicide as a result of incitement—to cases in which no attempt is made.²⁸⁹ This offence would “be limited to inciting a particular person to suicide, rather than a non-specific direction”.²⁹⁰ The Committee remarked:
- Most messages referring to potential suicide are not sufficiently specific or do not go as far as actual incitement. Some are intended to hurt and cause distress rather than to induce the recipient to self-harm. Communications of that kind are, we believe, sufficiently covered by the general offensive communication provision which we recommend. However, we consider it appropriate that the small number of very harmful communications that do specifically incite a particular person to suicide should be caught by the offence of incitement.²⁹¹
- 5.45 Similarly, the Committee recommended extending the existing child ‘grooming’ provision to cases in which no overt act has yet been taken in preparation for a sexually inappropriate meeting with a child.²⁹² Thus, the proposed offence makes it a crime to engage in any conduct that exposes a person under the age of 16 to indecent material with the intention of making it easier to procure that person for unlawful sexual activity.²⁹³ The Committee did not comment on how this provision might impact young people who engage in sexting.
- 5.46 The Committee did, however, refer to sexting in relation to its third proposal for criminal law reform—the extension of the existing covert filming provision to criminalise the non-consensual publication of “intimate images”.²⁹⁴ The Committee explained:

[T]he offence would apply only to the publication of intimate images by the person who created them [where the creator is not depicted or is not the only person depicted]. The offence will not therefore catch behaviours such as “sexting” where teens take intimate images of *themselves* and share them with others who may on-share the images more broadly than was expected. It will also not catch publication of an intimate image by someone other than the person who created it. For example one scenario might involve a partner of the image’s creator posting an intimate image of their partner’s lover on the internet to humiliate or intimidate them. While such scenarios could involve substantial harm and distress, we consider that it is appropriate to target the criminal publication offence (in cases where the picture was taken with the consent of the subject) to the creator of the image because of the serious breach of trust involved. Cases of publication without consent by third parties should be dealt through civil law mechanisms such as Privacy Act complaints and the tribunal remedies that we propose in the next chapter.²⁹⁵

- 5.47 The biggest change proposed by the Committee is the creation of a Communications Tribunal to “operate like a mini-harassment court specialising in digital communications”.²⁹⁶ The Tribunal would consist of a District Court judge (and any necessary technical experts)²⁹⁷ and would have jurisdiction over all forms of electronic communication.²⁹⁸ Cyber bullying victims (or their parents or guardians) who could demonstrate that they have attempted to resolve their matter through other avenues and that they have experienced or are likely to experience significant harm would be eligible to have their matter heard before the Tribunal.²⁹⁹
- 5.48 The Tribunal would apply a set of principles “based on” relevant statutory and common law.³⁰⁰ It would have the power to make orders to take down communications; to cease publishing such communications; to refrain from encouraging others to make such communications; to correct inaccurate communications; to give the complainant a right of reply; to apologise to the complainant and to release the identity of an author of an anonymous communication or to suppress the names of any parties.³⁰¹ In deciding whether to make an order, the Tribunal would have to consider factors such as the content of the communication and the level of harm caused by it; the purpose of the communicator; the context of the communication; the size of the audience; the age and vulnerability of the complainant; the truth or falsity of the communication; the extent to which it is of public interest and the conduct of the complainant and defendant.³⁰²
- 5.49 The Tribunal proposal is similar to the Ombudsman option considered by the Australian Joint Select Committee on Cyber-Safety. While the creation of a new Tribunal remains open to the same concerns expressed in some of the Australian submissions about duplication of facilities and jurisdictional issues, there are various existing administrative bodies—such as the Privacy Commissioner and the Anti-Discrimination Board—that already handle similar complaints and could take on cyber issues related to their current work. In any event, an administrative complaints mechanism is a regime worth considering, as it would offer a lower-level alternative to criminal proceedings and an array of responses that may be more beneficial to young victims and more appropriate for young offenders than criminal sanctions.

iii. United States

- 5.50 In the US, at least 38 states have enacted or amended laws in relation to cyber bullying.³⁰³ Of these, 34 states have statutory definitions of bullying that cover electronic acts and 6 states define cyber bullying more specifically.³⁰⁴ According to the Berkman Center for Internet & Society, the legislative definitions of bullying and cyber bullying vary greatly, with some states focusing on specific actions, some on the intent of the bully and others on the nature of harm to the victim.³⁰⁵

- 5.51 Many of these laws mandate procedures for schools to carry out in response to cyber bullying among students.³⁰⁶ However, the current trend in US law reform seems to favour the criminalisation of bullying:

Recent state legislation and policy addressing school bullying has emphasized an expanded role for law enforcement and the criminal justice system in managing bullying on school campuses. Though historically, authority over youth bullying has fallen almost exclusively under the purview of school systems, legislation governing the consequences for bullying behavior reflects a recent trend toward treating the most serious forms of bullying as criminal conduct that should be handled through the criminal justice system. . . . An increasing number of states also have introduced bullying provisions into their criminal and juvenile justice codes.³⁰⁷

- 5.52 At least 3 states have passed specific cyber bullying offences. In Arkansas, a person commits the offence of cyber bullying if he or she transmits, sends, or posts a communication by electronic means with the purpose to frighten, coerce, intimidate, threaten, abuse, harass or alarm another person in furtherance of severe, repeated or hostile behaviour towards that person.³⁰⁸ In Louisiana, criminal cyber bullying is the transmission of any electronic textual, visual, written or oral communication with the malicious and willful intent to coerce, abuse, torment or intimidate a person under the age of 18.³⁰⁹ North Carolina's cyber bullying offence lists specific behaviours that are prohibited, such as building a fake profile or website to intimidate or torment a minor; planting a statement that could provoke someone else to stalk or harass a minor; or signing up a minor for a pornographic website.³¹⁰
- 5.53 Law makers have also attempted to criminalise cyber bullying at the federal level. In 2008, the 'Megan Meier Cyberbullying Prevention Act' was introduced, proposing to make it a felony to transmit in interstate or foreign commerce a communication intended to coerce, intimidate, harass or cause substantial emotional distress to another person, using electronic means to support severe, repeated and hostile behaviour.³¹¹ The bill was introduced in response to the cyber bullying-related suicide of 13-year-old Megan Meier, whose middle-aged bully had eluded criminal conviction.³¹² Critics expressed concern that the Act was too vague, that it was likely to infringe on the First Amendment right to freedom of speech and that it implemented a much harsher penalty for cyber bullying than exists for traditional bullying.³¹³ As a result, it failed to pass.
- 5.54 There have been similar calls for the passage of specific anti-cyber bullying legislation in Australia.³¹⁴ However, as explained above, there is already a vast framework of criminal law in place that applies to cyber bullying behaviours. In our view, more emphasis should be placed on raising awareness of the existing offences than on the creation of newer, more restrictive offences. As several of our survey respondents asserted, "[m]aking the rules clearer – knowing the exact repercussions", making them "more accessible to youth" and ensuring that "[m]ore people are aware of the consequences that can happen and the long term effects" is likely to be more effective than adding more layers to the existing criminal law framework.

6. The Need for Law Reform

- 6.1 As we have seen, sexting and cyber bullying implicate a variety of criminal laws and penalties. The most serious of these are child pornography laws. Child pornography laws were enacted to serve an unquestionably important purpose—protecting children from sexual exploitation by those in a position of power or authority. However, in the modern context, criminal sanctions that exist for the very purpose of protecting children now have the capacity to be used against them. These laws were never intended to be applied against young people expressing age-appropriate sexual curiosity, no matter how offensive their method of expression may seem. Threatening young people with disproportionate penalties intended for the most heinous sex offenders will not make children safer; it will only undermine the legitimacy of the law.

- 6.2 Further, the ‘criminalisation’ of sexting threatens to infringe on young people’s rights to expression, bodily autonomy and privacy. According to Professor Julia Halloran McLaughlin, “[t]eens approaching the age of majority are individuating from their parents, beginning to form emotional and intimate relationships with peers, and are using technology as a method of flirting and assessing whether further amorous advances might be welcomed. Thus, the decision whether and with whom to engage in teen sexting is at its core a relationship right”.³¹⁵ Or, in the words of a young person, “[i]f my [g]irlfriend is bored and she sends me sexy photo’s or what not, why should that be a crime? That’s a little drastic . . . I think if I spread them around if we broke up or something sure, but as long as they are not being used to harm people, let them have their fun”.³¹⁶
- 6.3 There are also several specific gaps or irregularities within NSW and Commonwealth child pornography and indecency laws:
- The inconsistency in the applicable ages for NSW and Commonwealth child pornography laws is confusing and can result in lawful sexual experimentation being converted into serious crimes through the flash of a mobile phone camera.
 - The child pornography laws do not differentiate between private/consensual distribution of images and public/non-consensual distribution. While we have been informed that the NSW police would rarely, if ever, press charges in the former case,³¹⁷ we nevertheless have to advise our young clients whose images have been distributed without permission that if they report the matter to the police, we cannot guarantee that they will be immune from charges themselves. This creates a situation in which victims or potential victims of stage 4 sexting may actually be made more vulnerable by the criminal law.
 - While the Commonwealth law requires the Attorney-General to consent to the prosecution of a person who is under the age of 18 for a child pornography offence, there is no equivalent protection in NSW law. Again, this may result in different outcomes for similar cases, depending on which laws are applied.
 - Children can be placed on the sex offender register for sexting where they have committed more than a single registrable offence. We were very pleased to hear from the NSW police that no one under the age of 18 has, as yet, been placed on the register for sexting.³¹⁸ However, we remain concerned that registration continues to be an option for young people involved in more than one sexting incident.
- 6.4 There are fewer problems with the criminal laws that apply to cyber bullying. The main concern is that these laws will take away too much expressive freedom in an effort to promote dignity, safety and well being. Striking the appropriate balance between freedom of speech and freedom from abuse will be particularly challenging in the application of the Commonwealth law against the menacing, harassing or offensive use of carriage services. The vagueness and breadth of this law is both a strength, in that it can be used to combat the infinite and ever-evolving array of cyber bullying behaviours, and a flaw, in that it can be used to stifle speech that is unpopular but of some value to society (or, at a minimum, unworthy of criminalisation).
- 6.5 The other relevant criminal laws are more narrowly tailored to specific types of abuse. These laws are not problematic as long as they are applied in a manner that is consistent with children’s rights and procedural fairness. Indeed, many students remarked that “the rules for cyber bullying [are] fair”³¹⁹ and said that it is important to them “[t]hat bullies are held accountable”.³²⁰ A particular concern is that, given the extensive publicity surrounding a number of horrific cyber bullying-related suicides, the availability of these laws may result in police being quick to press criminal charges in lieu of more localised responses that might be preferable to both victims and offenders.

