Non-consensual sexting: An examination of law and prosecutions

By Laura Elizabeth Vitis
B.A. (Arts) (Hons).

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Department of Criminology, Monash University
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List of Abbreviations

ACLU	American Civil Liberties Union
ALRC	Australian Law Reform Commission
CGA	Connecticut General Assembly
CJDP	Criminal Justice Diversion Program
DPP	Director of Public Prosecutions
ICT	Information Communication Technology
IPV	Intimate Partner Violence
IO	Intervention Orders
NCTPTUP	The National Campaign to Prevent Teen and Unplanned Pregnancy
OPP	Office of Public Prosecutions
RANZCP	Royal Australian and New Zealand College of Psychiatrists
SAP	Sentencing Advisory Panel
SNS	Social Networking Site
US	United States
VLRC	Victorian Law Reform Commission

Glossary

This glossary lists key terms used within this thesis. Each of these terms has come to be defined in various ways within law, scholarship and public discourse, therefore, this section seeks to clarify the ways these terms are understood and employed within this thesis and provide point of reference.

Sexting

Sexting is a colloquial noun used to describe the production and dissemination of sexual, nude or semi-nude images or videos via information and communication technologies such as mobile phones, multimedia messages, email, social networking sites and online forums.

Consensual Sexting

Consensual sexting is sexting that occurs *with* the consent of the person in the image. It includes consensually creating and disseminating sexual, nude or semi-nude images via information and communication technologies.

Non-consensual Sexting

Non-consensual sexting is sexting that occurs *without* the consent of the person in the image. It includes non-consensually creating and disseminating sexual, nude or semi-nude images of young people via information and communication technologies and threatening to disseminate these images.

'Sext'

A 'sext' is the product of the practice of sexting. For example, one person can send a sext to another person. The term is a contraction of 'sexual text'.

Sexting Case

A general term used to describe the cases recounted by participants, irrespective of the offence being charged.

Child and Children

Pursuant to Section 3 of the *Children and Young Persons Act 1989* (Cwlth), 'child' is the preferred term used to differentiate between young people as subjects of the law. However, within the context of this thesis, I use the term 'child' to refer to someone aged 13 years and under.

Young Adults

I use the term 'young adult' to refer to offenders who are aged from 18 to 19 years. My preference for the term 'young adult' over 'adult' is in recognition that the offenders discussed in this study are on the cusp of legal childhood but they are legally adults and subject to the rigors of adult courts.

Young People

The terms 'young people' and 'youth' are used as general terms to refer to people aged from 13 to 21 years.

Abstract

For nearly a decade reports of young people being prosecuted under child pornography laws for sexting have been widely publicised in many jurisdictions. In response to these cases and the community concerns a number of jurisdictions in the United States and Australia have implemented statutes that criminalise youth and adult sexting as misdemeanour or summary offences. Despite this, little is known about the nature of the cases being prosecuted under both child pornography law and these recently implemented reforms. This research, therefore, examines the operation of child pornography, sexting and family violence legislation in relation to youth sexting, focusing specifically on prosecutions in Victoria (Aus) Connecticut (US), Florida (US) and Texas (US). The analysis draws upon 20 semi-structured interviews in these four jurisdictions of which 14 involved legal practitioners who had defended, prosecuted or presided over sexting cases and four involved offenders and their family members (the offenders had been prosecuted offences related to non-consensual sexting).

Specifically, this research investigates the types of incidents reaching prosecution, how legal practitioners have negotiated the various child pornography, sexting and family violence laws applied in these cases and the implications of applying this legislation to youth sexting incidents. The findings point to the need for a varied legislative landscape to encompass non-consensual youth sexting. One which accounts for the complexity of these incidents, including gendered contexts in which they occur. Additionally, the findings highlight that research needs to examine, in more detail, how the law is positioned to assist victims of non-consensual sexting.

Declaration

This thesis contains no material which has been accepted for the award of any other degree or diploma in any university or other institution and to the best of the candidate's knowledge, it contains no material previously published or written by another person, except where due reference is made in the text of the thesis.

Signed

Date

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This thesis is dedicated to you Dad. I miss you more and more each day. Everything you ever taught me about hard work and perseverance I tried to emulate over the past three years and I wish you were here to see me get to this point, I reckon you would have been proud.

Chapter One: Introduction

In its most basic form, sexting is defined as the sending of nude and semi-nude images via mobile phones (Hiffa 2011; Ostrager 2010; Szymialis 2010) and the internet (via social networking sites and emails) (Albury et al. 2013; Day 2010; Sherman 2011). Sexting incidents can be consensual, non-consensual[1] (Sherman 2011; Wolak and Finkelhor 2011) and coerced (Leary 2010). They can involve flirtation bonding, relieving boredom and joking, within friendships and sexual relationships (Albury and Crawford 2013; Bond 2010; Crofts et al. 2014). These incidents can also involve images distributed to or by known individuals, unknown third parties and onto online public forums (Ryan 2010).

While the existing scholarship has primarily focused on the potential for child pornography laws to be applied to youth sexting, there has been little published research examining the cases that have been prosecuted to date. This thesis shifts the focus of analysis from the law's *potential* application to youth sexting, to how the law is currently being applied by seeking the perspectives of legal practitioners who have defended, prosecuted or presided over sexting cases and offenders who have been prosecuted after sexting. In drawing upon semi-structured interviews with legal practitioners and offenders, this research provides detailed insights into the application of child pornography, sexting and family violence legislation in cases involving consensual and non-consensual youth sexting.

Due to the protected nature of case law with respect to young victims of child sex offences sentencing transcripts and judgements are inaccessible to the public. As

1 The non-consensual distribution of images of young people via information and communication technologies and the threat disseminate these images without consent.

such, the insights of legal practitioners are of particular importance in illuminating how the law is being applied to sexting incidents and how legal practitioners are negotiating its application. In order to analyse the implications of the various laws utilised to prosecute and respond youth sexting incidents, this research was undertaken in four jurisdictions: Victoria (Aus), Florida (US) Connecticut (US) and Texas (US). Within these jurisdictions I interviewed legal practitioners (Judges, Prosecutors, Defence Lawyers and a Community Lawyer) about their experiences presiding, prosecuting or defending cases involving youth sexting. I also interviewed two offenders who had been prosecuted for child pornography offences after sexting and their two family members.

This thesis aims to strengthen the existing criminological literature in the area of sexting by providing details of the breadth and contexts of cases that are reaching prosecution and examining how legal practitioners' have negotiated the different legislation being applied to youth sexting in each jurisdiction. The research objective is not to present a comprehensive account of case prevalence or suggest that the accounts presented here are indicative of the entire legal communities' response to sexting. Rather, this research is a qualitative study that contributes to the literature on the operation of law in response to youth sexting through these unique insights. It provides an opportunity to explore and critique recently implemented sexting statutes in the US and Victoria that have been presented as the panacea to the problem of prosecuting youth sexting incidents as child pornography offences. This thesis also contributes to the growing scholarship that identifies sexting as a form of intimate partner or family violence and explores the use of civil mechanisms such as

intervention orders to assist victims. The thesis is structured around attending to the three research questions that were the foundation of the research, including:

1. What are the prevalence and details of cases involving consensual and non-consensual sexting practices in the jurisdictions of Victoria, Florida, Connecticut and Texas?
2. How are legal practitioners negotiating existing legislation with respect to sexting? What are the challenges in prosecuting, defending or presiding over these cases?
3. What are the alternative laws in place in the jurisdictions and what are the positive and negative implications of these different laws the structure of the thesis is outlined below.

The specific structure of the thesis is and how it pertains to these questions is outlined below.

Chapter Two: Miller & Alpert, catalysts for an examination of youth sexting and the law

Chapter Two introduces the issue of youth sexting and the law. It provides an overview of the development of key definitions of sexting and examines in detail how national and international discussions have arisen around youth sexting and the law. In particular, I focus on two 'watershed' US sexting cases – *Miller v. Skumanick*[2] (hereafter referred to as *Miller*) in Pennsylvania and the case of Phillip Alpert (hereafter referred to as *Alpert*)– that have prompted discussion among legal scholars and criminologists regarding the law's role in response to youth sexting. By drawing upon *Miller* and *Alpert*, which involve consensual and non-consensual sexting respectively, the key theoretical and empirical issues that form the foundation of this thesis are identified.

[2] The first US federal sexting case (Lewin 2010)

Chapter Three: Literature Review

In Chapter Three I draw upon a broad and interdisciplinary literature base to provide the key conceptual framework underpinning this thesis and to canvass the contemporary empirical and theoretical debates centred on youth sexting and on youth sexting and the law. The first section of Chapter Three synthesises scholarship from anthropology, child studies, sociology and criminology to map historical and contemporary discourses of child and youth sexuality. I draw upon these scholarships to identify the dominant narratives of childhood, in particular child sexuality, and explore the characteristics of these narratives and how they may relate to responses to consensual youth sexting. A core theme that emerges from this literature is the predominance of innocence and risk narratives in cultural anxieties surrounding youth sexuality that play out with respect to consensual youth sexting.

In the second section of Chapter Three I review the literature focused on non-consensual sexting. This section begins by canvassing early feminist and contemporary feminist engagement with the concept of consent and the difficulties in differentiating between consent and non-consent, particularly in relation to rape. This key feminist literature provides a conceptual backdrop for discussions about the differentiation between consensual and non-consensual sexting in law, and the conceptualisation of non-consensual sexting as a legal wrong. After these core discussions, I review key empirical and theoretical literature focused on non-consensual sexting. This burgeoning feminist scholarship illustrates the prevalence of non-consensual sexting against women and contextualises this as gendered violence, intimate partner violence and coercion.

Chapter Four: Child pornography law, sex offender registration and youth sexting

Chapter Four returns to the law and examines the relevant child pornography legislation in Victoria, Connecticut, Florida and Texas to provide an understanding of the legal landscape in which these cases are situated. This chapter contextualises the research within the broader empirical and theoretical discussions about child pornography law and sex offender registration. In this chapter, I also examine key debates between legal scholars as to role of law in relation to youth sexting. More specifically, I canvass legal scholars' critiques of applying child pornography laws to youth sexting and their arguments as to whether consensual and/or non-consensual sexting should be criminalised. This review of the legal scholarship concludes by explaining the importance of examining legal practitioners' accounts of youth sexting and child pornography law due to the dearth of information around the details of the cases being prosecuted.

Chapter Five: Methodology

Chapter Five details the research methodology developed and implemented to answer the three research questions driving this inquiry. The rationale for the research design is explained as is the implementation of the research, which revolved around a comparative qualitative research approach utilising semi-structured interviews with legal practitioners and offenders in Victoria, Florida, Connecticut and Texas. This chapter explains in detail that the US states were selected because the prosecution of adolescents emerged in the US in 2007 (Leary 2010; Wood 2009), the academic and community discourse on sexting is focused on the US and since 2009, and 16 of the 50 states in the US have enacted sexting-specific legislation, with 26 other states having introduced bills that either haven't

passed or are pending review (National Conference of State Legislatures 2012). Additionally, this chapter indicates that Florida, Texas and Connecticut were selected because each jurisdiction had implemented youth sexting law reforms since 2010 and Florida had a prominent case where child pornography laws had been applied to a sexting incident. The approach to analysis of the data is also outlined here.

Chapter Six: Prosecuted sexting cases, insights into trends, patterns and legal processes

The first analysis chapter examines legal practitioners' and offenders' accounts of cases reaching prosecution or legal intervention. These accounts indicate that there are a number of common elements among cases reaching prosecution. Firstly, prosecuted cases primarily involved young adult men (aged 18 years or older) who have non-consensually disseminated images of (mostly) minors and also young adults. Secondly, cases were overwhelmingly gendered with each case involving an image of a young girl. Thirdly, according to participants' accounts, the law's role has been predominantly a response to the non-consensual distribution of images, rather than the consensual mediated sexual interactions between young people. Finally, a common context in which images were non-consensually distributed was the breakdown of a relationship. The emphasis on non-consensual distribution suggests that the law is not responding to sexting, which is considered a consensual mediated sexual exchange, but instead it is intervening in the non-consensual sexting (in the form of distribution of sexual images without the consent), which is an entirely different practice altogether.

Chapter Seven: Negotiating the application of child pornography laws to youth sexting – Experiences of legal practitioners and offenders

Chapter Seven addresses how legal practitioners and offenders are negotiating child pornography laws when applied to youth sexting incidents. Legal practitioners' experiences negotiating the law in the cases discussed in Chapter Six varied depending on their position and their jurisdiction, as such this chapter examines the experiences of Victorian defence lawyers, Connecticut Prosecutors and Victorian offenders respectively. Victorian defence lawyers reported that their ability to mitigate on behalf of clients was extremely limited due to the broad definitions of child pornography and the lack of age based defences. Additionally, defence lawyers indicated that mechanisms such as the Criminal Justice Diversion Program (CJDP) were never used in their sexting cases. Conversely, the experiences of prosecutors in the US told a very different story and challenged perceptions that prosecutors willingly pursue child pornography charges for incidents involving youth sexting. Chapter Seven also examines young adult offenders experiences as persons on the sex offender registration (registrants). Their experiences reflect the problematic nature of this broad and net-widening risk management and illustrated how it labelled them as risky subjects despite the nature of their offences.