- 6.6 Where possible, cyber bullying should be resolved through less intrusive means, such as restorative justice, school discipline or police cautioning. Youth Justice Conferencing is very often preferable to criminal charges, and if criminal prosecution is deemed necessary, the least restrictive and most age appropriate sanctions should be applied. Victims should always have a say in this process.
- 6.7 In conclusion, the current laws that apply to sexting—and to a lesser extent, cyber bullying—leave children and young people vulnerable to unnecessary criminal charges and disproportionate penalties. As the young people of NSW have told us, “[t]he sentences for young people should be a focus of reform . . . as the penalties . . . would ruin the life of a young person who thinks they are doing a harmless act, they are actually unaware they are breaking the law. Sexting and cyber bullying should still be punished, however their sentences should be less harsh.”³²¹

Appendices

Appendix A: Survey (version 2)

New Voices / New Laws

Survey

Now that you've heard what we have to say, we want to hear from you! The National Children's and Youth Law Centre (NCYLC) is writing a report about the criminal laws on sexting and cyber bullying in NSW, and how these laws can be changed to make them more fair and appropriate for young people. We want to make sure the report includes your knowledge and opinions.

This survey is completely anonymous. You do not have to give your name and no one will know what you tell us. All questions are optional. Your answers will not be used for any purpose other than helping us write our report. By filling in this survey, you agree to allow NCYLC to use your anonymous responses in our report.

About the presentation (questions 1 – 5)...

1. Did you understand the presentation?

- ☐ Yes ☐ No

2. Was the presentation useful? (rate from 1-very useful to 5-totally useless)

- ☐ 1-very useful
☐ 2-pretty useful
☐ 3-neither useful or useless
☐ 4-pretty useless
☐ 5-totally useless

3. Did you like the format and design of the presentation? (rate from 1-liked it a lot to 5-didn't like it at all)

- ☐ 1-liked it a lot
☐ 2-liked it ok
☐ 3-neither liked it or didn't like it
☐ 4-didn't really like it
☐ 5-didn't like it at all

4. How would you rate the speaker(s)? (rate from 1-very good to 5-very bad)

- ☐ 1-very good
☐ 2-good
☐ 3-neither good or bad
☐ 4-bad
☐ 5-very bad

5. Is there anything you would add to or change about the presentation to make it better?

About you (questions 6 – 10)...

6. What is your gender?

- ☐ Female ☐ Male ☐ Transgender ☐ I'd rather not say

7. Are you Aboriginal or Torres Strait Islander?

- ☐ Yes ☐ No ☐ I'd rather not say

8. Are you or your parents from a non-English speaking background?

- ☐ Yes ☐ No ☐ I'd rather not say

9. Do you have any disabilities?

- ☐ Yes ☐ No ☐ I'd rather not say

10. Has anyone ever...

	Yes	No
asked you or someone you know for a naked/sexy photo?	<input type="radio"/>	<input type="radio"/>
sent you or someone you know a naked/sexy self-photo?	<input type="radio"/>	<input type="radio"/>
shared a naked/sexy photo of you or someone you know without permission?	<input type="radio"/>	<input type="radio"/>
posted or said something hateful/offensive about you or someone you know online?	<input type="radio"/>	<input type="radio"/>
sent you or someone you know a threatening text or message?	<input type="radio"/>	<input type="radio"/>
bothered you or someone you know repeatedly online or on your mobile?	<input type="radio"/>	<input type="radio"/>
logged into an online account that belongs to you or someone you know without permission?	<input type="radio"/>	<input type="radio"/>
made a fake profile about you or someone you know with a photo, mobile number or other info?	<input type="radio"/>	<input type="radio"/>

What you *THINK* about sexting and cyber bullying (questions 11 – 16)...

11. Do you think the following sexting-related actions are harmful? (rate from 1-very harmful to 5-totally harmless)

	1-very harmful	2-harmful	3-neither harmful/ harmless	4-pretty harmless	5-totally harmless
Asking someone for a naked/sexy photo is...	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Taking a naked/sexy photo of yourself and sending it to someone else is...	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Sharing a naked/sexy photo of someone else without permission is...	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

12. When are the following penalties appropriate (or fair) for young people who ask for, take or share nude/sexy photos?

	Always	Sometimes	Never
Gaol sentence	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Sex offender registration	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Fines or community service	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Police caution	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
School discipline	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Education program	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Suspension of mobile or internet service	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Apology to the victim	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
No penalty	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

13. Do you think the following sexting-related actions SHOULD be crimes?

	should be a crime	should NOT be a crime
Asking someone for a naked/sexy photo...	<input type="radio"/>	<input type="radio"/>
Taking a naked/sexy photo of yourself and sending it to someone...	<input type="radio"/>	<input type="radio"/>
Sharing a naked/sexy photo of someone else without permission...	<input type="radio"/>	<input type="radio"/>

14. Do you think the following cyber bullying-related actions are harmful? (rate from 1-very harmful to 5-totally harmless)

	1-very harmful	2-harmful	3-neither harmful/ harmless	4-pretty harmless	5-totally harmless
Posting or saying hateful/offensive stuff about someone online is...	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Sending someone threatening texts or messages is...	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Bothering someone repeatedly online or on their mobile is...	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Logging into someone's online accounts without their permission is...	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Making a fake profile about someone using their photo or other info is...	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

15. When are the following penalties appropriate (or fair) for young people who cyber bully others in these ways?

	Always	Sometimes	Never
Gaol sentence	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Sex offender registration	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Fines or community service	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Police caution	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
School discipline	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Education program	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Suspension of mobile or internet service	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Apology to the victim	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
No penalty	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

16. Do you think the following cyber bullying-related actions SHOULD be crimes?

	should be a crime	should NOT be a crime
Posting or saying hateful/offensive stuff about someone online...	<input type="radio"/>	<input type="radio"/>
Sending someone threatening texts or messages...	<input type="radio"/>	<input type="radio"/>
Bothering someone repeatedly online or on their mobile...	<input type="radio"/>	<input type="radio"/>
Logging into someone's online accounts without their permission...	<input type="radio"/>	<input type="radio"/>
Making a fake profile about someone using their photo or other info...	<input type="radio"/>	<input type="radio"/>

What you KNOW about sexting and cyber bullying (questions 17 – 25)...

17. What are the different ways you can get in trouble sexting and cyber bullying? (select any that apply)

- ☐ You can get kicked off a website or have your account shut down
- ☐ You can get punished, suspended or expelled from school
- ☐ You can get sued by someone who says you've hurt them
- ☐ You can get charged with a crime
- ☐ I don't know

18. Which of these sexting-related actions can be crimes? (select any that apply)

- ☐ Asking for a nude/sexy photo
- ☐ Taking a nude/sexy photo
- ☐ Having a nude/sexy photo
- ☐ Sending, posting or passing around a nude/sexy photo
- ☐ I don't know

19. Sexting can be a crime under which law(s)? (select any that apply)

- ☐ Child pornography laws
- ☐ Indecency laws
- ☐ Offensive use of the internet/mobile phone laws
- ☐ No laws
- ☐ I don't know

20. A nude/sexy photo might be considered child pornography if it...(pick one)

- ☐ Shows someone up to 16 years old OR
- ☐ Shows someone up to 18 years old

21. A nude/sexy photo might be considered child pornography if it...(pick one)

- ☐ Would be considered 'offensive' by reasonable adults OR
- ☐ Would be considered 'offensive' by the person who receives the photo

22. A photo of a young person in a sexual pose can be considered child pornography, even if they're not naked...true or false?

- ☐ True OR
- ☐ False

23. If police consider a nude/sexy photo to be child pornography, what are the possible penalties? (select any that apply)

- ☐ Going to gaol
- ☐ Getting registered as a sex offender
- ☐ Having to tell police every time you travel or move house
- ☐ Not being allowed to get a job working with children
- ☐ I don't know

24. Which of these cyber bullying-related actions can be crimes? (select any that apply)

- ☐ Posting or sending hateful/offensive messages or pictures
- ☐ Sending threatening texts or messages
- ☐ Bothering someone repeatedly online or on their mobile
- ☐ Contacting someone in any way that could scare or intimidate them
- ☐ Logging into someone else's account without their permission and pretending to be them
- ☐ Creating a fake online profile using someone else's photo or other info
- ☐ None of these
- ☐ I don't know

25. Cyber bullying can be a crime under which law(s)? (select any that apply)

- ☐ Hacking (unauthorised access of restricted info) laws
- ☐ Identity theft (misuse of identity info) laws
- ☐ Threat laws
- ☐ Stalking and intimidation laws
- ☐ Menacing, harassing or offensive use of the internet/mobile phone laws
- ☐ No laws
- ☐ I don't know

Your reactions (questions 26 – END)...

26. ALL of the sexting and cyber bullying actions mentioned above could be crimes, depending on the situation. Do you think that's fair? (rate from 1-very fair to 5-very unfair)

	1-very fair	2-fair	3-neither fair/unfair	4-unfair	5-very unfair
Asking someone under 18 for a naked/sexy photo can be a crime. The punishment can include gaol and sex offender registration. This is...	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Taking a naked/sexy photo of yourself and sending it to someone else can be a crime if you're under 18. The punishment can include gaol and sex offender registration. This is...	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Sharing a naked/sexy photo of someone else who is under 18 without their permission can be a crime. The punishment can include gaol and sex offender registration. This is...	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Posting or saying hateful/offensive things online or on your mobile can be a crime. The punishment can include goal. This is...	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Bothering someone repeatedly online or on your mobile can be a crime. The punishment can include gaol. This is...	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Sending threats online or on your mobile can be a crime. The punishment can include gaol. This is...	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Logging into someone's online accounts without their permission can be a crime. The punishment can include gaol. This is...	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Using someone's photo, mobile number or other information to make a fake profile about them can be a crime. The punishment can include gaol. This is...	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

27. Did you know before today that these actions could be crimes?

	YES, I knew this was a crime	NO, I did NOT know this was a crime
Asking someone under 18 for a naked/sexy photo	<input type="radio"/>	<input type="radio"/>
Taking a nude/sexy photo of yourself and sending it to someone	<input type="radio"/>	<input type="radio"/>
Sharing a nude/sexy photo of someone else who is under 18 without their permission	<input type="radio"/>	<input type="radio"/>
Posting or saying hateful/offensive things online or on your mobile	<input type="radio"/>	<input type="radio"/>
Bothering someone repeatedly online or on their mobile	<input type="radio"/>	<input type="radio"/>
Sending threats online or on a mobile	<input type="radio"/>	<input type="radio"/>
Logging into someone's online accounts without their permission	<input type="radio"/>	<input type="radio"/>
Using someone's photo, mobile number or other info to make a fake profile about them	<input type="radio"/>	<input type="radio"/>

28. If you knew that some or all these actions could be crimes, where did you learn this? (select any that apply)

- ☐ at school
- ☐ from my parents
- ☐ from a friend
- ☐ from police
- ☐ from a legal centre or website
- ☐ from news stories
- ☐ when I (or someone I knew) got in trouble
- ☐ Other: _____
- ☐ N/A

29. Does knowing that these actions could be crimes make you less likely to do them?

- ☐ Yes ☐ No ☐ I don't know

30. Does knowing that these actions could be crimes make you feel more confident about being able to deal with them if they happen to you?

- ☐ Yes ☐ No ☐ I don't know

31. What's the most important change that you'd like to see made to the laws and penalties that apply to sexting and cyber bullying?

Appendix B: Focus group worksheets

Worksheet 1: Proportionate Penalties and Deterrence

Actions	Harms	Penalties
1. asking for a sexy photo	Depending on the nature and the source of the request, the recipient of the request may feel upset by it. He or she may also feel pressured to comply with the request.	The person requesting the photo could be charged with soliciting child pornography, inciting indecency or using the internet or a mobile in an offensive way.
2. taking a sexy photo	If the photo is a self-portrait, its creator may be acting in response to peer pressure. If the image is captured by someone else, there are additional concerns, including possible lack of understanding or consent on the part of the subject.	The person taking the photo could be charged with producing child pornography, even if it's a self-portrait and no one else ever sees it.
3. sending a photo with consent of the person shown	Again, peer pressure is the main concern. The subject of the photo may also feel scared to do anything that could upset the recipient, in case they share the photo with others.	The person sending the photo and the person receiving it could both be charged with child pornography, indecency or misuse of the internet or a mobile, even if it never gets out to anyone else.
4. sending a photo without consent of the person shown	The subject of the photo probably feels betrayed, humiliated, angry and upset. If the photo is shared widely, the subject is likely to feel a sense of helplessness and loss of control. The subject is also likely to worry about long-lasting damage to his or her reputation and even job prospects. If the image is passed around, he or she may also experience bullying and harassment.	The person who sends the image out, and anyone who receives it or passes it on, can be charged with child pornography, indecency and misuse of the internet or a mobile phone.

Do you agree or disagree with the harms listed above? Are there any other harms caused by these actions?

Laws and penalties should be proportionate (balanced) to the harms caused. That way, the penalties deter (discourage) people from doing harmful actions & provide a fair punishment for those who act in spite of the law.

Do you think the current penalties for these actions are proportionate to their harms? If not, what would be a more fair response to these actions? Should any crimes apply?

Some people worry that changing child pornography and indecency laws so they no longer apply to sexting would send young people the message that these actions are ok. They think the laws should continue to apply so that young people are deterred (discouraged) from sexting.

What do you think? Do these laws make young people less likely to engage in sexting? Are other punishments (eg getting in trouble at school) enough to deter young people from the most harmful kinds of sexting, like passing around private pictures to embarrass someone?

Worksheet 2: Victim vs Offender

Under child pornography laws, Brie is both a victim (because she appears in a sexual photo that others can view) and an offender (because she is the one who took and sent the photo).

Does it make sense to label someone a victim and an offender at the same time? Are there any other laws that do this?

Does it seem fair that Brie can be charged for creating child pornography in the same way that Adam and all their friends can be charged for sending it around without her permission?

If Brie was your friend, and you found out that her photo was being passed around, but you also knew that she could be charged for creating child pornography if police found out, what would you tell her to do? Would you go to the police? How about a parent or teacher?

What kind of response (by students, teachers, family members, police, etc) would be most helpful to Brie?

Worksheet 3: Legal Act vs Illegal Image

Child pornography laws go beyond photos that show sexual activity—they also include photos that show young people who are naked or posing in a sexy way. That's because forcing a little kid to get naked or do a sexy pose for the camera can be just as abusive as touching them in front of the camera. However, this means that some actions that are otherwise legal (like standing around naked in your bedroom) become illegal with the flash of a camera.

What do you think? Does this make sense? What should happen to young people who take photos of themselves standing around naked in their bedrooms?

Is there a way to re-define child pornography so that the laws continue to protect kids from being sexually abused by adults, but no longer turn legal teenage behaviour into something illegal?

Some people say the line should be drawn at consent—if a young person voluntarily shares a naked photo with someone else, then neither of them should be charged with a crime...but if the recipient of the photo sends it to others without permission, then they should be charged with a crime.

What do you think? Should the criminal law be based on consent, so that private and voluntary sharing of photos is legal, but public sharing of photos without permission is illegal?

If not, why not? If so, what crimes should apply and why?

Worksheet 4: Age Discrimination

A lot of studies are coming out now that say that adults engage in sexting as often as (or more than!) young people. But as long as they're sexting with other adults, they usually can't be charged for it. Some people say this discriminates against young people—just because of their age, they're subject to really harsh penalties.

What do you think? Does the law discriminate against young people? Why or why not?

Other people say that a lot of laws make distinctions based on age—for example, laws about when you can drive, gamble, drink alcohol, etc. They say that the laws are in place to protect young people against their own immaturity.

What do you think? Do child pornography and indecency laws protect children from themselves? Is there a better way to do this?

NSW says that child pornography laws only apply to photos of people under 16, but the Commonwealth child pornography laws cover people up to 18. This means that 17 year olds can have sex in NSW but can't record it.

What do you think of this? Does it make sense? What do you think the age should be and why

SEXTING

Using the internet or your mobile to take, send or even receive a 'sexy text' or a 'sexy pic' of yourself is known as 'sexting'. In this fact sheet, we're talking about how sexting can get young people into trouble with the law.

If you're concerned about a nude or 'sexy' picture of yourself that might be on someone's phone, computer or online, or if you're worried that you have a picture like that on your phone, computer or online, you can send a Lawmail to get free confidential legal advice from www.lawstuff.org.au or call the Youth Hotline on 1800 10 18 10.

What is 'sexting'?

- Taking naked or partly naked photos or videos of yourself (posing in a sexual way) and sharing the photos or videos with others online or through your mobile phones; and
- Receiving, forwarding or posting these photos or videos online or through mobile phones.

Is sexting a crime?

Sexting can be a crime, depending on the age of the people sexting and whether the pictures would be considered 'offensive' or 'indecent' by a court.

It is a crime if you make, send out, or have an 'offensive' picture of someone **under the age of 18** (including yourself) who is:

- showing their private parts, which includes a person's genital area, anal area or female breasts;
- posing or acting in a sexual way;
- in the presence of another person involved in a sexual activity or pose; or
- involved in a sexual activity.

For example:

- A 16 year old boy who takes a photo of his private parts and sends it to someone on his mobile phone is committing a crime. It does not matter whether you can see his face or any other identifying feature.

- A 15 year old girl who takes a video of herself doing a 'sexy' dance in her bra and underwear and posts it online may be committing a crime. It does not matter whether you can see her private parts.
- A 14 year old boy who takes and posts a video of himself at a party watching a girl do a striptease may be committing a crime. It does not matter how old the girl is.
- A 17 year old boy and girl who take photos of themselves having oral sex and email the photos to themselves are committing a crime. It does not matter that they are old enough to have sex.

The law calls these images 'child abuse material', or more commonly, child pornography. Child abuse material can include films, photos, digital images and videos sent by SMS, email, in chat rooms or published on blogs. **It can even include pictures that have been photo-shopped to make a young person look naked, or cartoons of young people having sex!** The maximum penalty for making, sending or having child abuse material is 15 years in gaol!

New South Wales child pornography laws only apply to images of young people under the age of 16, but the Commonwealth laws are broader. **These laws even apply to images of young people who look like they are under the age of 18.**

Anyone who sends, receives or even asks for a naked or sexual image of a person who is or appears to be under the age of 18 is at risk of committing a crime and of being charged.



What if the young person gives their permission to take the photo?

The law says that while you are under 18, you aren't allowed to consent (say yes) to sexting – even though you are able to legally start having sex at 16 years of age. The reason the laws on sexting are so confusing is that they were made to protect children from adult offenders, and didn't consider that teenagers might record their own sexual activity. As a result, even if the young person in the image says it's okay to be filmed or photographed, it's still a crime.

If there is no permission, it's never okay—no matter how old they are!

It is a crime to take a sexual, nude or partly nude picture or video of anyone—regardless of their age—without their permission. However, it is a more serious crime if the person is under the age of 16. The maximum penalty for this is prison for up to 5 years. In the case of 'sexting', this 5 years is on top of the ten years maximum discussed above!

If you ask someone else to send you a sexual photo/video...

Asking a person of any age to send you a sexual image in a harassing or offensive way is a crime. It does not matter how old you and the other person are.

Asking a person under the age of 16 to send you a sexual photo or video is a crime. You could be charged with:

1. soliciting child pornography (penalty includes up to 15 years gaol);
2. causing a child to be used for child pornography (penalty includes up to 14 years gaol); or

3. inciting a child to an act of indecency (penalty includes up to 2 years gaol).

It is a crime to use the internet or a mobile phone to ask anyone who is or appears to be under the age of 18 to send you a sexual image. This is called soliciting child pornography material and carries a maximum penalty of up to 15 years in gaol.

You could also be charged with committing an act of indecency towards a child or transmitting an indecent communication to a child.

Example

Ted is 15 and his 15 year old girlfriend sent him a text with a photo of herself in her bra and underwear. Her dad found the picture on her phone as well as other photos she sent Ted of herself posing in a sexual way. Her dad is now saying he will report Ted to the police. Ted is worried about what might happen, even though the photos were only for him and no one else saw them.

Ted has committed a crime because it is against the law to have a photo of someone under the age of 16 posing in a sexual way. The law says these photos are child pornography. Having these photos on his phone is a crime. Ted's girlfriend has also committed a crime by taking photos of herself, keeping them and sending them to other people.

Can I be forced to register as a sex offender for a sexting crime?

The Australian National Child Offender Register (ANCOR) is an online registration system designed to help the police manage and share information about people charged with sex crimes in relation to children. If you are found guilty of a sexting crime, you may be placed on the register. Some of the restrictions for people on the register include telling the police every time you move houses or change jobs. If registered, you will not be able work or volunteer in a job where you are likely to have contact with children and young people such as coaching a junior

sporting team or becoming a surf lifesaver.