Chapter Eight: Alternative frameworks, implementation and application of sexting statutes and family violence legislation

Chapter Eight shifts focus to examine the implementation of alternative models to criminalise or regulate sexting. Including sexting statutes in the US (with a specific focus on Connecticut), the recently implemented Victorian offences: distribution of intimate images (*Summary Offences Act 1996* (Vic) s. 41DA) and threat to distribute intimate images (*Summary Offences Act 1996* (Vic) s. 41DB) and Victorian family

violence legislation. This chapter examines how these models conceptualise and criminalise sexting and the implications of applying this legislation.

Firstly, this chapter examines Connecticut Prosecutors experiences implementing sexting misdemeanours in the US. It is revealed that the paternalistic model implemented in Connecticut, reproduced moralising discourses that blame and responsibilise victims of non-consensual sexting. Moreover, this section examines an additional issue highlighted by Connecticut Prosecutors, the problems associated with criminalising youth sexting as a base level offence. Secondly, Chapter Eight examines the newly implemented Victorian reforms. What emerges from this analysis is that by only criminalising non-consensual sexting Victoria has implemented a harm model that focuses on abuse of consent and harms to victims. However, Victoria shares an issue identified by Connecticut prosecutors, the use of a base level offence. Lastly, this Chapter focuses on the application of family violence legislation to youth sexting incidents. Drawing from an interview with a Victorian Community Lawyer, this section illustrates the importance of considering family violence legislation, particularly intervention orders, as a response to the use of images as a form of revenge or control in in the context of a relationship breakdown.

Chapter Nine: Conclusion

In Chapter Nine we consider the broader empirical and theoretical implications of this research project. This chapter points towards the need to develop more nuanced and comprehensive accounts of gendered violence and the dangers of understanding sexting as a technology-enabled crime as well as a detailed understanding of how victims seek redress through the criminal justice system.

Chapter Two: *Miller* & *Alpert*, catalysts for an examination of sexting and the law

The following chapter provides the background to how the issue of sexting and in particular youth sexting came to the fore as a legal and social problem across countries such as the US and Australia. It first offers an explanation of the emergence of the terminology around sexting and what is meant by the term 'youth sexting' by providing a brief overview of the range of definitions of this practice. It then examines two widely reported US cases: *Miller* and *Alpert.* Together these two cases raised key questions pertaining to the nature of cases reaching prosecution which remain largely debated and are the focus of this research.

Sexting defined

The portmanteau sexting (sex and texting) first appeared in the *Daily Telegraph* in 2005 as a way to describe Shane Warne's use of his mobile phone to send nude images to women (Roberts 2005). In its most basic form, sexting is defined as the sending of nude and semi-nude via mobile phones (Hiffa 2011; Ostrager 2010; Szymialis 2010) regardless of the age of the sender or recipient. As the term has become ubiquitous, the definition has been broadened as well as narrowed. The definition now incorporates a range of new technologies used to distribute digital images, for example, the posting or distributing images and videos on the internet (Albury et al. 2013; Day 2010; Sherman 2011). Additionally, the definition of sexting has been narrowed. While people of any age can engage in sexting, the term is now colloquially used to describe the behaviour of young people (Barry 2010; Day 2010; Hiffa 2011; Ryan 2010; Sherman 2011; William 2012), despite evidence that adults

are more likely that young people to engage in this practice (Klettke, Hallfor & Mellor 2014).

While the unqualified term sexting has entered the public lexicon, there is yet to be a clear consensus on a uniform definition within academia, specifically because sexting comprises a multifarious number of expressions and therefore cannot be defined as a simple incident or action. As such, a number of typologies have been advanced over the past seven years to highlight the multifarious nature of sexting incidents and the contexts in which they occur (Albury et al. 2013; Leary 2009; Ryan 2010; Sherman 2011; Wolak & Finkelhor 2013; Smith 2011). For example, Wolak and Finkelhor (2011) separate sexting into two categories: aggravated and experimental. Aggravated sexting includes sexting where adults have solicited sexual images from minors or 'sexual abuse, extortion, deception or threats; malicious conduct arising from interpersonal conflicts; or creation or sending of images without the knowledge or against the will of minors who were pictured' (Wolak & Finkelhor 2011, p. 3). Experimental sexting includes the use of sexting for sexual attention seeking and in the context of romantic relationships (Wolak & Finkelhor 2011, p. 3). Other definitions focus on sexting as a process of distribution. For example, Ryan (2010) distinguishes between primary sexting (where the person who creates the images sends the images) and secondary sexting (where the person who receives the image then distributes it to a third party). The intention of the person depicted in the image has been also been advanced as a defining characteristic; for example, Sherman (2011) categorises sexting as voluntary or involuntary. Controversially, Leary (2010, p. 521) argues that sexing – which she defines as self-produced child pornography – can also occur for profit as well as in

the context of interpersonal relationships. Such a variety of types and typologies, demonstrates how the context of an investigation yields a different interpretation of sexting behaviour. These scholars demonstrate that there is yet to be a uniform definition due to the variation of behaviours that can potentially be defined as sexting.

As identified above, discussions surrounding sexting have been focused on young people. While these practices raise concerns around the intersection between technology, sex and young people, over the past eight years, discussions have been centred on the prosecution of young people under child pornography laws after young people have sexted (either produced or distributed) images that inadvertently fall within the definition of child pornography. The following section of this chapter outlines how sexting prosecutions emerged in Victoria and discusses some of the key cases on the international stage that inform the need for this research into legal practitioners insights into sexting prosecutions in both Victoria and the US.

In 2011, reports in Victoria emerged that young people were in court for the production, possession and distribution of child pornography after receiving or distributing images of naked minors via their mobile phones (Brady 2011a; 2011b; Nelson 2011). A swathe of articles appeared in *The Age* detailing the potential and actual prosecution of young people after sexting. One in particular stood out. On 15 August 2011, *The Sunday Age* reported the case of a 'young' Victorian man who was prosecuted under child pornography laws and had to register as a sex offender after his friend sent him an image of an underage girl (Brady 2011a). In the same year, these cases sparked a Parliamentary Inquiry into sexting (VPLRC 2013).

Despite these reports little was known about the application of child pornography laws to youth sexting in Australia. However, in the US this issue had emerged in early 2007, particularly in the wake of media coverage of two watershed cases *Miller* Pennsylvania and *Alpert* in Florida. These two cases sparked a national conversation about the operation of child pornography law in relation to sexting (Podlas 2011) and raised concerns that young people are at risk of prosecution for engaging in this practice.

The following section discusses these concerns and examines some of the key issues raised by sexting and the law by drawing upon these two watershed cases. These cases were selected for three key reasons. First, they were among the first cases that prompted public and political concern that young people who participated in sexting (which was reported as an epidemic; Podlas 2011; Cooper 2012) could be charged as child pornographers and consequently have to register as sex offenders. Second, the cases were catalysts for a re-examination of child pornography legislation and its application to sexting practices, concomitantly prompting legislators in the US to introduce specific laws that distinguished youth sexting from child pornography (Podlas 2011). Third, despite both cases involving sexting (the production and distribution of sexual images), their circumstances are markedly different. *Miller* involved the attempted prosecution of female minors (aged 15 to 16 years) for consensual sexting, while *Alpert* involved the prosecution of young adult male (aged 19 years) for non-consensual sexting. These cases are entry points into the broader discussion about sexting and the law, prompting questions as to whether legal intervention into youth sexting is focused on consensual sexting, non-consensual sexting or both. Before addressing the intersecting issues that

culminated in the discussion and analysis of these cases, the two cases are described below to provide some context.

Miller

In 2008, Pennsylvania School District Officials found that several Pennsylvanian students had images of 'scantily clad semi-nude and nude teenage girls' (*Miller v. Skumanick*, No. [3-09-cv-00540]) on their phones. After confiscating the phones, the School District Officials found that male students had been disseminating images of three Pennsylvanian minors: Marissa Miller, Grace Kelly and Nancy Doe. In the civil complaint against Skumanick by the girls' parents, the images were described as follows:

> One photo shows Marissa and Grace, from the waist up, lying side by side in their bras, with one talking on a telephone and the other making a peace sign. The other photo shows Nancy Doe standing upright, just emerged from the shower, with a white towel wrapped tightly around her body just below the breasts. The two photographs, which depict no sexual activity or display of pubic area, are not illegal under Pennsylvania's crimes code and, indeed, are images protected by the First Amendment[3] (*Miller v. Skumanick*, No. [3-09-cv-00540])

After the School District Officials contacted District Attorney George Skumanick (hereafter referred to as Skumanick) about these photos, Skumanick identified the girls in the images and informed the girls' parents that unless the girls attended an education program (designed by Skumanick himself) they could be charged with the possession of child pornography (18 Pa. C.S. § 6312[d]), criminal use of a

[3] Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances *(U.S. Const.* am. 1.). In 1982, after the landmark case *New York v. Ferber*, the US Supreme Court held that child pornography was not protected under the First Amendment regardless of whether it was obscene or not.

communication facility (18 Pa C. S. § 7512) and open lewdness (8 Pa. C.S. § 5901) (*Miller v. Mitchell*, No. [09-2144]). The girls' families were dissatisfied with Skumanick's approach and sought assistance from the American Civil Liberties Union (ACLU) who then filed a restraining order against Skumanick. On 30 April 30 2010, the Circuit Court issued an order permanently preventing Skumanick from initiating criminal charges against the girls.

Immediately after the Third Circuit Court affirmed the Technical Restraining Order against Skumanick, sexting prosecutions began to be reported in the US media and focused on this specific case (Podlas 2011). Podlas' media analysis of US news coverage on sexting between 2006 and 2011 illustrates that, in the aftermath of the media attention garnered by *Miller*, a child pornography label forever framed the teen sexting debate and 'became foundational theory for analysing teen sexting and its regulation' (2011, p. 23). While this case did not involve prosecution or conviction, it illustrates the potential for child pornography law to be applied to incidents involving sexting. The conviction of a young person (although not a minor) for sexting was evidenced in the case of Philip Alpert.

Alpert

Unlike *Miller*, Alpert was not charged after producing or disseminating pictures of himself. Instead, he was charged after non-consensually disseminating images of his ex-girlfriend. In 2008, Phillip Alpert's 18-year-old girlfriend emailed him self-produced nude images. In the aftermath of their breakup, Alpert hacked into her email account and sent the images to her friends, family and employers (Richards & Calvert 2009, p. 8). Police were contacted and they searched Alpert's house and confiscated his

electronic devices. The prosecutor then filed child pornography charges against Alpert (Richards & Calvert 2009, p. 9). The prosecution then offered Alpert a plea bargain; if he pleaded guilty, he would receive five years' probation and avoid a custodial sentence (Richards & Calvert 2009, p. 9). Alpert accepted and pleaded guilty, but he was required to register on Florida's Sex Offender/Predator Register until he is 43 years old (Richards & Calvert 2009, p. 9).

As with *Miller*, the outcome of *Alpert* was met with significant media interest, both nationally and internationally (Feyerick & Steffen 2009; Richards & Calvert 2009). This case has been widely used by legal scholars as an example of the misapplication of child pornography law onto youth sexting (Arcabascio 2009; Bailey & Hanna 2011; Barry 2010; Day 2010; Forbes 2011; Geyer 2009; Hiffa 2011; Kushner 2013; Leary 2010; Nunziato 2012; Ostrager 2010; Potter 2011; Richards & Calvert 2009; Ryan 2010; Slane 2010; Tang 2013; Walter 2014; Wood 2009).

Key issues raised by the Miller and Alpert cases

After the *Miller* and *Alpert* cases were publicised, it came to the attention of the local and international community that that young people who sext could be prosecuted under child pornography law (Wood 2009). These cases raised concerns that the potential for these laws to apply to young people who sext means that young people are at risk of prosecution and sex offender registration (Cannon 2010; Fichtenberg 2011; Nunziato 2012). These cases are similar and have been discussed together as examples of how the law is being applied to youth sexting (Briggs 2010; DiFrancisco 2011; Forbes 2010). Moreover, Podlas (2011, p. 41) argues (in relation to Miller) that by focusing on cases involving child pornography prosecutions the media 'help set

the stage for legislative intervention' and that this impacted lawmakers who 'focused on correcting that [child pornography] problem to the exclusion of any others', an issue that we will return to later in Chapter Eight. But beyond questions of the potential for prosecution, the circumstances of these two cases differ considerably and each raises a number of practical and conceptual issues around the operation of law in relation to youth sexting, the implications of which have been the subject of commentary and criticism from legal scholars that will be explored in the following section.