What should I do if I have a picture or text I am unsure about?

It is important to protect yourself by deleting any pictures you are unsure or uncomfortable about straightaway. It is really difficult to keep images private and once they are shared, you will never be able to delete those pictures forever. Never share it online or through SMS, and only show it to a trusted adult.

If you are questioned or arrested by the police in relation to sexting, you should give your correct name, age and address, but you have the right to remain silent for any other questions. Try to remain calm, and politely ask to get legal advice by calling the [Youth Hotline](tel:1800101810) on 1800 10 18 10 before you give them any other information.

Useful links and contacts

Lawmail is a FREE legal advice and information service. If you have a question or need legal advice you can send a **Lawmail** at http://www.lawstuff.org.au/nsw_law/lawmail.

Call the **Youth Hotline** on 1800 10 18 10. The Youth Hotline gives legal advice and information to young people under 18. You can call the Hotline from 9am to midnight on weekdays, with a 24-hour service from Friday 9am to Sunday midnight and also on public holidays.

If you want to talk to someone, you can call the **Kids Helpline** on 1800 55 1800 or visit their website at <http://www.kidshelp.com.au>.

This information was last reviewed on 10 April 2012. This factsheet provides information about the law in NSW. It does not provide legal advice. If you need advice, or if you would like information about the law in a state or territory other than NSW, please send us a Lawmail at <http://www.lawstuff.org.au>.

CYBER BULLYING

Did you know that social networking sites like Facebook, Twitter and YouTube all ban cyber bullying? Or that cyber bullying can be illegal? If you have been bullied online, have seen bullying online or are worried that you may have bullied someone else online and you don't know what to do next, you can get free, confidential legal advice from www.lawstuff.org.au

What is bullying?

Bullying generally includes behaviour that:

- is meant to be hurtful;
- targets a certain person or group of people;
- happens more than once;
- embarrasses, threatens or intimidates the person being bullied.

For example, repeatedly touching someone against their will, leaving them threatening messages or spreading nasty rumours about them are all examples of bullying.

What is cyber bullying?

Cyber bullying is when someone uses SMS, e-mail, blogs, chat rooms, discussion boards, instant messages, or social networking sites (such as Facebook and Twitter) to behave in a way that is cruel or hurtful. It includes everything from posting nasty comments and photos to spreading rumours and making threats. It's important to remember that words and actions meant as a joke can end up really hurting someone.

Cyber bullying is serious because the target often feels like they can't escape. Unlike bullying at school, bullying online can happen anywhere and at any time.

Cyber bullying can also be very public, especially if photos or comments are posted on sites that can be accessed by anyone. Even if photos or comments are only sent to one person or a small group of people, there's a chance that they'll get out to others. Once they're out, they're out forever—and there's no way to control who sees them.

Is cyber bullying a crime?

Cyber bullying is banned by most social networking websites and can be a crime. Website administrators can remove pages with offensive, harassing or intimidating messages and photos and may also ban cyber bullies from using the site in future.

Cyber bullies may also be charged and have to go to court depending on the seriousness of the bullying. For example, it is illegal to use mobiles or the internet in a way that is menacing, harassing or offensive. A 'menacing' use would be threatening to harm someone. (Threats are illegal under a number of laws, and can even be considered assault.) A 'harassing' use would be bothering someone over and over again. An 'offensive' use is harder to define. There is a thin line between actions that are hurtful and actions that are illegal. If you use your mobile or the internet in a way that is likely to really hurt or anger a typical person, you may be committing a crime. The penalty for menacing, harassing or offensive cyber bullying is up to 3 years in gaol.

Example

A teenager in NSW made a Facebook page called "All XXX Police Are Corrupt". The page had the names of some police officers from XXX. The page has been taken down now but the teenager has been charged with harassing and offensive use of the internet.



Bullying at school

All schools in New South Wales have anti-bullying plans in place to deal with bullying and cyber bullying. Schools are responsible for making sure students know what their anti-bullying plan is and teachers are responsible for making sure the plan is followed.

If you are being bullied at school or you think someone else is being bullied, it's important to report it to your teachers or an adult you trust so they can look into it. Your teachers won't always know when bullying is going on, especially if it's happening online or via text message.

While different schools have different ways of dealing with cyber bullying, it is always taken very seriously. Students who bully other students (or teachers) can be suspended and in some cases expelled.

The school may also call the police if they think a crime has been committed. For instance, in New South Wales, it is a crime to assault, stalk, harass or intimidate someone (students, teachers or other school staff) while they are at school. This includes cyber bullying. If you use the internet at school to cyber bully there is a maximum penalty of 7 years in prison!

Example

A group of young people created a "Root-Rater" page on Facebook. The page asked Facebook users from local schools to send in information about the people they had sex with, including descriptions of their bodies and scores for their sexual performance. The page then posted this information for all its friends to see. The page was **taken down**, but local schools threatened to expel students who were involved, and NSW Police said that "Root-Rater" and other gossip pages could lead to criminal charges for the girls and boys who participated.

Stalking & Intimidation

Stalking is when someone gets repeated attention that intimidates or frightens them. Stalking is a crime and penalties include up to 5 years in prison and fines up to \$5,500.

Stalking doesn't only happen in person. In some cases, cyber bullying can be stalking. For example, if a bully sends lots of messages or uses the internet to find out where someone is, this might amount to stalking. Stalkers sometimes pretend to be someone else online, so it's important to be careful about giving away personal information (such as your address or phone number). It's also important to think about who can see your profile or newsfeed before posting your plans or checking in at a place.

If you feel intimidated or scared by something someone has posted online or sent to you on your phone, keep copies of what they have said and report it to police. Courts are able to make special 'Apprehended Violence Orders' (AVOs) to protect you from people who are stalking or bullying you. The exact orders will depend on the individual case, but will usually state how close a person is allowed to come to you or your house and if they are allowed to contact you (including by phone or on the internet).

If you are accused of stalking, there may be long term effects. For instance, if an AVO is taken out against you by someone under the age of 16, you will be placed in a database that may make it difficult for you to work in jobs where you come into contact with children.

What can I do about cyber bullying?

Whether you've been bullied or called a bully, you have the right to information, advocacy, advice and support.

Some good online habits

- Keep your profile settings private;
- Only add people you actually know as friends;
- If you're being bullied by someone online, block them from contacting you and consider reporting them to the website administrator or to a trusted adult;
- Keep your log-in details private; and
- Only send pictures or personal information to people you know and trust.

Finally, be careful about what you write and what you say.

If you are having issues with your friends or someone else, whether it be at school or in other places, try not to react to them via email, text or social networking sites. It's easy to say something hurtful when you're feeling angry or upset, but if it's written down or posted online, it's permanent. Nothing online is ever private, even after you delete it!

That said, you should always respect other people's requests to take down things you've posted about them. Even though online posts and photos can never truly be erased, you can help stop the spread and lessen the damage by taking the post down quickly.

If you are questioned or arrested by the police in relation to cyber bullying, you should give your correct name, age and address, but you have the right to remain silent for any other questions. Try to stay calm, and politely ask to get legal advice before you give them any other information.

Useful links and contacts

For FREE and confidential legal advice and information you can send a **Lawmail** at http://www.lawstuff.org.au/nsw_law/LawMail.

If you want legal advice or information over the phone, you can call the **Youth Hotline** on 1800 10 18 10. The Hotline provides legal advice and information to young people under 18, and operates from 9am to midnight on weekdays, with a 24-hour service from Friday at 9am to Sunday at midnight and also on public holidays.

If you want to talk to someone, you can call the **kids helpline** on 1800 55 1800.

Here are some great websites with information on bullying:

<http://www.bullyingnoway.gov.au>

<http://www.cybersmart.gov.au>

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IDENTITY THEFT

Did you know that logging into someone's email or social networking account without their permission could be illegal? Or that pretending to be someone else online could be identity theft? Find out what identity theft is and how you can prevent it by reading this factsheet.

What is identity theft?

Identity theft is when someone pretends to be someone else to get a benefit or cause harm. An identity thief collects personal information about another person, such as their name, address, date of birth and passwords, and uses that information to take on the other person's identity.

Facebook, Twitter and YouTube all ban this type of behaviour.

Is identity theft illegal?

Yes. It is illegal to have anyone else's identity information with the intention of committing a crime. It is also illegal to make, supply or use identity information with the intention of committing a crime.

For example, it is illegal to use someone's name or photo to create a fake online profile of that person with the intention of harassing them. That's because their name and photo are identity information and online harassment is a crime.

Did you know...

Online, it is illegal to:

- Access or change password-protected information on purpose and without permission. For example, logging into someone else's email or social networking accounts without their permission.
- Access or change information held in a computer without permission in order to commit a serious crime. (A serious crime is a crime that has a long prison sentence, like identity theft or fraud.) For example, logging into someone else's email or social networking accounts without their permission to impersonate them or steal something that belongs to them.
- Intercept (look at or stop) any communication passing over the internet. For example, hacking a wifi connection to read someone's email.
- Menace, harass or offend someone. For example, posting threatening messages on someone's Facebook wall.
- Trick someone to get something. For example, using someone else's credit card number to buy stuff without their permission.



How does identity theft happen online?

Making fake profiles

Creating or using profiles on social networking sites under a fake name or using another person's identity is 'identity theft' and can be illegal.

Some social networking sites also have their own rules about creating more than one profile per person or creating profiles under fake names. Profiles breaking those rules may be removed from the site.

Example

Samantha created a Facebook page using Kelly Parker's identity information and photo under the name 'Kelly Porker'. The identity information Samantha used included Kelly's home address,

her school, date of birth and some photos. Samantha's actions could be considered identity theft with the intention of committing a crime – cyber bullying and online harassment.

Hacking into real profiles

An identity thief may be able to get into your online accounts in a few different ways. For example, you or someone you know might give them your password. Or they might use a computer or smart phone that has your log-in information saved.

An identity thief may also be able to hack into your online accounts by guessing the answers to your security questions. Any details you post to your profile—like your school and your favourite bands—may be used as clues to guess the answers to these questions. Once a person answers the security questions correctly, they can change your password and lock you out. A number of Facebook accounts have been taken over this way.

Finally, some computer viruses are programmed to record your log-in details and pass them along to identity thieves.

Example

15 year old Leon wanted to play a prank on his friend Jason. He thought it would be funny to log onto Jason's email account and send emails to their friends to embarrass Jason. Leon knew Jason's password because Jason had told it to him one time when they were online at Leon's house. Using the password Jason had given him, Leon logged on to Jason's account, and he read and deleted some of the emails in Jason's inbox. Then he sent an

email to Jason's girlfriend, calling her names and telling her that he wanted to break up. Leon was worried Jason would find out so he changed Jason's password to make it difficult for him to log in again.

Because Leon logged on to Jason's email without Jason's permission, he has committed a crime. Even if someone tells you their password, using it to get into their account without their permission is against the law. If Leon logged on to Jason's account with the intention of harassing Jason's girlfriend, he might also be charged with identity theft.

What can I do to prevent identity theft?

- **Be careful with passwords.** Avoid sharing them with others. Pick passwords that aren't easy to guess, and that have a combination of numbers, symbols and capital and lower case letters.
- **Be careful when picking security questions.** Avoid questions that can be answered using the information on your profile. Pick questions that aren't easy to guess.
- **Be careful when using a public computer, or when letting other people use your computer or smart phone.** Make sure to log out of your accounts on public computers, and to click "don't remember my password". Think about setting up a pin number for your smart phone or a password for your computer so people can't use them to get into your accounts without your permission.
- **Be careful when shopping or banking online.** Avoid buying stuff on websites that seem dodgy.

- **Be careful with your information on social networking sites.** Avoid adding people you don't know or trust and limit the amount of information you share.
- **Be careful when clicking links or downloading files.** Avoid downloading files from people or sites you don't know or trust.
- **Use antivirus software and keep it up-to-date.**

What can I do if I think my identity has been stolen?

- Report it to the website administrator (e.g. Facebook, Twitter and YouTube)
- Contact [ACCC SCAMwatch](http://www.scamwatch.gov.au)
 - <http://www.scamwatch.gov.au>
 - Phone: 1300 795 995
- If you have a question or need legal advice you can send a **Lawmail** at www.lawstuff.org.au/nsw_law/LawMail. Lawmail is a FREE legal advice and information service.

Other useful links

For useful tips and information on being safe online, check out the following websites:

- www.cybersmart.gov.au
- www.staysmartonline.gov.au/teens
- www.thinkuknow.org.au

This information was last reviewed on 10 April 2012. This factsheet provides information about the law in NSW. It does not provide legal advice. If you need advice, or if you would like information about the law in a state or territory other than NSW, please send us a Lawmail at <http://www.lawstuff.org.au>

Appendix D: How Schools Can Deal with Sexting and Cyber Bullying (Hand Out)

Social Responses	Website and Mobile Phone Terms of Use	School Policy and Acceptable Use Agreements	Alternative Dispute Resolution	Advocacy and Advice	Statute Law	Common Law	Criminal Law
<p>Acknowledge the punitive and/or beneficial responses already occurring within the family and among the student body</p> <ul style="list-style-type: none"> Facilitate appropriate responses (eg bystander intervention in cyber bullying) Discourage unhelpful responses (eg retributive cyber bullying) Avoid over-punishing 	<p>Take advantage of pre-legal options to address issues and minimise harm</p> <ul style="list-style-type: none"> Become familiar with the terms of use that apply to popular websites Educate teachers, students and families about how to report online misconduct to website administrators Ask the perpetrator and re-distributors to delete offensive material Report offensive behaviour or material to website administrators Advise students that a letter from a solicitor may bring about prompt resolution 	<p>Make sure that school policies and agreements include harmful forms of sexting, cyber bullying and identity theft as unacceptable conduct</p> <ul style="list-style-type: none"> Inform students and their families of these policies Ensure that policies and associated disciplinary measures are implemented Ensure counselling for the victim 	<p>Use the school's or community's conflict resolution mechanisms to resolve online disputes between students</p> <ul style="list-style-type: none"> Elicit an apology Develop the students' understanding of the harms and risks involved in their actions 	<p>Urge victims and their families to seek independent legal information, advocacy and advice</p> <p>Advocates may pursue pre-legal responses such as</p> <ul style="list-style-type: none"> Sending a warning letter to the bully or the holder of a sexed image outlining the laws being broken Sending a defamation concerns notice or other official request for prompt removal/deletion of offensive material 	<p>Urge victims and their families to seek independent legal information, advocacy and advice</p> <p>Sexting, cyber bullying and identity theft may give rise to claims in relation to:</p> <ul style="list-style-type: none"> Victims compensation Sexual or racial harassment Racial or gender identity vilification 	<p>Urge victims and their families to seek independent legal information, advocacy and advice</p> <p>Sexting, cyber bullying and identity theft may give rise to claims for:</p> <ul style="list-style-type: none"> Invasion of privacy / breach of confidence Intentional infliction of harm Civil assault Defamation 	<p>Sexting</p> <ul style="list-style-type: none"> Child pornography and child abuse material Indecency Offensive use of the internet or a mobile phone AVOs
							<p>Cyber Bullying</p> <ul style="list-style-type: none"> Threats In school/out of school harassment, stalking or intimidation Menacing, harassing or offensive use of the internet or a mobile phone AVOs
							<p>Identity Theft</p> <ul style="list-style-type: none"> Unauthorised access of restricted data with or without intent to commit a serious offence Unauthorised impairment of electronic communication Possession of identity information with intent to commit an offence Stalking Harassing or offensive use of the internet AVOs

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- ¹ 14-15 year old boy from New South Wales.
- ² 16-17 year old boy from New South Wales.
- ³ 14-15 year old girl from New South Wales.
- ⁴ 14-15 year old girl from New South Wales.
- ⁵ 14-15 year old girl from Victoria.
- ⁶ 14-15 year old girl from New South Wales.
- ⁷ 16-17 year old girl from New South Wales.
- ⁸ 14-15 year old girl from New South Wales.
- ⁹ 14-15 year old girl from New South Wales.
- ¹⁰ 14-15 year old girl from New South Wales.
- ¹¹ 14-15 year old girl from New South Wales.
- ¹² Age and gender not disclosed, from New South Wales.
- ¹³ See *Young Offenders Act 1997* s 7(c).
- ¹⁴ 16-17 year old girl from New South Wales.
- ¹⁵ *Criminal Code Act 1995* (Cth) s 474.17(1).
- ¹⁶ *Crimes Act 1900* (NSW) s 578C.
- ¹⁷ 16-17 year old transgender person from New South Wales.
- ¹⁸ *Young Offenders Act 1997* (NSW) s 7(a).
- ¹⁹ 16-17 year old, gender not disclosed, from New South Wales.
- ²⁰ 16-17 year old boy from New South Wales.
- ²¹ 14-15 year old girl from Northern Territory.
- ²² 16-17 year old girl from New South Wales.
- ²³ 16-17 year old girl from New South Wales.
- ²⁴ 14-15 year old girl from Tasmania.
- ²⁵ See factsheets found at <http://www.lawstuff.org.au/nsw_law/topics/article7>.
- ²⁶ *United Nations Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) arts 3(1); 12.
- ²⁷ *United Nations Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 3(1).
- ²⁸ *Young Offenders Act 1997* (NSW) s 7(a).
- ²⁹ *Ibid* s 7(c).
- ³⁰ *United Nations Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990), art 37(b).
- ³¹ *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 23(3).
- ³² *United Nations Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 12.
- ³³ N Nheu and H McDonald, 'By the People, For the People? Community Participation in Law Reform' (2010) Law and Justice Foundation of New South Wales <<http://www.lawfoundation.net.au/report/lawreform>>.
- ³⁴ Parliament of Australia Joint Select Committee on Cyber-Safety, *High Wire Act: Cyber Safety Interim Report* (December 2011) <http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=jsc/report/prelims.html> at [18.33].
- ³⁵ See Patricia Moloney Figliola and Gina Stevens, 'Text and Multimedia Messaging: Issues for Congress', (2012) Congressional Research Service <<http://www.fas.org/sgp/crs/misc/RL34632.pdf>>.
- ³⁶ See, eg, Victorian Law Reform Commission, *Inquiry into Sexting - Terms of Reference* (1 September 2011) Parliament of Victoria <<http://www.parliament.vic.gov.au/lawreform/article/947>>.
- ³⁷ National Children's and Youth Law Centre, *Send a Lawmail*, Lawstuff, <<http://www.lawstuff.org.au/lawmail/send-a-lawmail>>.
- ³⁸ Kids Helpline <<http://www.kidshelp.com.au/>>.
- ³⁹ See Deborah Gordon-Messer et al, 'Sexting Among Young Adults' (2012) *Journal of Adolescent Health* <<http://www.jahonline.org/article/S1054-139X%2812%2900214-5/abstract>> ("Our results suggest that sexting is not related to sexual risk behavior or psychological well-being").
- ⁴⁰ See, eg, Kath Albury and Kate Crawford, 'Sexting, Consent and Young People's Ethics: Beyond Megan's Story' (2012) 26(3) *Journal of Media & Cultural Studies* 463, 471; 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 on Media, Democracy and Change, Old Parliament House Canberra, 7-9 July 2010); Julia Halloran McLaughlin, 'Exploring the First Amendment Rights of Teens in Relationship to Sexting and Censorship' (2012) 45(2) *University of Michigan Journal of Law Reform* 315, 332.
- ⁴¹ BoysTown, Submission No S9 to the Law Reform Committee Parliament of Victoria, *Inquiry into Sexting*, 12 June 2012, 11.
- ⁴² Eastern Community Legal Centre, Submission No S23 to the Law Reform Committee Parliament of Victoria, *Inquiry into Sexting*, 15 June 2012, ("We have noticed a concerning trend whereby generally young adult women have felt coerced to stay in abusive relationships for fear of a sexual image ... being released to third parties").
- ⁴³ Halloran McLaughlin, above n 40, 332-33.
- ⁴⁴ Christina Caron, 'Teen Sexting Linked to Psychological Distress', *ABC News*, 10 November 2011 <<http://abcnews.go.com/Technology/teen-sexting-linked-psychological-distress/story?id=14914700#.UGT1rMWD8il>>.
- ⁴⁵ Dena Sacco et al, 'Sexting: Youth Practices and Legal Implications' (2010) Social Science Research Network <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1661343>; Parliament of Australia Joint Select Committee on Cyber-Safety, *High Wire Act: Cyber Safety Interim Report* (December 2011) <http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=jsc/report/prelims.html>.

⁴⁶ Lelia Green et al, 'Risks and Safety for Australian Children on the Internet' (2011) 4(1) *Cultural Science Journal* 1, 9 <<http://cultural-science.org/journal/index.php/culturalscience/article/view/49/129>>.

⁴⁷ See National Children's and Youth's Law Centre, *Cyber Bullying* <http://www.lawstuff.org.au/nsw_law/topics/article7>.