Legal commentary on the *Miller* and *Alper*t cases has focused on the issues they raise with respect to the use of prosecutorial discretion, the definitions of child pornography, and the distinction between consensual and non-consensual sexting in law. Skumanick's actions, particularly his threat to charge the young girls with child pornography offences have been the focus of criticism from within academia. Critics described Skumanick's behaviour as 'fervent' (Karaian 2012, p. 62) and a misuse of prosecutorial discretion (Kushner 2013, p. 287; Nunziato 2012, p. 61). Additionally they argued that these cases demonstrate 'the inconsistency in… attempt[s] to criminalize sexting' (Hiffa 2011, p. 512), and an '…uncertainty inherent in sexting prosecutions, where prosecutors may either embark upon a 100 percent rate of prosecutorial evangelism simply to "make a point"' (Tang 2013, p. 17).

Critics have also noted that this use of prosecutorial discretion points to larger issues with the parameters of child pornography definitions. For example, Forbes posits that:

> [*Miller and Alpert*] reveal the problematic inflexibility of applying current child pornography laws to sexting cases: the girls in Miller face the same charges that Alpert did for completely different actions (2011, p. 1728).

Szymialis (2010, p. 326) (writing on *Miller*) that the ability for Skumanick to initiate criminal proceedings against these young girls is 'illustrat[ive] [of] the need for specific language [in child pornography statutes] that ensures the content does not warrant First Amendment protection'.

The definitions of child pornography and the concomitant role of prosecutors in interpreting those definitions are illustrated in anecdotal evidence of Skumanick's behaviour. During a meeting to discuss the program proposed by Skumanick, one of the girls' fathers asked Skumanick how his daughter (pictured in her bathing suit) could be charged with a child pornography offence. Skumanick replied that it was the girl's provocative pose that made the image fit within the legal definition of child pornography (*Miller v. Skumanick* No. 3:09cv540, p. 30). Marissa Miller's father then questioned Skumanick as to who arbitrates the definition of 'provocative', at which point Skumanick refused to elaborate and informed Mr Miller that 'these are the rules. If you don't like them, too bad' (*Miller v. Skumanick* No. 3:09cv540, p. 30).

Beyond procedural issues of discretionary decision making and statutory definitions of child pornography, which focus on *how* the law is being applied to youth sexting, the *Alpert* and *Miller* cases also raise questions as to the *types* of sexting cases being prosecuted, namely whether they involve consensual or non-consensual sexting. As noted by Forbes (2011), while charged with the same offence, *Miller* and *Alpert* involve two significantly different types of behaviour: one consensual sexting

the other non-consensual. Therefore, these cases bring to the fore questions about these separate incidents of sexting and how they are perceived.

Critics of *Miller* have argued that the young girls were engaging in a form of self-expression, agency and choice (Briggs 2010, p. 191), and as such they have characterised legal intervention as an example of 'policing female sexuality' (Geyer 2009, p. 3) or censorship of teens' '…digital sexual expression' (Karaian 2012, p. 63). The commentary on *Alpert* was significantly different. Although Briggs (2010, pp. 191–192) argues that, in comparison with *Miller*, Alpert's 'behavior aligns more closely with the goals of child pornography statutes'. Alpert's actions have been described by a number of scholars as different to child pornography and have been characterised as either malicious act or a thoughtless discretion. For example, Richards and Calvert (2009, p. 8) describe Alpert's behaviour as 'a hasty online decision that would embroil him in a tangled legal morass usually reserved for the sordid side of society'. Similarly, Nunziato (2012 p. 62), while condemning Alpert's actions, describes them as 'profoundly unwise', and Kushner (2013, p 5) describes Alpert's actions as 'a sophomoric teenage act'. Hiffa (2011, p. 510) takes the position that Alpert's behaviour should be looked at through the lens of his relative youth, while Tang (2013, p. 115) characterises Alpert's behaviour as hasty and enabled by technology. However, it is important to note that this interpretation of Alpert's culpability has been challenged, for example Sherman (2011, p. 46) argues that 'his punishment is not easily dismissed as unjustifiable because his actions were malicious and non-consensual'. These retellings of *Miller* and *Alpert* raise questions as to the range of sexting incidents reaching prosecution, whether the law is using child pornography and intervening into incidents involving youthful sexual

expression, adolescent foolishness or malicious behaviour. Maintaining a distinction between the varying types of sexting has also been identified as particularly important, and as Briggs (2012, p. 201) argues, '[e]ach scenario creates a different dilemma in potential prosecution'.

Legal scholars, in their discussion of *Miller* and *Alpert*, raise some key questions that require further investigation and guide inquiry into sexting and the law. Firstly, are prosecutors using their discretion to pursue these types of incidents as child pornography offences? Secondly, are sexting incidents being successfully prosecuted as child pornography offences? Thirdly, is a distinction being made in law between consensual and non-consensual sexting? *Miller* and *Alpert* point to broader practical issues of prosecutorial discretion and statutory definitions of child pornography as well as conceptual issues of youth sexuality, technology and consent and how they are being negotiated and applied in law in the context of dramatically evolving technological advancement.

The mixture of legal and conceptual issues raised by *Miller* and *Alpert* informs the theoretical and empirical framework that guides this inquiry into sexting and the law. As such, the following chapter explores these intersecting conceptual and legal issues by focusing on the conceptual issues underpinning consensual and non-consensual sexting and how they play out in the sexting literature.

Chapter Three: Literature Review

The literature relevant to sexting draws upon a broad remit of interdisciplinary scholarship given that sexting traverses young people, sexuality, new technology and the law. There are significant bodies of work that attend to youth, sexuality, consent, technology and the role of law that cannot be mapped in exhaustive detail here. The aim of this chapter is to identify the key conceptual issues emerging within the developing literature examining consensual and non-consensual sexting. In this chapter I explore the conceptual issues that underpin consensual and non-consensual sexting, and how these concepts play out in the focused empirical and theoretical literature on sexting.

The first section is a discussion of consensual sexting. The prosecution of young girls for consensual sexting (as in the attempted prosecution in *Miller)* is underpinned by broader conceptual issues regarding the historical and contemporary understandings of youth sexuality, agency, gender and the regulation of youth sexuality. These concepts are explored before engaging in the contemporary debates on the nature of consensual youth sexting. Following this, I draw from an interdisciplinary scholarship that qualifies the experiences of young people sexting and the role of consensual sexting in their lives.

The second section is a discussion of the key sexting scholarship on non-consensual sexting and its conceptual underpinnings. Non-consensual sexting (as in *Alpert*) raises issues that are less focused on youth sexuality and agency and more focused on to the parameters of gendered violence, sexual violence, and the breach of consent and privacy. This section draws upon qualitative empirical literature that has

demonstrated that non-consensual youth sexting occurs on a continuum ranging from pressure, to coercion and to non-consent (Ringrose et al. 2013). This section also draws upon the emerging feminist and criminological scholarship that has examined non-consensual youth sexting through the lens of gendered violence as well as feminist scholarship within and without of criminology to include key debates around differentiating consent from non-consent in the context of sexual engagements. This chapter provides an empirical and conceptual foundation before turning our focus to the role of law in relation to youth sexting.

Consensual sexting: Youth sexuality, agency and risk

The potential legal prosecution of consensual youth sexting raises questions regarding cultural interpretations of youth sexuality, youth sexuality and technology and the regulation of youth sexuality. Lee et al. (2013, p. 45) have argued that by framing sexting as a 'teen' practice, 'these activities have become a key object of governmental, legal and moral regulation' that are inherently steeped in cultural and moral anxieties surrounding youth sexuality and technologies. Similarly, Angelides (2013, p. 682) has argued that '[t]he predominant legal, policy and pedagogical response to sexting functions as something of a displaced conversation about the complexity of teenage sexual agency'. These observations of the intersection between law and youth sexuality raise questions about the pre-existing cultural interpretations of youth and sexuality.

Before interrogating issues of children's sexual agency, that is, their ability participate in and consent to sexual experiences, we must first consider the narratives that define childhood sexualities (Plummer 1990). The following

discussion focuses on the key sociological, educational and feminist interrogations of child and youth sexuality. In doing so, a broad conceptual and theoretical literature base is investigated, integrating scholarship from anthropology, childhood studies, sociology and criminology to understand historical and contemporary discourses of child and youth sexuality and explore the characteristics of these narratives and how they may relate to responses to youth sexting. These narratives are then linked to empirical and theoretical literature on consensual sexting.

Childhood: a historical construction

In the 1960s, Aries (1962) – who has been credited as one of the most influential writers on Western understandings of childhood (Waites 2005) – introduced the importance of understanding childhood as an idea that can be imagined and represented in society. Since Aries' (1962) seminal work entitled *Centuries of Childhood*, the disciplines of anthropology and history have influenced the social sciences' interrogation of childhood to produce what Waites (2005, p. 12) terms the 'new sociology of childhood'. The 'new sociology of childhood' is underpinned by the notion that childhood is neither fixed nor universal but a product of culture, structure and situation (James & James 2004, p. 13). This construction, as Jackson and Scott (2010, p. 103) note, is often enacted through 'family, education and the state namely informal and formal adult controlled institutions'.

Key scholarship into the new sociology of childhood has argued that the cultural expectations and practices of Western child sexuality understand children as an inversion of adulthood – where adults are rational sophisticated and sexual, children are innocent, pure and asexual (Frith & Kitzinger 1997; Robinson 2008; Thorne

1993). Robinson (2008, p. 113) argues that this interpretation or construct is predicated on 'fixed, adult centric, white, Eurocentric, gendered, middle-class values', and as such, creates a situation where fostering discourse on child sexuality and agency becomes difficult (Montgomery 2009). For example, Egan and Hawkes (2010), in their discussion of child nudity in art note that representations child sexuality can be perceived as 'the destruction of sexual innocence, and axiomatically, therefore, the very essence of childhood itself' (Egan and Hawkes 2010, p. 2) or as Jackson and Scott (2010, p. 101) note, 'inimical to childhood itself'. The innocence that dominates contemporary narratives of childhood is not without nuance or cultural reflexivity. For example, Waites (2005) argues that contemporary narratives of childhood innocence have moved from Victorian notions of innocence by acknowledging that children can experience the physical excitement or the 'upsurge of sexual feelings' of puberty (Jackson and Scott 2010, p. 181). However, the notion of the innocent child still inspires a sense of adult anxiety when children act on these feelings and experiment sexuality (Montgomery 2009). Sociologists Egan and Hawkes (2008) refer to this anxiety as 'youthful erotophobia' or the fear of youth sexuality. The importance of sexuality in cultural understandings of childhood is highlighted by Robinson (2005, p. 66) who argues that 'the relationship between children and sexuality is volatile and controversial, often demanding one to exercise great caution when negotiating the discursive minefield that culturally underpins the contradictory representations and understandings prevailing in this relationship'.

It has been argued that in light of cultural perceptions of children as sexually innocent, youth sexuality and youth sex are sources of fear and concern (Shoveller & Johnson 2006) and, therefore, recognising sex as an intrinsic part of adolescence

has been difficult (Schalet 2000). These fears are often founded in dominant understandings of, and responses to, youth sexual practices as inherently risky. Indeed, scholars reviewing the youth sexuality literature have found that risk is a dominant theme in this body of work, and protecting children and teenagers from the negative consequences of sexual activity has been a priority (Russell 2005; Smiler et al. 2005). This area of scholarship accepts the presence of adolescent sexual desire and does not prescribe the 'child as completely asexual' framework. What it does highlight are the risks and negative connotations of exploring this sexuality. For example, Oberman (2000) explains that concomitant variables such as youth and vulnerability mean that young people's sexual engagement often sits in a grey area between consensual and non-consensual. While these scholars have argued that risk narratives underpin contemporary understandings of youth sexuality, feminist scholars have argued that these concerns are often gendered and intensified in relation to women and young girls.

Powell (2007, p. 26) argues that 'young women['s]…sexuality appears to be more commonly associated with problems rather than potential pleasure'. Young girls' sexuality has been problematised as dangerous (Fine 1988; Tolman 1999), with young women characterised as at risk of unintended pregnancies, sexually transmitted diseases, sexual violence, statutory rape, premature sexuality, drug abuse, alcohol abuse, low self-esteem and peer pressure (Blinn-Pike et al. 2004; Horne and Zimmer-Gembeck 2005).

Consensual youth sexting raises a number of questions about youth sexuality, but in particular, questions about the mediation of that sexuality and young people's use of

technology to explore or practice their sexuality. The following section draws upon the key media scholarship on youth sexuality and technology which illustrates that risk narratives evident within discussions of youth sexuality also play out in discussions of youth sexuality and technology.

Youth Sexuality: Technology, media and risk

Although sexting is (in some ways) a manifestation of sexual engagement and sexuality it cannot be disembodied from cultural interpretations of new technology. As Crofts and Lee (2013, p. 101) argue 'alongside the traditional adult discomfort with children exploring their sexuality is the added concern about the impact of new technologies and the risks that these pose for children'. Indeed 'fears about new technology are compounded when looking at the intersection of youth sexuality and new media practices' (Pascoe 2011, p. 5). Therefore, the link between youth, technology and sexuality is explored as part of the conceptual framework for this thesis.