⁴⁸ New South Wales Department of Education and Communities, *Cyber bullying: Information for Staff in Schools*, 1 <https://www.det.nsw.edu.au/policies/student_serv/discipline/bullying/cyberbully.pdf>.

⁴⁹ Parliament of Australia Joint Select Committee on Cyber-Safety, *High Wire Act: Cyber Safety Interim Report* (December 2011), 8 <http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=/jscc/report/prelims.html>.

⁵⁰ Green et al, above n 46, 9.

⁵¹ Ibid.

⁵² Parliament of Australia Joint Select Committee on Cyber-Safety, *High Wire Act: Cyber Safety Interim Report* (December 2011), 87-8 <http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=/jscc/report/prelims.html>.

⁵³ See, eg, *Criminal Code Act 1995* (Cth) s 474.27; *Crimes Act 1900* (NSW) s 66EB.

⁵⁴ *Children (Criminal Proceedings) Act 1987* (NSW) s 5.

⁵⁵ The leading case in New South Wales on *doli incapax* is the decision of *R v CRH* (Unreported, NSW Court of Criminal Appeal, Smart, Hidden and Newman JJ, 18 December 1996). See also Matthew Johnston, *Doli Incapax: The Criminal Responsibility of Children* (Paper presented at the Children's Magistrates' Conference, Forbes Chambers, Sydney, 1 February 2006), <www.lawlink.nsw.gov.au/lawlink/childrens_court/ll_cc.nsf/vwFiles/DoliIncapax-TheCriminalResponsibilityofChildren.doc/%24file/DoliIncapax-TheCriminalResponsibilityofChildren.doc+&hl=en&gl=au&pid=bl&srcid=ADGEEsGyEn4JiM_nLDtfzlw7TdcaM5IrmM91VGtpDcQXxlhV8oW90ykfL-85JExyK6KHtBbR2IkLxNnQ_ekhuxb6wvQDaKIPK3Lu57MNp-AcaUkxskR6Z296YGwNL6HiorYBB6l6uL4&sig=AHIEtbRHkzQJraeoA8ssvurghMMsojYYUw>.

⁵⁶ *Crimes Act 1900* (NSW) ss 91K-L.

⁵⁷ Ibid s 91I.

⁵⁸ Ibid s 91I.

⁵⁹ Ibid s 91I.

⁶⁰ Ibid ss 91K-L.

⁶¹ Ibid ss 91K-L.

⁶² *Criminal Code Act 1995* (Cth) s 473.1; *Crimes Act 1900* (NSW) s 91FB.

⁶³ *Criminal Code Act 1995* (Cth) s 473.4; *Crimes Act 1900* (NSW) s 91FB. In NSW, there is a fourth factor: the journalistic merit (if any) of the material, being the merit of the material as a record or report of a matter of public interest.

⁶⁴ *Crimes Act 1900* (NSW) s 91H.

⁶⁵ Ibid s 91G.

⁶⁶ *Crimes Act 1900* (NSW) s 91FA.

⁶⁷ *Criminal Code Act 1995* (Cth) s 474.19.

⁶⁸ Ibid s 474.24A.

⁶⁹ See, eg, *Criminal Code Act 1995* (Cth) s 474.21; *Crimes Act 1900* (NSW) s 91HA(3)-(8).

⁷⁰ *Crimes Act 1900* (NSW) s 91HA(1).

⁷¹ Ibid s 91HA(2).

⁷² *Criminal Code Act 1995* (Cth) s 474.24C (1).

⁷³ Australian Federal Police, Submission No S57 to the Parliament of Victoria Law Reform Committee, *Inquiry into Sexting*, 11 July 2012, 7 <http://www.parliament.vic.gov.au/images/stories/committees/lawrefrom/isexting/subs/S57_-_AFP.pdf>.

⁷⁴ *Criminal Code Act 1995* (Cth) s 474.24C (2).

⁷⁵ Email from Detective Superintendent John Kerlatec to Kelly Tallon, 19 Jul 2012.

⁷⁶ Ibid.

⁷⁷ Ibid.

⁷⁸ Ibid.

⁷⁹ *Eades v DPP (NSW)* [2010] NSWCA 241 [39], quoting *R v Manson* (NSWCCA, 17 February 1993, unreported).

⁸⁰ *Crimes Act 1900* (NSW) s 61N.

⁸¹ Ibid s 61N.

⁸² Ibid 61O(1)-(1A).

⁸³ Ibid s 61O(3).

⁸⁴ Ibid s 61O(2).

⁸⁵ Ibid s 61O(2A).

⁸⁶ Ibid s 578C.

⁸⁷ Ibid s 578C(1). It does not include films, publications or computer games that have been classified in certain ways under Commonwealth law.

⁸⁸ Ibid s 578C(1).

⁸⁹ Ibid s 578C(2).

⁹⁰ Ibid s 578C(3A).

⁹¹ See *Eades v DPP (NSW)* [2010] NSWCA 241 (17 September 2010).

⁹² Katherine Danks, 'Bond for Sydney Man "Sexting" With Teen', *The Daily Telegraph*, 18 December 2010 <<http://www.dailytelegraph.com.au/archive/national-old/bond-for-sydney-man-sexting-with-teen/story-e6freuzr-1225973042703>>.

⁹³ *Eades v DPP (NSW)* [2010] NSWCA 241 (17 September 2010), [2].

⁹⁴ Ibid [61].

⁹⁵ Ibid [63].

⁹⁶ Danks, above n 92.

⁹⁷ *Police v Ravshan USMANOV* [2011] NSWLC 40 <<http://www.caselaw.nsw.gov.au/action/pjudg?jgmid=157947>>.

⁹⁸ Ibid.

⁹⁹ Ibid.

¹⁰⁰ Ibid.

¹⁰¹ Criminal Law CLE, *The NSW Child Sex Offender Register*, 1 <http://www.criminalcle.net.au/attachments/Child_Sex_Offender_Register.pdf>.

¹⁰² Ibid 1-2.

¹⁰³ *Child Protection (Offenders Registration) Act 2000* (NSW) s 3.

¹⁰⁴ Ibid.

¹⁰⁵ Ibid.

¹⁰⁶ Criminal Law CLE, *The NSW Child Sex Offender Register*, 2 <http://www.criminalcle.net.au/attachments/Child_Sex_Offender_Register.pdf>.

¹⁰⁷ *Child Protection (Offenders Registration) Act 2000* (NSW) s 3A(2).

¹⁰⁸ Ibid s 3A(5).

¹⁰⁹ Ibid s 3(3).

¹¹⁰ Email from Detective Superintendent John Kerlatec to Kelly Tallon, 19 Jul 2012.

¹¹¹ Ibid.

¹¹² Law Reform Commission of Western Australia, *Community Protection (Offender Reporting) Act 2004*, 29 <<http://www.lrc.justice.wa.gov.au/2publications/reports/P101-FR.pdf>>.

¹¹³ *Child Protection (Offenders Registration) Act 2000* (NSW) s 9.

¹¹⁴ Law Reform Commission of Western Australia, *Community Protection (Offender Reporting) Act 2004*, 25 <<http://www.lrc.justice.wa.gov.au/2publications/reports/P101-FR.pdf>>, quoting E Garfinkle, 'Coming of Age in America: The Misapplication of Sex-Offender Registration and Community-Notification Laws to Juveniles' (2003) 91 *California Law Review* 163, 205.

¹¹⁵ Attorney-General and Justice Department New South Wales, *Juvenile Justice: Conferencing*, NSW Juvenile Justice <<http://www.djj.nsw.gov.au/conferencing.html>>.

¹¹⁶ Section 8 of the *Young Offenders Act 1997* (NSW) lists the offences covered by the Act. These include "indictable offences that may be dealt with summarily under Chapter 5 of the *Criminal Procedure Act 1986* (NSW) or another prescribed law, committed, or alleged to have been committed, by children". Chapter 5 of the *Criminal Procedure Act 1986* (NSW) then points to Schedule 1 for the list of indictable offences triable summarily. An offence against sections 91H, K and L of the *Crimes Act 1900* (NSW) (production, dissemination or possession of child pornography; filming of private parts; filming of private acts) is listed here.

¹¹⁷ Email from Detective Superintendent John Kerlatec to Kelly Tallon, 19 Jul 2012.

¹¹⁸ Ibid.

¹¹⁹ See, eg, Clancy Yeates et al, 'New Laws Flagged to Combat "Vile" Trolls', *The Sydney Morning Herald*, 11 September 2012 <<http://www.smh.com.au/technology/technology-news/new-laws-flagged-to-combat-vile-trolls-20120910-25onp.html>>; Claire Connelly and Neil Keene, Charlotte Dawson Twitter Attack Sparks Call For Changes To Laws Against Cyber Bullying', *News.com.au*, 30 August 2012 <<http://www.news.com.au/top-stories/charlotte-dawson-twitter-attack-sparks-call-for-changes-to-laws-against-cyber-bullying/story-e6frfkp9-1226461706760>>; Bethany Hiatt Education, 'Labor Proposes Cyber-Bully Laws', *The West Australian*, 14 August 2012 <<http://au.news.yahoo.com/thewest/a/-/wa/14542001/labor-proposes-cyber-bully-laws/>>.

¹²⁰ *Criminal Code Act 1995* (Cth) s 474.17(1).

¹²¹ Ibid s 474.17(1).

¹²² Ibid s 473.4.

¹²³ *Monis, Man Haron v R; Droudis, Amirah v R* [2011] NSWCCA 231 (6 December 2011), [100].

¹²⁴ Ibid [44].

¹²⁵ Explanatory Memorandum, *Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Bill 2004* (Cth), 33 <<http://www.comlaw.gov.au/Details/C2004B01708/Explanatory%20Memorandum/Text>>.

¹²⁵ Tara Miko, 'Texting Lands Couple in Court', *CQ News*, 29 April 2011 <<http://www.cqnews.com.au/story/2011/04/29/foul-mouthed-texting-lands-couple-in-court/>>.

¹²⁶ Ibid.

¹²⁷ Amelia Bentley, "'Despicable" Stalker Avoids Jail', *The Brisbane Times*, 10 January 2011 <<http://www.brisbanetimes.com.au/queensland/despicable-stalker-avoids-jail-20110110-19kwj.html>>; Jeremy Sollars, 'Textual Offender Lands Probation', *Warwick Daily News*, 13 August 2011 <<http://www.warwickdailynews.com.au/story/2010/08/13/textual-offender-lands-probation-court-criminal/>>.

¹²⁸ Roanne Johnson, 'Man Sent Suggestive Texts to Two Minors', *The Townsville Bulletin*, 24 February 2011 <http://www.townsvillebulletin.com.au/article/2011/02/24/209981_news.html>.

¹²⁹ Lee Gailer, 'Suspended Sentence for "Troll"', *The Gympie Times*, 3 August 2010 <<http://www.gympietimes.com.au/story/2010/08/03/jail-for-troll-facebook-justine-jones/>>; 'Australian Jailed for Defacing Kids' Facebooks', *The Sydney Morning Herald*, 26 March 2011 <<http://news.smh.com.au/breaking-news-technology/australian-jailed-for-defacing-kids-facebooks-20110326-1cacd.html>>.

¹³⁰ 'Cadet "Bragged About Skype Sex Plan On Facebook", Court Told', *News.com.au*, 29 April 2011 <<http://www.news.com.au/features/adfa/two-cadets-charged-over-adfa-sex-scandal/story-fn8eum6d-1226046930120#ixzz1Kys0PsD3>>.

¹³¹ *Criminal Code Act 1995* (Cth) s 474.15.

¹³² Ibid s 474.15(1).

¹³³ Ibid s 474.15(2).

¹³⁴ Ibid ss 474.15(1)(b), (2)(b).

¹³⁵ Ibid s 474.15(3).

¹³⁶ *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 13(1).

¹³⁷ Ibid s 7(1).

¹³⁸ Ibid s 13(3).

¹³⁹ Ibid s 13(4).

¹⁴⁰ Ibid s 13(1). It is a separate offence to intimidate someone while at school. See also *Crimes Act 1900* (NSW) s 60E(1).

¹⁴¹ *Crimes Act 1900* (NSW) s 60D(2).

¹⁴² Ibid s 60E(1).

¹⁴³ Ibid s 60E(2).
¹⁴⁴ Ibid s 60E(3).
¹⁴⁵ Ibid s 199(1).
¹⁴⁶ Ibid s 199(1).
¹⁴⁷ Ibid s 31(1).
¹⁴⁸ Ibid s 31(1).
¹⁴⁹ Ibid s 31(2).
¹⁵⁰ Ibid s 31(1).
¹⁵¹ Louise Hearn and AAP, 'Youth accused over internet death threats', *The Sydney Morning Herald*, 24 March 2006 <<http://www.smh.com.au/articles/2006/03/24/1143083951297.html>>.
¹⁵² Ibid.
¹⁵³ *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 13(1).
¹⁵⁴ Ibid s 8(1).
¹⁵⁵ New South Wales Government, *What is Stalking?* New South Wales Police <http://www.police.nsw.gov.au/community_issues/domestic_and_family_violence/what_is_stalking>.
¹⁵⁶ *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 19(1).
¹⁵⁷ New South Wales Government, *Apprehended Violence Orders*, LawLink <http://www.lawlink.nsw.gov.au/lawlink/lawaccess/ll_lawassist.nsf/pages/lawassist_avo>.
¹⁵⁸ *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 19.
¹⁵⁹ See New South Wales Government, *Applying for an Apprehended Violence Order*, LawLink <http://www.lawlink.nsw.gov.au/lawlink/lawaccess/ll_lawassist.nsf/pages/lawassist_applying_avo>.
¹⁶⁰ *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 36.
¹⁶¹ Ibid s 35(1).
¹⁶² Ibid s 35(2)(f).
¹⁶³ *Crimes Act 1900* (NSW) s 308H; *Criminal Code Act 1995* (Cth) s 478.1(1).
¹⁶⁴ Attorney-General's Department, Submission No S58 to the Joint Select Committee on Cyber-Safety (February 2011) <http://www.aph.gov.au/house/committee/jscc/subs/sub_58.pdf>.
¹⁶⁵ *Crimes Act 1900* (NSW) s 308H(3); *Criminal Code Act 1995* (Cth) s 478.1(3).
¹⁶⁶ *Crimes Act 1900* (NSW) s 308H(1)(c); *Criminal Code Act 1995* (Cth) s 478.1(1)(b).
¹⁶⁷ *Crimes Act 1900* (NSW) s 308H(1)(b); *Criminal Code Act 1995* (Cth) s 478.1(1)(c).
¹⁶⁸ *Criminal Code Act 1995* (Cth) s 478.1(1)(d)(iii). The Commonwealth law also applies if the restricted data is held in a Commonwealth computer or on behalf of the Commonwealth.
¹⁶⁹ *Crimes Act 1900* (NSW) s 308H(1); *Criminal Code Act 1995* (Cth) s 478.1(1).
¹⁷⁰ *Crimes Act 1900* (NSW) s 308C(1); *Criminal Code Act 1995* (Cth) s 477.1(1).
¹⁷¹ *Crimes Act 1900* (NSW) s 4; *Criminal Code Act 1995* (Cth) s 477.1(9).
¹⁷² Attorney-General's Department, Submission No. 558 to the Joint Select Committee on Cyber-Safety (February 2011), <http://www.aph.gov.au/house/committee/jscc/subs/sub_58.pdf>.
¹⁷³ *Crimes Act 1900* (NSW) ss 192J, K; *Criminal Code Act 1995* (Cth) s 372.1(1).
¹⁷⁴ *Crimes Act 1900* (NSW) s 192I; *Criminal Code Act 1995* (Cth) s 370.1.
¹⁷⁵ *Crimes Act 1900* (NSW) s 192J-K; *Criminal Code Act 1995* (Cth) s 372.1-2.
¹⁷⁶ David Abel 'Newbury Port teens charged in cyberbullying case' *The Boston Globe*, 11 February 2010 <http://www.boston.com/news/local/breaking_news/2010/02/newburyport_tee.html>.
¹⁷⁷ *Anti Discrimination Act 1977* (NSW) s 20D; s 38T; s 49ZTA; s 49ZXC.
¹⁷⁸ Ibid s 38R(a).
¹⁷⁹ Ibid s 20D; s 38T; s 49ZTA; s 49ZXC.
¹⁸⁰ Ibid s 20D; s 38T; s 49ZTA; s 49ZXC.
¹⁸¹ Ibid s 20D; s 38T; s 49ZTA; s 49ZXC.
¹⁸² See, eg, Peter Wertheim, 'Hate Crime and Vilification Law: Developments and directions' (Roundtable on Hate Crime and Vilification Law: Directions and Developments, the Law School, University of Sydney, 29 August, 2009) <http://sydney.edu.au/law/criminology/ahcn/docs_pdfs/HATE_CRIME_AND_VILIFICATION_LAW.pdf>.
¹⁸³ *Anti Discrimination Act 1977* (NSW) s 20D; s 38T; s 49ZTA; s 49ZXC.
¹⁸⁴ *Crimes Act 1900* (NSW) s 529(3).
¹⁸⁵ Ibid s 529(3).
¹⁸⁶ Ibid s 529(7).
¹⁸⁷ See, eg, Shalailah Medhora, 'Q&A: Social media and defamation', *SBS World News*, 23 December 2010 <<http://www.sbs.com.au/news/article/1450841/QA-Social-media-and-defamation>>.
¹⁸⁸ There are, however, some exceptions, including a recent criminal conviction in South Australia of a 19 year old boy who created a defamatory Facebook page about a local police officer.
Nigel Hunt 'Teen guilty of Facebook slur' *The Sunday Mail*, 22 November 2009 <<http://www.adelaidenow.com.au/news/south-australia/teen-guilty-of-facebook-slur/story-e6frea83-1225801651074>>.
¹⁸⁹ *Crimes Act 1900* (NSW) s 31C(2); *Criminal Code Act 1995* (Cth) s 474.29A(1).
¹⁹⁰ *Criminal Code Act 1995* (Cth) s 474.29A(1)(a).
¹⁹¹ *Crimes Act 1900* (NSW) s 31C(2)(b).
¹⁹² *Crimes Act 1900* (NSW) s 31C(2); *Criminal Code Act 1995* (Cth) s 474.29A(1).
¹⁹³ See Stewart Healley, Submission No. 163.3 to Joint Committee on Cyber-Safety, Parliament of Australia, *Inquiry into Cybersafety*, 64, May 2011 <<http://au.ibtimes.com/articles/281112/20120113/melbourne-schoolgirl-sheniz-erkan-commits-suicide-over.htm#.UFFCRMWD8il>>.
¹⁹⁴ National Children's and Youth Law Centre, *To Tweet or not to Tweet*, Lawstuff <http://www.lawstuff.org.au/nsw_law/topics/article7>.

¹⁹⁵ The names of these schools have been omitted in an effort to maintain respondents' anonymity.

¹⁹⁶ National Children's and Youth Law Centre, *New Voices/New Laws—Putting the 'ex' in sexy text*, Prezi <<http://prezi.com/dxtczcyvsjiy/new-voices-new-laws-putting-the-ex-in-sexy-text/>>.

¹⁹⁷ National Children's and Youth Law Centre, *New Voices/New Laws—Putting the 'post' in imposter*, Prezi <<http://prezi.com/ryydvji9bxcp/new-voices-new-laws-putting-the-post-in-imposter/>>.

¹⁹⁸ National Children's and Youth Law Centre, *New Voices/New Laws v5*, Prezi <<http://prezi.com/q6aih0jmsrhd/new-voices-new-laws-v5/>>.

¹⁹⁹ National Children's and Youth Law Centre, *New Voices/New Laws Survey v2*, Survey Monkey <<http://www.surveymonkey.com/s/NewVoicesNewLaws>>.

²⁰⁰ NSW Department of Education and Communities, *State Research Approval Process* (2006), NSW Government Education and Communities <<https://www.det.nsw.edu.au/media/downloads/about-us/statistics-and-research/research-partnerships/research-guidelines.pdf>> at 2; Email with Dr Robert Stevens of the Department of Education & Communities, 11 May 2012.

²⁰¹ *Criminal Code Act 1924* (Tas) ss 130—130D.

²⁰² *Ibid* s 1A. Or as the subject of torture, cruelty or abuse (whether or not in a sexual context).

²⁰³ *Ibid* s 130E.

²⁰⁴ *Ibid* s 130E(2).

²⁰⁵ *Ibid* s 124(1).

²⁰⁶ *Ibid* s 124(3).

²⁰⁷ *Ibid* s 124(3).

²⁰⁸ SBS Staff, 'New 'sexting' guidelines for Tassie police' *SBS World News Australia*, 5 December 2011 <<http://www.sbs.com.au/news/article/1610329/New-sexting-guidelines-for-Tassie-police>>; Kelly Tallon, Telephone call with Detective Senior Sergeant Luke Manhood (5 October 2012).