As with the dedicated scholarship on risk and youth sexuality, young people using technology to engage in sexuality is often presented through a lens of risk and danger. While contemporary anxieties over youth sexuality and technology are centred on sexting, such concerns have been a historical constant, with young people being viewed by adults as vulnerable to the technologies they use for communication (Cassell & Cramer 2008; Jenkins & boyd 2006).

Cultural concerns about youth and media have emerged in relation to a variety of media and technologies including penny dreadfuls, gangster films and horror comics

(Springhall 1999), the domestication of telephones (Cassell & Cramer 2008) and social networking sites such as MySpace (Jenkins & boyd 2006; Marwick 2008; Thiel-Stern 2009). However, with the advent of the Internet, the perceived risks for young people exploring their sexuality via technology have diversified. Two particularly prominent risks that have been discussed within the media scholarship are risks of online predators and sexualisation. This section draws upon media scholarship that explores online predators and sexualisation focusing firstly on the risk narratives surrounding online predators, particularly as they pertain to young women.

Risk narratives of online predators and harms

Contemporary versions of these historical anxieties are underpinned by new concerns including the concern that young people who engage in image sharing online or have an online presence are at risk of being exploited by paedophiles and sexual predators (Barnes 2006; Cramer & Cassell 2008; Jenkins & boyd 2006; Shade 2007). Feminist scholars have posited that risk-narratives are pervasive with respect to young people's use of information and communication technologies, yet these understandings of risk are more pronounced when it comes to women, particularly young women (Cassell & Cramer 2008: Thiel-Stern 2009). These concerns have followed every technological frontier that enables women to freely express themselves and their sexuality. For example, one of the earliest concerns about young women using communication devices emerged after the introduction of telephones into homes; at the time there was widespread concern that young women would use this new technology to communicate with dangerous strangers and partners (Cassell & Cramer 2008).

Thiel-Stern (2009) argues that narratives of risk around the use of social networking sites such as MySpace predominantly focus on how young girls using these sites are particularly vulnerable to predators and simultaneously invite these risks by posing provocatively in their online pictures or wearing revealing clothes and capturing the attention of predators. These narratives have been described as prefiguring girls as naïve and vulnerable in these online spheres, yet simultaneously enabling predators by posing provocatively in their pictures and exposing their bodies online (Thiel-Stern 2009, p. 32).

Risk narratives and sexualisation

The second key risk that is discussed by media scholars is sexualisation. Beyond the traditional health-related concerns of pregnancy and sexually transmitted infections, young women and girls have been the focus of concerns about raunch culture, pornification or sexualisation. Concerns about sexualisation in culture are underpinned by the assumption that the media promotes sexualisation and this affects young women's self-perception and behaviours (Tankard Reist 2009, Walter 2010). For example, Tolman (2012, p. 746) argues that 'young people girls are being barraged by a deafening one-note anthem: Their appearance is what matters, and looking sexy is what counts'. Hasinoff (2014, p. 103) notes that the key concern is that sexualisation 'causes girls to be too sexually active, too early, in an unhealthy or unnatural way'.

In Australia in particular, this issue emerged on the political agenda in the form of a Senate Inquiry into the 'sexualisation of children in the contemporary media environment' (Commonwealth of Australia 2009). This inquiry was informed largely

by two major Australia Institute research papers: *Corporate Paedophilia* (Rush & La Nauze 2006a) and *Letting Children be Children* (Rush & La Nauze 2006b). These papers argue that young people are being sexualised through many aspects of the media including advertising and popular culture (music videos) aimed at both adults and children (Rush & La Nauze 2006a). The resulting early sexualisation is characterised as a physical and psychological and sexual harm (Rush & La Nauze 2006a, p. 35).

A particular criticism of these papers has been the assumption of childhood sexual innocence that is then degraded or corrupted by external sexualisation (Faulkner 2010; Lumby & Albury 2010). Moreover, while scholars such as Rush and la Nauze (2006a) frame sexualisation as a media-driven cultural problem for which young girls bear the consequences, Egan and Hawkes (2012, p. 280) argue that literature that '[d]eploy[s] hyperbole and pathologisation foments a rhetorical strategy that foregrounds sexualisation as a crisis of sexual behaviour as opposed to a sexist culture'. This argument is supported by Hasinoff:

> Sexualization positions girls as both its victims and its agents. As for the former, sexualization is thought to take away girls' agency by undermining their capacity to make authentic, healthy, self-determined choices about their gender and sexual embodiment. At the same time, sexualization also posits that girls are agents in that their choices and actions have an effect on others and society in general (2014, p. 103).

Feminist scholars have been challenged on this issue, a conundrum that Tolman (2012, p. 747) observes is far from being solved, saying that 'feminist scholars are facing unprecedented complexities in thinking about what developing healthy sexuality might be for young people women'.

Positive aspects of mediated sexuality

Despite these concerns, research into young people's use of technology demonstrates that information and communication technologies play a significant role as a mechanism for engaging in, sustaining and ending relationships (Ito et al. 2009; Lenhart et al. 2007). Studies have found that the use of information and communication technologies in young relationships often has intrinsic benefits including enabling young people to conduct relationships privately in ways that 'transcend adult control and geography' (Pascoe 2011, p. 10). Information and communication technologies are also beneficial for marginalised groups, particularly lesbian, gay, bisexual, transgender, intersex and questioning youths who are able to connect with each other online when they may not have been able to do this in their offline social spheres (Holloway & Valentine 2003). These technologies have also been reported as beneficial for youths who wish to have same-sex relationships and have parents who may not approve (Pascoe 2011). While these studies acknowledge that there are instances where young people are harassed online and contacted in online forums such as chatrooms by adults seeking sexual exchanges, they also have functional benefits for young people. For example, Pascoe speaking on his ethnographic research into youth new media engagements and sexuality concluded:

> In sum, new media provide a previously unavailable, direct line to many young people, a line of communication that might, for better or worse, evade adult monitoring and provide much needed information to youth about their bodies, their lives, and their sexual health (2011, p. 16).

Therefore, while there are anxieties about young people's use of technology to engage in their sexuality, there is evidence to suggest that technologies play a

functional role in young people's sexual and social interactions with other young people.

As evidenced by the research above, notions of risk are clearly features of investigations into youth sexuality and its intersection with technology and media underpinned by the assumption of childhood sexual innocence. Reviews of youth and child sexuality literature have identified risk as a dominant aspect of this scholarship, in which the protection of children and teenagers from the negative consequences of sexual activity has been a priority (Russell 2005; Smiler et al. 2005). Importantly, these concerns about sexual predation and sexualisation are made manifest in discussions around consensual sexting (Hasinoff 2013; Karaian 2012), particularly in explaining why young girls participate in consensual sexting. This will be explored further in the following section.

Risk narratives and consensual sexting

Lee et al. argue that sexting renews concerns (such as those outlined above) surrounding risks and technology:

> We have suggested that these concerns are not new but a set of moral discourses given new life within the context the risks of new technologies. Sexting is thus seen to constitute a risk to the moral health of young individuals and the population more generally; a risk that has been excessively criminalised to the point that young people can face serious criminal sanctions, relying only on the discretion of police and other legal officers to moderate such punitive and harmful interventions (2013, p. 45).

Moreover, these scholars point to the need to consider how expressions of youth sexuality are criminalised because they are risky. The intersection between consensual sexting and risk is explored in the following section by canvassing the

key research that has focused on the representation of consensual youth sexting within news media, pop culture and educational campaigns. This research has consistently demonstrated that discourse surrounding consensual sexting in the media is dominated by risk and danger. Media scholars have identified that the narratives underpinning consensual sexting include sexual predators, sexualisation and shame and are highly gendered.

Hasinoff (2013, p. 452) argues that concerns about online predation have been re-produced and heightened in both legal and media discourses about sexting where the primary concern is that broad dissemination of sexted images will result in them being obtained by online predators. She concludes that '[w]hile assertions that online predators will "hunt down" minors who sext fit into the homogenizing logic of a moral panic about the gendered dangers of sexuality and technology, there is no evidence that this routinely occurs' (2013, p. 452). Similarly, Karaian (2012, p. 60) notes that narratives that emerge from international and national (US) news media coverage of sexting construct sexting as a 'significant and overwhelmingly harmful practice for youth and for teenage girls in particular'. This is affirmed by Angelides (2013, p. 67) who argues that concerns surrounding youth sexting have manifested in a 'sexting panic'.

Media scholars have also observed similar narratives within educational campaigns focused on sexting. Since 2009, there have been a number of sexting education campaigns aimed at young people across the US (NCTPTUP 2008; A Thin Line n.d.; SPEPT 2009; Futures Without Violence 2011), United Kingdom (CEOPC 2011) and Australia (Commonwealth of Australia 2012; SECASA 2014). These campaigns aim

to raise awareness of the legal, social and psychological risks of sexting. Before presenting key critiques of these campaigns, I give a brief overview of some of these campaigns from Australia, the US and the United Kingdom.

In her review of 10 sexting education campaigns across Australia, the US and the United Kingdom, Döring (2014) finds a number of similarities in their focus, narratives and recommendations. The majority of these campaigns (six out of 10) are focused on young girls, and all campaigns used a common scenario to edify young people, in which 'a girl who sends a sext to a current or former boyfriend because he asks for one, sometimes pressuring her…' (Döring 2014, p. 1). Döring also found that all of these campaigns promoted abstinence from sexting as a way to avoid negative social, legal and psychological consequences. Only one campaign (A Thin Line n.d.) discussed safe sexting practices (taking them but not sharing them, and storing them on personal devices). Döring concludes that:

> Youths and especially girls are told by the sexting risk-prevention messages that even a single revealing photo, if it ends up in the wrong hands, can never be recalled, will destroy their reputation, and bring about severe negative legal, social, educational, and career consequences, and may even lead to sexual abuse by adults. Only five of the ten campaigns discuss third parties who illegally forward private sexts and participate in bullying, thus providing *anti-forwarding and anti-bullying messages* (2014, para. 40).

Risk-management attitudes that place the impetus on young girls to take action and prevent the dissemination of their images are clearly articulated in the US *National Campaign to Prevent Teen and Unplanned Pregnancy* (NCTPTUP 2008) survey. The survey authors published their data along with five key recommendations for young people entitled 'Five Things to Think About Before Pressing Send' (NCTPTUP 2008, p. 2). These recommendations advise young people not to 'assume anything

you post is going to remain private' and that the things they post online 'will never truly go away' (NCTPTUP 2008, p. 2). The *2SMRT4U* campaign funded by the National Center for Missing and Exploited Children in the United States[4] suggests that for girls to ensure their safety in online spaces they should avoid 'posting sexually provocative photos' (2SMRT4U 2006, p. 1). Similarly, Australian educational campaigns such as *Megan's Story*[5] illustrate the perceived dangers of sexting and the role of the individual in preventing these dangers. In their critique of the *Megan's Story* campaign, Albury and Crawford note that:

> In the absence of context, the video appears to be a morality tale: the story of a foolish young woman who 'thought she knew' (but should have known better) and was victimized as an inevitable result of her own actions (2012, p. 465).

Angelides extends upon Albury and Crawford's (2012) critique by arguing that these educational campaigns (such as *Megan's Story*) draw from stereotypical understandings of young people to diminish confidence in their agency:

> Trading in popular, long-standing narratives of teenagers as foolish, rash, hormone-driven, and psychologically and emotionally immature, teenage sexters are represented as lacking the wherewithal both to engage in the practice maturely and to deal with any unforeseen consequences (2013, p. 682)

Indeed, feminist critiques of sexting campaigns such as *Megan's Story* focus on the responsibility narratives that emerge from within these texts. For example, Karaian (2012) argues that these government sexting campaigns prefigure young girls as

[4] A body that advises young people on safe online practices.

[5] A video campaign produced by *ThinkYouKnowAustralia*. This campaign depicts a high school girl exiting her school bathroom. As she leaves the bathroom she presses send on her mobile phone, buttons up her shirt and looks pleased (the implication being that she has sent a sext). By the time she arrives in class, her classmates and teachers have all received her image (presumably disseminated by the intended recipient), they laugh, smirk and give her disappointing & judgemental glances. The video ends with Megan running out of the class crying (ThinkUKnowAustralia 2010).

simultaneously vulnerable to the dangers of paedophiles and over-sexualisation and also responsible for placing themselves in a position to be victims by producing or distributing their own images. Moreover, feminist scholars have located these campaigns within the context of historical concerns about young girls displaying their sexuality and the need to police it. For example, Ringrose and Renold further critique these campaigns by arguing that making young girls responsible for 'sexting gone wrong' is reflective of a historical need to control women's and girl's sexuality:

> …the girl body returns again and again as the focal point of a patriarchal, moralising gaze and frequently as the only site of intervention for change. Furthermore, we argue this dynamic ends up making feminine sexual desires an invisible, discursive silence in school and beyond (2012, p. 341)

In the educational campaigns, there is an explicit link between the person who sends a sext and a person who disseminates it without consent. These campaigns imply that non-consensual sexting is a failure of individual risk management and failure of the judgment of the person in the image (i.e., the young girls) rather than a problem of breaching consent and the subsequent harm it produces. Albury and Crawford (2012) observe that narratives that make young women responsible for the non-consensual sexting (of their own images) reflect the risk management model of sexual violence (Hall 2004; Marcus 1992), in which women are constructed as simultaneously vulnerable to sexual violence and responsible for managing those risks.

In addition to these aforementioned risks and dangers of consensual sexting, scholars have identified that one of the other risks associated with consensual sexting is the sexualisation of girls. Sexting, particularly young girls' consensual sexting, has been identified as a manifestation of sexualisation that is situated within

broader arguments about pornification (Paul 2005), in particular the sexualisation or pornification of young girls (Hasinoff 2014; Karaian 2012; Ringrose et al. 2013).

As discussed above, sexualisation has no clear definition (Egan & Hawkes 2008), but a key tenet of the sexualisation discourse is that 'sexually explicit popular culture is linked to a range of problematised sexualised behaviours by girls and young women, body-image disorders and low self-esteem…and the sexual abuse of girls and women' (Baird 2013, p. 652). With respect to sexting, concerns have emerged that young women are producing sexualised images as a result of pressure from sexualised media (Grisso & Weiss, 2005; Thiel-Stern, 2007) which can be located against a backdrop of observations about girls' 'imitat[ion] of sexualized media' (Lamb & Peterson 2012: 708). Hasinoff (2013, p. 105) argues that sexting has been explained as a product of sexualisation and that this has been accepted as 'common sense'. This commonsensical understanding of that link is exemplified by Bailey and Hanna's (2011, p. 407) unsubstantiated claim that due to the cultural sexualisation of girls that promotes sexual self-representation, '[i]t is perhaps surprising that the percentage of young peoples and teens who sext is so low'. Zalewski makes a similar argument by drawing an explicit link between youth sexting and sexualised media:

> Popular teen idols are frequently in the news and all over the Internet for leaked 'sexy' photos. It should come as no surprise that teenage girls are getting mixed messages about their sexual expression (2010, p. 3).

These explanations present a limited cause and effect understanding of the impetus for sexting. Indeed concerns surrounding 'focus[es] on girls' supposedly bad choices and diverts attention away from perpetrators of privacy violations and detracts from

productive discussion about the role of sexual ethics, consent and pleasure in youth sexual practices (Hasinoff 2014, p. 113).

Young people's experiences of consensual sexting

Despite these concerns, qualitative research focused on young people's experiences and attitudes towards sexting has demonstrated that there are positive and non-harmful aspects of consensual sexting. Key discourses on sexting are dominated by adult voices and definitions (Lee et al. 2013), and in light of this, researchers have explored young people's understandings and experiences of sexting to paint a more nuanced picture of these practices and obtain young people's perspectives on their own experiences. The following section examines five key research studies in education, childhood, criminology and media studies that have conducted focus groups, interviews and surveys with young people in Australia, US and the United Kingdom (Albury et al. 2013; Bond 2010; Crofts et al. 2014; Lippman & Campbell 2014; Ringrose et al. 2013; Walker, Sanci-Temple & Smith 2013). These studies have brought to the fore detailed accounts of sexting practices from the perspectives of young people.

A common finding among these studies was that sexting practices (as experienced by young people) were highly varied (Albury et al. 2013; Ringrose et al. 2013; Walker, Sanci & Temple-Smith 2013). This was not just in terms of the technological mechanisms and platforms used to sext[6] but the range of practices that could be defined as sexting and the nuanced ways in which young people viewed these

[6] For example, Ringrose et al. (2013) observed that sexting practices spanned a number of mechanisms and platforms including Facebook and Blackberry Messaging.

practices. For example, Ringrose et al.'s (2012) focus groups in two inner-city schools in London found that:

> …a great diversity of experiences, which contradicts any easy assumptions about sexting as a singular phenomenon. Nor can it simply be described in absolute terms – wanted vs. unwanted sexual activity, deliberate vs. accidental exposure – for much of young people's engagement with sexual messages and images lies in the ambiguous and grey zone (2012, p. ii)

While this particular observation was not replicated across all studies, there was replication of the underpinning point about variance and complexity in sexting practices including sexting as a form of humour and pleasure when consensual.

These research studies have highlighted that young people sext for a number of reasons, including pleasure and fun. For example, interview and focus group participants reported that (among other motivations) young people sexted for the purposes of flirtation, bonding, relieving boredom, gaining popularity and joking, and that they did so within friendships and sexual relationships (Albury & Crawford 2013; Bond 2010; Crofts et al. 2014). Additionally, found young people discussed an informal set of ethics around using sexual images (Albury et al. 2013). However, other researchers (Ringrose et al. 2013; Walker, Sanci & Temple-Smith 2013; Lippman & Campbell 2014) have found that some sexting can occur outside these ethical boundaries; this includes coerced and non-consensual sexting, which will be explored later in this chapter.

Sexting through the lens of mediated communication

In light of these positive aspects of consensual sexting, media scholar Hasinoff (2013, p. 455) argues that sexting needs to be re-framed as 'media production'; this is an approach that emphasises the creation of sexual content as a form of

authorship. She (2013, p. 458) argues that new media offers young women an alternate form of self-expression in terms of their communication and is thus a tool through which girls can assert their agency and experience pleasure. This approach avoids constructing sexting as a risky or dangerous practice for women, instead framing it as a medium for them to explore sexual pleasure. Technology as a facilitator of sexual engagement was addressed early in the literature on young people's use of mobile phones. For example, Bond's (2010, p 7), research into mobile phones as a tool for young Australians' (aged 11 to 17 years) sexual interactions found that mobile phones play a functional role in young people's sexual engagements. The participants' use of phones facilitated a mediated performance of courtship such as asking people out or ending relationships. Bond (2010) focuses on the mobile phone as a courtship device and questions whether or not these devices represent a modern day 'bike shed'. Bond notes:

> The notion of the *bike shed* offers a conceptual metaphor in understanding the young people's use of space – virtual space – afforded by the mobile phone in their developing sexual and romantic relationships, just as 'behind-the-bike-shed' facilitated such explorative, albeit often fumbling, adventures into young people's developing relationships previously (2010, p. 1).

However, Bond (2010, p. 13) concludes that the young people in her study use technologies as a tool for managing intimate relationships but this can be both positive and negative. She notes that '[t]he mobile phone is imperative in the formation, maintenance and manipulation of close, intimate relationships'. The double-edged sword of technology and sexuality is also addressed by Ringrose and Eriksson Barajas (2011, p. 124) who argue that prefiguring young people as inherently adept and using technology for sexual communication is problematic.

They argue:

> …we need to attend to the psychosocial complexity of how sexualized pleasures and dangers unfold online.

As such, these scholars highlight that, consensual sexting cannot simply be perceived through the lens of pleasure, particularly considering the gendered backdrop against which these practices play out.

Consensual sexting and gendered double standards

While the above scholars have found that there are positive elements of consensual youth sexting, they have also found that consensual youth sexting was interpreted differently when girls and boys engaged in these practices. Focus group studies reveal that young women are predominantly the subjects of sexted images (NCTPTUP 2008; Ringrose et al. 2013; Walker, Sanci & Temple Smith 2013). Additionally, these studies have revealed that young people read sexual images in gendered ways and that these gendered readings include double standards for young men and women (Albury et al. 2013; Lippman & Campbell 2014; Ringrose et al. 2013). For example, Albury et al.'s (2013, p. 10) focus groups with Australian high school students found that students and adults interpret young women's naked or semi-naked images through different lenses. For example, participants in their study noted that:

> Female 1: …it's like if a girl does anything in her underwear, it's immediately she's trying to get someone.
> She's trying to look provocative and sexy and stuff.
> Female 2: That's a gender equality issue.
> Female 1: Yeah. But if a guy does it it's hilarious and it's so funny (Albury et al. 2013, p. 10).

Similarly, Walker, Sanci & Temple Smith (2013, p. 700) found a gendered double standard in relation to sexting practices and reputation, whereby young men

engaging in the production and distribution of images were 'successfully masculine', yet young girls were labelled by participants as '"Slutty girls," "whores," "skanky little girls," or "just an idiot"' for engaging in this behaviour. Similar attitudes towards sexting and reputation were recorded in the Pew Survey:

> One older high school boy wrote: 'This is common only for girls with "slut" reputations. They do it to attract attention.' A middle school girl had a similar concern: 'I've been asked to send naked pics, but I think that's stupid. You can ruin your reputation. Sometimes I wonder how girls can send naked pics to a boy. I think it's gross. They're disrespecting themselves.' (Lenhart 2009, p. 9).

Lippman and Campbell affirm these findings by noting that that not only do double standards exist in relation to sexting, where young girls were both negatively judged for taking or sending images of themselves (called sluts) and resisting for not sexting (called prudes), but the context that produced the demand for these images remained un-interrogated by young people:

> According to these accounts, then, girls who send sexts are—to use some of our male participants' words—crazy, insecure, attention-seeking sluts with poor judgment. Nowhere in these responses did these participants stop to consider the ways in which forces external to the girls (including the boys themselves) might be contributing to girls' decisions to send sexts. Indeed, one of these boys even wrote 'I'm not going to stop it,' implying that on some level he enjoyed receiving sexts, even though he expressed no qualms about denigrating the girls who sent them (2014, p. 9).

Lippman & Campbell (2014, p. 11) also found that participants 'expressed concern that sending sexts might cause reputational damage'. This study demonstrates the importance of considering, reputation and shame when considering young girls' participation in consensual sexting and the consequences of non-consensual sexting.

Key themes that emerge from this broad literature base are cultural concerns around youth and sexuality and its expression in mediated spaces, in particular the vulnerabilities of young people to predators when they put themselves in these spaces. Additionally, this scholarship highlights that these risks and concerns cannot be disembodied from gender. The perception of these risks and dangers are challenged by research highlighting that consensual sexting can be experienced as a form of pleasure and play (Albury et al. 2013; Bond 2010), or even pursued as a risk taking activity (Crofts & Lee 2013). These discussions provide a conceptual framework for the following chapters that analyse the cases being prosecuted and try to understand the nature of the sexting practices being prosecuted, particularly whether the law is being used to intervene into consensual sexting and, by extension, regulating and punishing teen sexual agency.

An important aspect of the empirical literature on sexting discussed above is the recognition of the varied nature of sexting. The second section of this chapter shifts its focus to the literature on non-consensual sexting, this shift is clearly important as the distinction between consensual and non-consensual sexting as not been prominent from in the literature or the media (Salter, Crofts & Lee 2013). The literature on non-consensual sexting raises a different range of conceptual issues than for consensual sexting, including notions of consent, gendered harm, gendered violence and coercion.

Non-consensual sexting: Gendered violence

As demonstrated above, a significant portion of the literature on consensual sexting has focused on sexting as an expression of youth sexuality. Conversely, scholars

have identified that non-consensual sexting (whether it be non-consensual production or distribution of images, or threats to disseminate images) is a specific type of sexting that warrants both separation and its own analysis. However, the distinction between consensual sexting for pleasure or fun and non-consensual sexting for the purposes of violence or harassment has not been clear (Powell 2010a; Slane 2010). For example, Salter, Crofts and Lee observe that:

> In the course of questioning whether sexting should be prosecuted under child pornography legislation, academic and media commentary has at times failed to distinguish adequately the various forms of behaviour, which may be labelled as sexting. Sexting may be seen to cover consensual image taking and sharing, as well as consensual taking and non-consensual sharing of images (2013, p. 302).

Therefore, this section draws upon the empirical research that focuses on young women's experiences of and service providers observations of coerced, pressured and non-consensual sexting and the contextualisation of these experiences as gendered (Ringrose et al. 2013) and intimate partner violence (Powell & Henry 2014).

Demarcating consent is a critical issue in relation to youth sexting and the law, as evident from *Miller* and *Alpert*; it remains unclear as to whether the law is making these distinctions. But this distinction has also been a longstanding subject of feminist scholars' examination of the law, which has identified the difficulties in making those distinctions due to the deep-seated cultural myths that link non-consensual sex acts to women and girls' behaviour. The feminist scholarship and empirical and theoretical literature on non-consensual sexting in the next section provides a conceptual framework for the analysis of prosecuted cases and the

implementation of alternative frameworks that criminalise consensual sexting and non-consensual sexting and regulate sexting as intimate partner violence.

Problematising the distinction between sexual consent and non-consent: Patriarchy, sexual scripts, rape myths and law

Demarcating consensual and non-consensual sexual behaviour has been a key part of the feminist project within and beyond criminology, particularly in relation to rape and sexual assault. The following section canvasses some of the key feminist discourse on distinguishing consent from non-consent. It begins by focusing on early radical feminist concerns about women's ability to consent within the context of patriarchy, then moves on to discussions around sexual scripts, rape myths and ultimately the impact of these structural and cultural issues in the distinction between consent and non-consent in law.

Feminist scholars have often problematised the differentiation of consent from non-consent. This was brought to the fore by early radical feminists who discussed consent within the context of patriarchy, and argued within this context that women are unable to exercise sexual agency and consent (Brownmiller 1975; Dworkin 1981; Estrich 1987; Mackinnon 1989). These radical positions have been criticised as essentialist (Moore & Reynolds 2004, p. 32) and exclusionary (Naffine 1996), but they bought into sharp relief issues with differentiating between consent and non-consent.