²⁰⁹ Kelly Tallon, Telephone call with Detective Senior Sergeant Luke Manhood (5 October 2012).

²¹⁰ *Ibid*.

²¹¹ *Ibid*.

²¹² Commissioner of Police DL Hine, Submission No S48 to the Law Reform Committee Parliament of Victoria, *Inquiry into Sexting*, 25 June 2012, 1 <http://www.parliament.vic.gov.au/images/stories/committees/lawreform/isexting/subs/S48_-_Tasmania_Police.pdf>.

²¹³ *Ibid*.

²¹⁴ *Crimes Act 1958* (Vic) ss 68—70.

²¹⁵ *Ibid* ss 67A; 70AB.

²¹⁶ *Ibid* s 70(2)(e).

²¹⁷ *Ibid* s 70(2)(d).

²¹⁸ We could not find any satisfactory explanation for this anomaly—indeed, the only explanation we could find was that it “seems to be a bizarre legislative stuff-up dating to a 1995 amendment” to the classification act, which was where the child pornography possession offence originated. Jeremy Gans, *The Right to Party!* on *Charterblog* (2 July 2008) <<http://charterblog.wordpress.com/2008/07/02/the-right-to-party/>>.

²¹⁹ National Children's and Youth Law Centre, Submission No 36 to Victoria Joint Investigatory Committee, *Inquiry into Sexting* (2012) <http://www.parliament.vic.gov.au/images/stories/committees/lawreform/isexting/subs/S36_-_National_Childrens_and_Youth_Law_Centre.pdf>.

²²⁰ Victorian Law Reform Commission, Sex offenders registration Final Report, 5 <http://www.lawreform.vic.gov.au/sites/default/files/SOR_Final%20Report_Full%20text.pdf>.

²²¹ Victorian Law Reform Commission, *Inquiry into Sexting - Terms of Reference* (1 September 2011) Parliament of Victoria <<http://www.parliament.vic.gov.au/lawreform/article/947>>.

²²² See, eg, Lesley Anneey, Submission No 5 to Victoria Joint Investigatory Committee, *Inquiry into Sexting*, June 2012; Salvation Army, Submission No 7 to Victoria Joint Investigatory Committee, *Inquiry into Sexting*, June 2012; Australian Privacy Foundation, Submission No 8 to Victoria Joint Investigatory Committee, *Inquiry into Sexting*, June 2012; Dr June Kane, Submission No 10 to Victoria Joint Investigatory Committee, *Inquiry into Sexting*, June 2012; Victorian Health Promotion Foundation, Submission No 26 to Victoria Joint Investigatory Committee, *Inquiry into Sexting*, June 2012; Civil Liberties Australia, Submission No 27 to Victoria Joint Investigatory Committee, *Inquiry into Sexting*, June 2012; Maree Crabbe, Submission No 30 to Victoria Joint Investigatory Committee, *Inquiry into Sexting*, June 2012; Dr Albury et al, Submission No 31 to Victoria Joint Investigatory Committee, *Inquiry into Sexting*, June 2012; Centres Against Sexual Assault, Submission No 32 to Victoria Joint Investigatory Committee, *Inquiry into Sexting*, June 2012; Parents Victoria, , Submission No 33 to Victoria Joint Investigatory Committee, *Inquiry into Sexting*, June 2012; Australian Council of Education Research, Submission No 35 to Victoria Joint Investigatory Committee, *Inquiry into Sexting*, June 2012.

²²³ See, eg, Royal Australian and New Zealand College of Psychiatrists, Submission No 13 to Victoria Joint Investigatory Committee, *Inquiry into Sexting*, June 2012; Women's Health Grampians, Submission No 14 to Victoria Joint Investigatory Committee, *Inquiry into Sexting*, June 2012; Vic Catholic Schools Parent Body, Submission No 15 to Victoria Joint Investigatory Committee, *Inquiry into Sexting*, June 2012; South Eastern Centre Against Sexual Assault, Submission No 16 to Victoria Joint Investigatory Committee, *Inquiry into Sexting*, June 2012; Alannah and Madeline, Submission No 42 to Victoria Joint Investigatory Committee, *Inquiry into Sexting*, June 2012.

²²⁴ See, eg, BoysTown, Submission No 9 to Victoria Joint Investigatory Committee, *Inquiry into Sexting*, June 2012; Law Institute of Victoria, Submission No 46 to Victoria Joint Investigatory Committee, *Inquiry into Sexting*, June 2012.

²²⁵ See, eg, Electronic Frontiers Australia, Submission No 30 to Victoria Joint Investigatory Committee, *Inquiry into Sexting*, June 2012; Legal Aid, Submission No 50 to Victoria Joint Investigatory Committee, *Inquiry into Sexting*, June 2012; Victoria Legal Aid, Submission No 58 to Victoria Joint Investigatory Committee, *Inquiry into Sexting*, June 2012.

²²⁶ See, eg, Giselle Solinski, Submission No 8 to Victoria Joint Investigatory Committee, *Inquiry into Sexting*, June 2012; Family Voice Australia, Submission No 4 to Victoria Joint Investigatory Committee, *Inquiry into Sexting*, June 2012; Australian Privacy Foundation, Submission No 8 to Victoria Joint Investigatory Committee, *Inquiry into Sexting*, June 2012.

²²⁷ See Victorian Law Reform Commission, *Sex Offenders Registration: Final Report* (2012) <<http://www.lawreform.vic.gov.au/projects/sex-offenders-registration/sex-offenders-registration-final-report>>.

²²⁸ Victorian Law Reform Commission, 'Sex Offenders Registration' <<http://www.lawreform.vic.gov.au/inquiries/sex-offenders-registration>>.

²²⁹ *Sex Offenders Registration Act 2004* (Vic) s 6(3)(a).

²³⁰ *Ibid* s 11(2); (3).

²³¹ See Victorian Law Reform Commission, *Sex Offenders Registration: Final Report* (2012), xii <<http://www.lawreform.vic.gov.au/projects/sex-offenders-registration/sex-offenders-registration-final-report>>.

²³² *Ibid* xiv.

²³³ *Ibid* .

²³⁴ *Ibid* .

²³⁵ Law Reform Commission of Western Australia, *Community Protection (Offender Reporting) Act 2004* (2012), 3 <<http://www.lrc.justice.wa.gov.au/2publications/reports/P101-FR.pdf>>.

²³⁶ *Ibid*.

²³⁷ *Ibid* 9.

²³⁸ *Ibid* 14.

²³⁹ *Ibid* 29.

²⁴⁰ *Ibid* 29-30.

²⁴¹ *Ibid* Recommendation 1.

²⁴² *Ibid* Recommendation 2.

²⁴³ *Ibid* Recommendation 16.

²⁴⁴ See, eg, Sacco et al, above n 45, 7-9;

Julia Halloran McLaughlin, *Crime and Punishment: Teen Sexting in Context* (January 2010) <http://works.bepress.com/julia_mclaughlin/1/>.

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²⁴⁷ Sexting, SC HB 3130, 119th General Assembly (2012) <http://www.scstatehouse.gov/sess119_2011-2012/bills/3130.htm>.

²⁴⁸ Juveniles: sexting., CA AB 1043, 2011-2012 Session (2011) <http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_1001-1050/ab_1043_bill_20110504_amended_asm_v98.pdf>.

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²⁵² See, eg, Pa SB 1121, 2009-2010 Regular Session (2009) <<http://www.legis.state.pa.us/cfdocs/billinfo/billinfo.cfm?syear=2009&sind=0&body=S&type=B&BN=1121>>.

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²⁵⁴ See, eg, Neb LB 97, First Session 2009, (2009) <<http://nebraskalegislature.gov/FloorDocs/101/PDF/Journal/r1journal.pdf>>.

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²⁵⁶ See, eg, ND HB 1186 (2009) <<http://www.legis.nd.gov/assembly/61-2009/session-laws/documents/CRMLC.pdf#CHAPTER133>>.

²⁵⁷ Sacco et al, above n 45, 32; NJ AB 1560 (2010) <http://www.njleg.state.nj.us/2010/Bills/A2000/1560_I1.HTM>; Tex SB 407 (2011) <<http://www.capitol.state.tx.us/BillLookup/History.aspx?LegSess=82R&Bill=SB407>>; NY AB 8622 (2011) <<http://assembly.state.ny.us/leg/?bn=A08622>>; Ind SR 90 (2009) <<http://www.in.gov/legislative/bills/2009/SRESF/SR0090.html>>.

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²⁵⁹ Parliament of Australia Joint Select Committee on Cyber-Safety, *High Wire Act: Cyber Safety Interim Report* (December 2011) <http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=jssc/report.htm> at xviii.

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²⁶¹ *Ibid* [11.9].

²⁶² *Ibid* [11.10].

²⁶³ *Ibid* [11.9].

²⁶⁴ *Ibid* [11.64].

²⁶⁵ *Ibid* [11.62].

²⁶⁶ *Ibid* Recommendation 23.

²⁶⁷ *Ibid* [11.125].

²⁶⁸ *Ibid* [11.125].

²⁶⁹ *Ibid* [19.16].

²⁷⁰ *Ibid* [18.33].

²⁷¹ *Ibid* [18.33].

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²⁷⁵ *Ibid* [13.18].

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²⁸² Ibid 55.
²⁸³ Ibid 6-7.
²⁸⁴ Ibid 90.
²⁸⁵ Ibid.
²⁸⁶ Ibid 91.
²⁸⁷ Ibid 15 at [53].
²⁸⁸ Ibid 15 at [54].
²⁸⁹ Ibid 85 at [4.82].
²⁹⁰ Ibid 85 at [4.84].
²⁹¹ Ibid.
²⁹² Ibid 86 at [4.88].
²⁹³ Ibid.
²⁹⁴ Ibid 88 at [4.94].
²⁹⁵ Ibid 89 at [4.98] (emphasis added).
²⁹⁶ Ibid, 16 at [59].
²⁹⁷ Ibid 16 at [60].
²⁹⁸ Ibid 111 at [5.51].
²⁹⁹ Ibid 112-13 at [5.55].
³⁰⁰ Ibid 115 at [5.61].
³⁰¹ Ibid 120-21.
³⁰² Ibid 122.
³⁰³ Ibid 5.
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³¹⁷ Email from Detective Superintendent John Kerlatec to Kelly Tallon, 19 Jul 2012.
³¹⁸ Ibid.
³¹⁹ 14-15 year old girl from New South Wales
³²⁰ 14-15 year old girl from Victoria.
³²¹ 16-17 year old girl from New South Wales.