Historically, it has been difficult to distinguish non-consensual sex acts from consensual sex acts due to the inherent links made between sexual violence and

women's behaviour. Indeed, early victimologists drew links between the behaviour and characteristics of victims and their assaults (Amir 1971; von Hentig 1948). This is exemplified in the well-known but highly critiqued work of victimologist Amir (1971, p. 155) whose study of rape asserted that victims precipitated rape by both acts of commission (e.g. agreeing to sex then withdrawing consent) or acts of omission (e.g. failing to protect oneself by walking alone at night). Amir (1971, p. 155) argued that when these acts of commission or omission are exhibited, 'the victim becomes functionally responsible for the offense by entering upon and following a course that will provoke some males to commit crimes'. While Amir's work has been widely criticised by feminists as a form of blatant victim blaming (Russell 1975), feminist scholars have also observed that these attitudes towards women's role in sexual violence are so pervasive that they have become entrenched rape myths.

In the late 1970s and early 1980s, feminist scholars began to discuss the existence of persistent and (false) beliefs and attitudes towards rape (Brownmiller 1975; Burt 1980). Burt (1980) was one of the first scholars to clearly articulate rape myths[7] and discuss their impact. Scholars examining these myths have highlighted how they are underpinned by assumptions of precipitation and provocation. For example, Scully (1990, p. 88) separated rape myths into four categories: (1) victim (female) precipitation, (2) victim responsibility, (3) victim participation and (4) rape as revenge. As such, these myths position rape as a dynamic act that involves and is predicated by the victim; it is seen as essentially a two-part process in which the victim shares responsibility. Despite feminist critique of these myths, they have been evidenced in

[7] Burt defined rape myths as including but not limited to, '"only bad girls get raped"; "any healthy woman can resist a rapist if she really wants to"; "women ask for it"; "women 'cry rape' only when they've been jilted or have something to cover up"; "rapists are sex-starved, insane, or both"' (1980, p. 217).

social and legal discourses. For example, the 2013 *National Community Attitudes towards Violence Against Women Survey* revealed an 'increase in Australians agreeing that rape results from men not being able to control their need for sex, from 3 in 10 in 2009 to more than 4 in 10 in 2013' (VicHealth 2014, p. 6). These attitudes have also been replicated in research on young people. For example, Xenos and Smith's (2001, p. 1113) questionnaire study of 608 Australian adolescents reveals that a large portion of the high school and university student participants reported 'unfavourable attitudes towards rape victims, perceived victims as being responsible for the rape, and perceived the victims as contributing to their assault'. Additionally, despite the legislative reform around consent (as discussed above) in Victoria, the prevalence of rape myths has still been reported (Powell et al. 2013).

Others have discussed the difficulties in distinguishing consensual from non-consensual sex acts within the context of sexual scripts or seduction scripts (Frith & Kitzinger 1997). These scripts enshrine culturally accepted practices of men's persistence (Anderson & Doherty 2008, p.6) where a woman's 'no' is a starting point from which men negotiate, thereby normalising coercion as part of the process of 'seduction' (Frith & Kitzinger 1997; Powell 2010b). Powell (2010b, p. 10) argues that these gendered expectations frame men's and boys' sexuality as raging and uncontrollable and girls as seeking emotional connection. For example, research has found that young people hold problematic attitudes towards consent and coercion in relationships. Including: accepting the use of pressure or coercion to obtain sex (Powell 2007), accepting physical assault as a response to infidelity and acknowledging that the rules of consent are different once two people have engaged in a sexual relationship (Office of the Status for Women 2003). Moreover, feminists

have long argued that these scripts; myths and cultural understandings of women's behaviour underpin the legal distinction between sexual consent and non-consent.

According to Larcombe, a key part of the feminist focus on law has been:

> …revising the story of sexual violence told by the criminal justice system: when and where sexual violence occurs, who perpetrates it, who it is perpetrated against. The feminist aim has been to reform law to ensure that its definition of rape is reflective of women's experiences, and inclusive of the circumstances and contexts in which sexual violence occurs most often (2011, p. 36)

While Larcombe is speaking specifically about rape and sexual assault, feminist scholars are alert to the legal fictions that are perpetuated around sexual violence, including how it is defined and demarcated and the effects of implementing laws that make that distinction. In early feminist scholarship that Estrich (1987) has identified on sexual violence and the law, rape is interpreted by the criminal justice system and the community as an act committed by a stranger who uses physical violence and is perpetrated on a victim who will have physically (and visibly) tried to resist the attack; outside these parameters of this 'real rape' is sex. Feminist scholars have argued that that this construction de-legitimates women's experiences of sexual violence that do not confirm to this stereotype and 'effectively bars many sexually assaulted women from being acknowledged as victims of rape' (Temkin & Krahé 2008, p. 50).

A core facet of improving the legal fiction around sexual violence is the crucial yet problematic concept of consent and the role it plays in distinguishing sex from sexual violence. In Australia, the legislative definition of consent has gone through three

shifts, each linked to the definition of sexual assault (Fileborn 2011).[8] Prior to law reform, rape was considered a property offence against a father or a husband (Heath 2005) and a woman's violation of consent was an irrelevant consideration (Fileborn 2011). Rape has now been further re-conceptualised as a violation of bodily autonomy and consent is now defined as 'free agreement' and part of a 'communicative' model of consent (Cowling 1998; Pineau 1996) that should be demonstrated by both parties (Fileborn 2011, p. 7).

Feminist criminologists have highlighted that, despite the evolution of the term consent within law, operationalisation of rape law demonstrates a varied understanding of sexual consent. For example, Lievore's (2005) research on prosecutorial decision-making in Australian rape cases reveals that stranger-rape cases were significantly more likely to proceed to prosecution. Additionally, researchers have found that the likelihood of reporting an offence and conviction for cases is greatly increased in cases that involve weapons and physical injuries (Edwards & Heenan 1994; Heath 2005; Heenan & McKelvie 1997; Naffine 1994; VLRC 2003, pp. 320–321). Additionally, conviction rates are lower where victims had consumed alcohol (Briody 2002; Edwards & Heenan 1994;). For example, in Powell et al.'s (2013, p. 476) analysis of 10 Victorian rape trials, they found that the communicative model of consent allows prosecutors to focus on whether or not the accused knew the victim-complainant was consenting. They also report that 'discourses of victim blaming, sexualised ideals of femininity and stereotypical perceptions of what constitutes real rape, and a real rape victim, remain a persistent feature of Victorian rape trials, even after the recent reforms' (Powell et al. 2013, p.

[8] It is important to note that these legislative shifts are not a constant across jurisdictions and are specific to the region in which they are located.

476). These studies illustrate the persistence of assumptions that non-consensual sex is precipitated, provoked or brought upon by women, and the focus on the victims rather than the offenders.

In relation to this research, feminist interrogation of consent and non-consent is particularly relevant to the application of law to youth sexting. As the two cases that opened this chapter illustrate, the issues of consent to the creation and distribution of an image are complex and consent at the point of making an image is not relevant to the non-consensual dissemination of that image. In essence, these cases involve a sexual expression that was consensual (either self-producing the image and retaining it or self-producing the image and sharing it with consent) and then having that image non-consensually disseminated.

Legislative reforms around sexting, including the criminalisation of sexting as a specific offence (which will be discussed in Chapter Eight), have demonstrated different conceptualisations of the legal wrong in youth sexting. Some jurisdictions criminalise both consensual and non-consensual sexting and others criminalise only non-consensual sexting. The importance that feminist scholars have historically placed on distinguishing the consensual from the non-consensual and the problems with that separation, including sustained understandings about women's provocation, are increasingly important to frame the analysis of these reforms in Chapter Eight. In the following section, I draw upon the theoretical and empirical literature that focuses on non-consensual sexting and scholarly discussions around non-consensual sexting, which centre on gender, culpability and violence.

Non-consensual sexting: Pressure, coercion and non-consent

While empirical research has indicated that sexting can be consensual and used for the purposes of flirtation, bonding, relieving boredom, gaining popularity and joking, and can be done so within friendships and sexual relationships (Bond 2010; Albury & Crawford 2013; Crofts et al. 2013), it has also indicated that young people's experiences of sexting can be non-consensual and coerced. The following section draws from empirical research on young people's experiences of non-consensual sexting as well as the work of scholars across criminology and media studies who contextualise non-consensual sexting in terms of gendered inequalities and gendered and intimate partner violence.

Focus groups and interviews with young people have revealed that young girls feel pressured to sext (Walker, Sanci & Temple Smith 2013; Ringrose et al. 2013). The young girls' experiences illustrated that this pressure is a grey area between consensual and non-consensual sexting. Ringrose et al. (2013) discuss this complex reality around consent and pressure in sexting, noting that young women are in a position of negotiating and balancing pressure to produce images alongside their own desires to engage in the production and receipt of the images. Importantly, Ringrose et al. (2013, p. 7) note that sexting may begin with the desire for sexual pleasure but the interactions themselves are 'coercive, linked to harassment, bullying and even violence'. Drawing on their questionnaire data, Lippman and Campbell (2014, p. 9) affirm this finding from Ringrose et al. (2013) and described this pressure as 'the undesirable price [girls] had to pay for a desirable relationship' (Lippmann & Campbell 2014, p. 9). Further, Lippman & Campbell (2014, p. 11) link this pressure with 'social injunctive norms' where young girls feel that there is a

social cost to not sexting (i.e., that they would not receive or sustain male attention). These studies reflect arguments from feminist researchers that women's experiences of violence cannot be recognised as either violent or not-violent, rather they fall on a continuum that ranges from 'choice to pressure to coercion to force' (Kelly 1987, p. 54). Beyond the context of pressure, scholars have also discussed non-consensual sexting as gendered violence and intimate partner violence; these discussions follow.

The non-consensual dissemination of images has also been identified in survey studies aimed at examining the prevalence of sexting. For example, the Pew Internet Survey in the US of a nationally representative sample (800) of 12 to 17 year olds found that 'exchanges between partners that are shared with others outside the relationship' was a key scenario in their survey (Lenhart 2009, p. 2). Another oft-cited study in the US is the *National Campaign to Prevent Teen and Unplanned Pregnancy* (NCTPTUP 2008) study, which surveyed 653 teens (aged 13 to 19 years) and 627 young adults (aged 20 to 26 years) demonstrates that non-consensual distribution of images was experienced by a large portion of their sample. They found that '25% of teen girls and 33% of teen boys say they have had nude or semi-nude images – originally meant for someone else – shared with them' (NCTPTUP 2008, p. 1). These surveys indicate that relationships and the non-consensual exchange of images are part of the broader spectrum of youth sexting practices. This distinction is demonstrated in Wolak and Finkelhor's (2011, p. 7) analysis of 550 cases in the US involving young people producing or distributing images of other young people, where they found that the non-consensual distribution of images was a distinctive feature. Wolak and Finkelhor specifically note that the non-consensual

behaviours in these cases were particularly egregious and potentially prosecutable outside of child pornography law:

> Even cases with only juveniles can be serious… our typology demonstrates that there are cases featuring minors alone as producers and recipients of images that have very abusive and exploitative dimensions. Some youth used images to blackmail other youth. Some youth sexually abused and photographed younger or vulnerable youth. Some used images to tarnish reputations. Not all episodes among minors are benign. Some entail criminal behavior that would land youth in the juvenile justice system even in the absence of images potentially classifiable as child pornography (2011, p. 7)

Young people's experiences of non-consensual sexting and other image-based sexual harassment have been recorded in Australia as well.

Feminist scholar Powell (2010, p. 77) focuses on the 'unauthorised taking and distribution of images of an otherwise consensual sexual encounter' and recognising how victims are harmed by this behaviour. Powell (2010, p. 77) notes that images are used against female victims to harm humiliate and intimidate and that the 'distribution is itself a violation of an individual's sexual autonomy'. Bluett-Boyd et al.'s (2013) Australian research into the role of emerging technologies on young people's experiences of sexual violence (which they refer to as technology-assisted sexual violence) affirms and extends upon Powell's (2010) argument. Bluett-Boyd et al.'s (2013) interviews with criminal justice agencies, judiciary, education and youth policy organisations, youth advocacy services and sexual assault services found that there were inherent links between emerging technology and sexual violence. Technology was used prior to sexual violence for the purposes of grooming or contact, during acts of sexual violence by recording or distributing the act, and post sexual violence in the form of threats to distribute recordings, distribution of recordings or as a way of contacting the victim (Bluett-Boyd et al. 2013, pp. ix–x).

While these studies are not specifically focused on non-consensual sexting they highlight the links between information and communication technologies' and sexual or gendered violence and the new legal challenges of prosecuting and responding to these practices.

In light of these experiences, feminist scholars have examined the use of images to harm, harass and humiliate women through the lens of gendered violence (Powell 2010a; Walker, Sanci & Temple Smith 2013; Powell 2013; Ringrose et al. 2013). For example, Walker, Sanci and Temple Smith (2013, p. 700) argue that 'media technology and social networking sites [being] used as vehicles in the perpetration of gendered sexual violence targeting women'. These scholars have made this link by focusing on the variety of ways in which images are used to harm women and girls.

Further extending the violence against women framework, it has been argued that the use of digital images against young women constitutes intimate partner violence (Citron & Franks 2014; Dimond, Fiesler, & Bruckman 2011; Hand, Chung & Peters 2009; Powell 2010a; Southworth et al. 2007; Powell & Henry 2014; Salter, Crofts & Lee 2013). The link between technology and intimate partner violence is well established. Researchers have found that abusers use spyware, tracking devices and visual surveillance to control and monitor their current and former partners (Kee 2005). Indeed, Powell & Henry (2014) found that non-consensual sexting within the context of intimate relationships is a growing issue for women and girls. In their interviews with 13 agencies including women's services and legal sectors, it was reported that information and communication technologies were increasingly becoming included in women's experiences of intimate partner of family violence,

either used as the primary tool for violence or as a way to further extend sexualised violence against women (Powell & Henry 2014). Their research demonstrated that this could manifest in myriad ways including:

> Pressure to produce sexual imagery, blackmail (threats to disseminate images if where an ex-partner or a perpetrator of sexual assault threatens to release images if women do not remain silent about the violence, Harassment or Cyberstalking (Powell & Henry 2014, p.122)

Similarly in the US, legal scholars Danielle Citron and Anne Franks –writing on revenge pornography[9] and the law-note that:

> Revenge porn is often a form of domestic violence. Frequently, the intimate images are themselves the result of an abuser's coercion of a reluctant partner. In numerous cases, abusers have threatened to disclose intimate images of their partners when victims attempt to leave the relationship. Abusers use the threat of disclosure to keep their partners under their control, making good on the threat once their partners find the courage to leave (Citron & Franks 2014, p. 352).

Naming information and communication technologies as tools of intimate partner violence is crucial considering the recognition that non-physical techniques of intimate partner violence and family violence are just as impactful on women and children as physical violence (Hand, Chung & Peters 2009, p. 2).

Despite this empirical literature characterising non-consensual sexting as gendered and intimate partner violence, in reviewing the legislative context for interpreting non-consensual sexting, (unauthorised sexual images), Powell argues that there is an oft-ignored link between these non-consensual acts and sexual violence:

> There is arguably a false distinction currently operating in law, policy and public debates, between unauthorised sexual imagery as distinct from sexual

[9] The publication of non-consensual images on pornography websites, specifically dedicated to stolen images of women.

> violence…This false distinction between unauthorised sexual imagery and sexual violence fails to recognise the full impact of such behaviours on their victims, in addition to the original assault (2010, p. 80).

The de-contextualisation of sexual or gendered harassment has also been observed in other panics surrounding information and communication technologies, youth and harassment. Thiel-Stern's analysis of the media panic surrounding MySpace and young people found that sexual and gendered harassment of girls online was referred to as cyberbullying, noting that:

> while the majority of the stories about cyberbullies used gender neutral language ("teens", "adolescents") to portray both bullies and their victims, the examples used in the stories overwhelming described girls being harassed by boys. Moreover, many of these stories were about boys sexually harassing girls online which has a quite different meaning from cyberbullying (2009, p. 33).

Salter, Crofts and Lee (2013) extend on this discussion of the lack of recognition of gendered violence, noting that the gendered nature of coerced and non-consensual sexting needs to be acknowledged. They argue not acknowledging the gendered nature of these offences and the role of the offender can result in rendering criminal law 'implicit in obscuring the reproduction of gender inequities that have a broader social aetiology' (Salter, Crofts & Lee 2013, p. 312).

However, Ringrose et al. argue that despite the gendered nature of this practice and its double standards, labelling this a 'girl problem' is detrimental because it can obfuscate both young men's culpability and their victimisation:

> It is important that safety initiatives provide gender sensitive support for girls without treating sexting as a girl-only or girl-initiated problem; the role, responsibility and experiences of boys in relation to sexting also deserve more research and practical attention (2013, p. 7).

Additionally, framing sexting as a ‘girl’ and ‘boy’ problem also leaves out discussions of lesbian, gay, bisexual, transgender, intersex and questioning teenagers and how they use and interpret sexting practices. However, the empirical literature on youth sexting has identified that this is predominantly experienced by girls.

These findings alert us to the existence and experience of non-consensual sexting and present it against a backdrop of existing gender double standards and gendered violence conducted predominantly by men against women with whom they have or have had a relationship. These arguments from within the predominantly feminist scholarship provide a framework for examining cases being prosecuted as gendered violence and alert us to the more gendered dimensions of non-consensual sexting.

After exploring these conceptual underpinnings and the empirical literature on youth sexting, I now return to sexting as legal issue. In the following chapter I outline the legal landscape within which sexting and the law is situated, focusing specifically on child pornography law and sex offender registration. In addition, the following chapter examines key debates within legal and criminological scholarship on the application of child pornography law to youth sexting and debates on the types of sexting which should or should not be criminalised.

Chapter Four: Child pornography law, sex offender registration and sexting

In the wake of cases such as *Miller* and *Alpert*, reports emerged in Victoria that youth sexting had been classified as child pornography and that young people have had to register as sex offenders as a result of prosecution (Brady 2011a), it is important to provide the legislative context for these concerns that are focused on the application of child pornography to youth sexting. The current legislative framework that encompasses child pornography images in Victoria and the US comprise State and Commonwealth or Federal child pornography offences and sex offender registration. This chapter firstly maps this legislative framework for sexting by outlining child pornography law and sex offender registration legislation in the four research sites in this thesis: Victoria (Australia) and Florida, Connecticut and Texas (US), with an additional focus on the ontology, themes and catalysts of this legislation.

Secondly, this chapter draws upon the emerging criminological and legal scholarship from Australia and the US that has discussed the key statutory provisions that enable the application of child pornography law to youth sexting practices. It also discusses the rationale behind these statutory provisions, drawing from Kimpel (2010), who opines that identifying the driving factors behind these laws facilitates a better understanding of their use as a response to youth sexting. This chapter then draws from the same scholarship to canvass the criticisms of applying child pornography laws to youth sexting practices. This chapter's examination of the legislative complexities that constitute the legal landscape for youth sexting in Australia and the US provides the framework to analyse legal practitioners and

offenders' accounts of negotiating child pornography law, at the point of charge, prosecution, defence, sentencing and post-sentencing.

Child pornography legislation: Victoria, Florida, Connecticut and Texas

In Australia, the first child pornography legislation emerged in the mid-1970s and was used to classify content as child pornography for eventual sale to adult consumers (Sullivan 1997). In 1973 to 1975, child pornography and the state's role in restricting access to child pornography were framed as an issue of civil liberties. In public policy, there was a clear sense that 'the state had no legitimate right to interfere with the freedom of adults to buy and read whatever they wished' (Sullivan 1997, p. 167). But in 1977, there was a decided shift in the framing of this issue after public outrage over the open sale of this material after US child sexual abuse experts claimed that a preponderance of child pornography was being sold in Sydney (Sullivan 1997, p. 167). In Victoria, child pornography laws were first introduced in 1977 (*Police Offences [Child Pornography] Act 1977* (Vic)) and included: providing obscene material (s. 168A); keeping child pornography on premises (s. 168B(A)); printing, recording (s. 168B(B)), selling or publishing child pornography (s. 168B(C)); and procuring a minor for its production (s. 168C).

In Victoria, child pornography is currently criminalised by state and Commonwealth legislation (*Crimes Act 1958* (Vic) s .67A) and *Criminal Code Act 1995* (Cwth) s. 474.19; 474.20). These statutes apply simultaneously, and an individual can be charged with both State and Commonwealth offences for the one action. These relatively new child pornography laws have undergone a variety of changes since they were first implemented in the 1970s (*Police Offences [Child Pornography] Act 1977* (Vic)), and these changes have been reflexive to changes in the consumption

of child pornography. The trade and distribution of child pornography has transformed from being hard to find, hard to reproduce and few images, to a global industry that allows for content to be accessed easily, relatively anonymously and in great numbers (Jenkins 2001; Taylor, Holland & Quayle, 2001; Taylor & Quayle 2003; Krone 2005). As such, this radical change in the consumption of child pornography prompted Federal legislators to implement new legislation targeting the dissemination of child pornography online. For example, when the *Crimes Legislation Amendment (Telecommunication Offences & Other Measures) Bill (No. 2) 2004* was introduced to Australian Parliament, Bruce Baird Member for Cook noted:

> The other aspect concerns the Internet child pornography and child abuse material offences. These are a significant step, with law enforcement agencies estimating that around 85 per cent of child pornography seized in Australia is distributed via the Internet. We have seen cases where a significant amount of pornography that has been downloaded from the Net onto CDs has been seized. This new offence carries a prison term of between one and 10 years, making it consistent Australia wide. Currently, an array of state and territory child pornography offences are used to prosecute these people, so this bill brings these offences into line (Commonwealth of Australia 2004, p. 32503)

As such, both the *Criminal Code Act 1995 (Cwth)* (s.474.19; s.474.20) and the *Classification Enforcement Act 1995 (Vic) (s.57A*) focus on the transmission of child pornography using carriage services such as the internet, mobile phones, telephones or the postal service.

In Australia, definitions of child pornography vary between jurisdictions, yet all are underpinned by a broad interpretation of child pornography (Griffith & Simon 2008). For example, Section 67A of the *Crimes Act 1958* (Vic) provides that that the production and distribution of child pornography is defined as:

> A film, photograph, publication or computer game that describes or depicts a person who is, or appears to be, a minor engaging in sexual activity or depicted in an indecent sexual manner or context (*Crimes Act 1958* (Vic) s. 67A)

The terminology used in Victorian legislation, such as 'indecent sexual manner or context', is both broad and subjective because the legislation does not indicate what constitutes 'a sexual manner'. Terms such as 'appears to be', 'implied' and 'sexual pose' demonstrate the view that the scope for child pornography material is not narrowly fixed and the definition of child pornography can, therefore, encapsulate a wide range of material, including images that don't feature actual children[10]. For example, jurisdictions either expressly include computer-generated content in the definition[11] or have definitions of child pornography broad enough to include such content (Warner 2010), as is the case in Victoria.

Broad definitions of child pornography endure beyond Australian borders and are characteristic of child pornography law in English-speaking Western countries (Kleinhans 2004). For example, the US Supreme Court created constitutional definitions and set definitional boundaries for each state; child pornography definitions rely on statutory decisions (Sweeny 2011). Not only does this allow for a variation of definitions in each US state (Arcabascio 2009), it also allows scope to increase with prosecutors enforcing these limits, leading Adler (2001, p. 235) to the conclusion that 'there is a sense of boundlessness in child pornography law' and Hamilton (2012, p. 1680) to argue that this (speaking on US child pornography

[10] For example, the NSW *Crimes Act 1900* s. 91FA, 91FB states that child pornography can be material that depicts someone who appears to be under the age of 16.

[11] *NSW Crimes Act* (1900 s.91FA) defines child abuse material as includes any film, printed matter, data or any other thing of any kind (including any computer image or other depiction)

statutes) constitutes ‘net widening’, which constitutes the unnecessary inclusion of ‘low-risk individuals and relatively harmless behaviors…within…punitive regime[s]’.

In the three US research sites in this project (Florida, Connecticut and Texas); child pornography statutes share a number of similarities with Victoria. Their definitions of child pornography use the same broad language and encapsulate any image that features a child[12] in sexual conduct. The definition of child pornography is relatively uniform across each jurisdiction and exemplified in Florida’s definition:

> Sexual conduct means actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, or sadomasochistic abuse; actual lewd exhibition of the genitals; actual physical contact with a person’s clothed or unclothed genitals, pubic area, buttocks, or, if such person is a female, breast with the intent to arouse or gratify the sexual desire of either party; or any act or conduct which constitutes sexual battery or simulates that sexual battery is being or will be committed. A mother’s breastfeeding of her baby does not under any circumstance constitute "sexual conduct.”(*Florida Statute* § 847.001 [16])

The Texas and Connecticut statutes vary only slightly with respect to defining what portions of the body and the context in which they are displayed constitutes child pornography:

> …Lewd exhibition of the genitals, the anus, or any portion of the female breast below the top of the areola (*Tex. Penal Code Ann*. § 43.25.)

> …lascivious exhibition of the genitals or pubic area of any person (*Conn. Gen. Stat.* § 53a-193[14E])

The language in all three statutes includes subjective terms that are similar to those in Victoria’s statutes, including ‘lewd exhibition’ (*Fla. Stat. Ann. §* 847.001 [16]); *Tex.*

[12] Both Florida and Texas define a child for the purposes of child pornography as someone under 18 (Fla. Stat. Ann. § 847.001(8); Tex. Penal Code Ann. § 43.26[a]), but Connecticut defines them as someone under the age of 16 (Conn. Gen. Stat. § 53a-193[13])

Penal Code Ann. § 43.25) and ‘lascivious exhibition’ (*Conn. Gen. St*at. § 53a-193[14E]).

Legal scholars have argued that the breadth of these definitions and their ability to encompass all images of minors engaged in sexual activity can be attributed to a number of intersecting motivations, including the perpetuation of the myth of youth sexual innocence (Adler 2001; Danay 2005; Ost 2002; as discussed in the previous chapter), community disgust over paedophilia and an urgency towards containing the growing problem of child pornography (Adler 2001, p. 212). For example Ost (2002, p. 436) posits:

> …the current law surrounding child pornography would seem to be a direct consequence both of the categorization of children as a vulnerable societal group in need of state protection from certain threats to their physical and psychological bodies, and of the perception of child pornography as material which maybe morally harmful to society.

Further, Adler (2001) and Danay (2005) argue that contemporary applications of child pornography law reflect cultural risk narratives of sexual abuse in youth sexuality (Ost 2002). Specifically, Adler (2001) argues that discourses of protection and risk are exemplified by expanding definitions of child pornography, which have become so broad as to encourage subjective interpretation. Hamilton (2012, p. 1680) refers to this as a ‘deontological perspective that judges all sexual images of children as immoral’. Danay (2005, p. 141) argues further that this results in the cultural condemnation of child abuse and child pornography that is ‘simultaneously reasonable and hysterical’. The clear issue addressed by Ost and others is the inability to distinguish between images of child nudity and pornography, and

understanding that child pornography is more complex than the simple statutory definition.

Concerns about the clarity and breadth of these definitions and the motivations for these laws were brought into sharp relief in a number of cultural moments where images of nude children that are not traditionally considered child pornography by prominent artists such as Bill Henson (Lee et al. 2013; Simpson 2011) and Robert Mapplethorpe (Rickey 1996) were confiscated or banned from galleries on suspicion of being child pornography.

The assumptions underpinning definitions of child pornography have also been examined in the understandings of child pornographers. Taylor and Quayle (2003), argue that one of the pervasive assumptions of child pornography use is that accessing this content is indicative of paedophilia or someone who had intentions towards committing a contact offence (Taylor & Quayle 2003). This is the subject of ongoing debate (Elliott, Brown & Kilcoyne 1995; Quayle et al. 2006)

In his seminal work on the dissemination of child pornography on online discussion boards, Jenkins (2001) shows that child pornography collectors self-identify as potential contact offenders, non-contact offenders, hobbyists and merely 'lookers'. While Jenkins (2001) notes that this self-assessment can be neither affirmed nor denied, his observations indicate the potential for different types of child pornography users with different motivations. As Taylor and Quayle (2003) argue, much of the data on child pornography offenders comes from incarcerated populations (some of whom have also committed contact offences) and yet 'evidence from the internet

would seem to suggest that there are many more people who fantasise about children and who use images (pornographic or erotic) to aid those sexual fantasies, but who never come to the attention of law enforcement' (Taylor & Quayle 2003, pp. 73–74). The link between contact offending and child pornography remains unclear (Williams 2004, p. 253), but despite this the link has been fortified (Williams 2004, p. 245). There is a perceived link between child pornography and contact offending that while not based on evidence has arguably the creation of the mandatory sex offender regime (Williams 2004).

The concern with broad statutory definitions of child pornography has consistently been that a number of images satisfy these definitions yet are not considered child pornography (Gillespie 2010). Youth sexting brings to bear these concerns from within legal scholarship. The breadth of definitions and the impetus to eradicate all material that is arousing to paedophiles culminates in the mislabelling of images of children and young people as child pornography. Additionally, concerns around labelling youth sexts as child pornography also extend to the labelling of youths sexted as child pornographers, particularly as child pornography offences carry non-custodial post-sentencing requirements including inclusion on sex offender registers. This is an administrative process determined by conviction rather than sentence and is not subject to judicial discretion in both the US and Australia. The following section, therefore, discusses the child pornography framework that has been the focus of much debate around sexting and the law, the post-sentencing scheme and sex offender registration. This section canvasses the key elements of sex offender registration in the four research sites and examines some of the key criminological debates on the assumptions underpinning this apparatus.

Sex Offender Registration: History, rationales and critiques

While sex offender registers had been established in the US by the mid-1990s and in the United Kingdom by 1997, the prospect of sex offender registers in Australia were first introduced by the Wood Royal Commission (Hinds & Daly 2000, p. 14) and first implemented in NSW in 2000 (*Child Protection [Offenders Registration] Act 2000* (NSW)). Since 2000, each Australian jurisdiction had created or amended sex offender registration acts (Vess et al. 2011, p. 405). Importantly, Australian Federal and State jurisdictions originally followed the United Kingdom model of registration that does not require law enforcement officials to notify the community of the whereabouts of sex offenders (community notification). While the majority of states have committed to this model, community notification has recently been implemented in Western Australia (*Community Protection [Offender Reporting] Act 2012* (WA)) after the murder of Sofia Rodriguez-Urrutia Shu in Perth 2006 (Spangolo 2011). After the well-publicised murder of Daniel Morcombe, community notification will be debated in the Northern Territory parliament in 2015 (Purtill & Dorsett 2014).

In Victoria, sex offender registration is part of a swathe of post-sentencing schemes aimed at monitoring and regulating sex offenders including: Sex Offenders Registration Act 2004 (Vic); *Serious Sex Offenders Monitoring Act 2005* (Vic); *Working with Children Act 2005* (Vic) and *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic).

Table 1: Victorian post-sentencing schemes

Community Supervision

Extended Supervision Order

• May be made in relation to sex offenders against children for up to 15 years
• Order subjects offender to conditions including reporting and restriction of movement post-release
• Court must be satisfied to a high degree of probability that offender is likely to commit sexual offence if released

Sex Offender Registration

• Required to advise police of personal details
• Reporting period differs dependant on seriousness of offending
• Prohibited from child related employment

Post Sentencing Detention

• Applies to offenders who are serving sentence of imprisonment for 'serious sexual offence'
• Application to be made in last six months of sentence – where court satisfied to a high degree of probability that offender is a serious danger to the community

Source: Adapted from the Sentencing Advisory Council 2006, p. 6

A range of offences are captured under the *Victorian Sex Offender Registration Act 200*4 (Vic) that are not specific to child pornography. In Victoria, all adults who have been convicted of sexual offences *against children* are automatically placed on the register; these offences may include rape, incest, sexual assault or possession of child pornography (RANZCP 2012, p. 2). These offences are classed as 1, 2 or 3 level offences the full list of offences in these categories are available in *Appendix A*. Every adult convicted of a child pornography offence is placed on the Sex Offenders Register for a minimum of eight years and a maximum of life[13], while a juvenile offender[14] may be placed on the register for a period of three years to seven and

[13] *Sex Offenders Registration Act 2004 (*Vic) highlights three different reporting time frames. Eight years if guilty of a single *Class 2* offence (s.34 [1a]); 15 years if guilty of a single *Class 1* offence (s.34 [1b][i]) two *Class 2* offences (S.34 [1b][ii]) and life time registration if guilty of two or more Class 1 & 2 offences (s.34 [1c][i]) three or more *Class 2* offences (s.34 [1c][iii]) or one offence under 47A of the *Crimes Act 1958* (Vic) persistent sexual abuse of a child under the age of 16.

[14] Under the age of 18

one-half years[15] (*Crimes Act 1914* (Vic); *Crimes Act 1958* (Vic)*; Sex Offenders Registration Act 2004* (Vic)).

Similar to Victoria, Florida, Connecticut and Texas, share the same convention with respect to judicial discretion and sex offender registration. Pursuant to the Federal Wetterling Crimes Against Children and Sexually Violent Offender Registration Act (*Federal Violent Crime Control and Law Enforcement Act* 1994 § 170101A), all three states require anyone convicted of a child pornography offence to register as a sex offender. This act, which passed in 1994 and was absorbed into the Federal Law Enforcement Act, mandated the implementation of mandatory states-wide sex offender registration for a range of child sex offences, including child pornography. Additionally, in 1996, the Jacob Wetterling Act was amended to mandate that the Sex Offenders Register be accessible by the public as a form of community notification.

The imagined paedophile

Comparative analysis on international sex offender registration has argued that across English-speaking Western countries, sex offender registration ultimately seeks to control a particularly type of offender: the stranger paedophile (Hinds & Daly 2000). At the core of these protective assumptions is the belief that sex offenders present a universal risk to the safety of vulnerable members of the community due to their high risk of recidivism (Petrunik, Murphy & Fedoroff 2008; Thomas 2012). This conceptualisation of the ideal sex offender registrant was made

[15] *Sex Offenders Registration Act 2004* (Vic) s.35(2). It is important to note that this reduced registration does apply if the individual has committed an offence as an adult in addition to an offence or offences committed as a child.

clear during parliamentary debates on the *Sex Offenders Registration Bill 2004*. The Honourable Ken Smith, the Liberal member for Bass, argued:

> Members should be aware that there are certain sexual offenders who are going to be registrable offenders. They will be required to register with the police and inform them of their personal details. That is important, but we have to make sure that that personal information is going to be detailed enough for these offenders to be tracked down, and so that they can be watched all the time. It will mean that police will be aware that these people are paedophiles. I am particularly concerned about the paedophile side of it, more so than sexual assault on adults, although that is also a very important issue. These people are predators; they are the scum of the earth. We should be in a position where we make sure that we put them out of commission, that we take them out of society; or if they want to live in society that we are watching every move they make. These people are predators who want to satisfy their sexual desires with children. They do not care about rules and regulations (Commonwealth of Australia 2004, p. 141)

Smith's words in support of the bill highlight that the perceived ideal sex offender registrant is the 'paedophile', despite registration applying to a number of offences, some of which are not associated with children (e.g. sexual assault) or not associated with contact offending against children (e.g. child pornography) (See *Appendix A*). Furthermore, Smith's description of paedophiles as 'predator[s]' and the 'scum of the earth' alert us to the perception of a specific type of offender, one who is risky, dangerous, pre-meditated and uncontrollable.

Unlike other offenders (e.g., repeat violent offenders), this group is deemed a long-term risk, and as such, the protection of the community, specifically children, from further offences is privileged over and above traditional legal principles of proportionality, as Freiberg (2010, p. 208) argues:

> The statutory and common law principles of proportionality have been gradually eroded in the face of the fear engendered by sex offenders, violent

offenders, mentally disordered offenders, arsonists, terrorists and others who frighten the public.

In Victoria, unlike other post-sentencing schemes such as post-sentencing detention (*Serious Sex Offenders Monitoring Act 2005* (Vic)) that require the convicted offender to undergo a risk assessment,[16] most offenders are not subject to a risk assessment review before registering as sex offenders (Sentencing Advisory Council 2006) and registration is mandatory and separate from a sentence. This assumption, that every sex offender poses a uniform risk has been a key criticism of the register in Victoria. In their examination of Australian registers, Vess et al. (2011) argue that the range of offences that require registration raises questions about the effectiveness of the Sex Offenders Register because these offences don't necessarily share 'etiology, risk of recurrence, consequences (e.g. the harm done to victims or to society at large)' (Vess et al. 2011, p. 417). Similar criticisms were evident in the Victorian Law Reform Commission's review of the register in 2012.

In 2011, the Attorney General asked the Victorian Law Reform Commission to conduct a review of the Sex Offender Register and its operation. The imperative for this review emerged after a report by the Ombudsman that alleged that Victoria Police did not inform the Department of Human Services of an estimated 376 registered sex offenders who had contact with at least one child (Ombudsman Victoria 2011, p. 7). This report raised concerns about the viability of the Sex Offender Register and the ability for key agencies (such as the police and the Department of Human Services) to manage its administration (VLRC 2012). Among

[16] Although the validity of these risk assessments and the requirement that the psychologists, psychiatrists and other health service professionals undertake these assessments have been criticised (Sullivan, Mullen & Pathe 2005)

the range of findings in the Victorian Law Reform Commission's' report was an issue with the premise that all sex offenders pose an equal risk and should be monitored uniformly:

> The Sex Offenders Registration Act proceeds on the assumption, however, that *all people convicted of the same offence pose the same risk of re-offending* and should have the same reporting obligations for the same period. The current undifferentiated method of selecting who should be registered solely by reference to the number and type of offences for which they have been convicted has led to a register which appears to have outstripped initial estimates of size. The Register, which is becoming i*ncreasingly expensive to maintain, contains a vast amount of information of variable usefulness*. It is time to assess whether the benefits of the scheme in its current form justify its escalating cost, especially as there are approximately 50 new registrants each month (VLRC 2012, p. xii; emphasis added)

Furthermore, the Victorian Law Reform Commission was critical of the sustainability of the Sex Offender Register under these conditions and recommended that, rather than mandatory registration, an individual assessment of risk was necessary to manage the program:

> The Commission considers that if registration were more closely aligned with the risk of harm to children, the rate of growth in numbers of registered offenders might be manageable... *Replacing automatic inclusion in the Register with a process that allows for individual assessment of the offender is highly likely to enhance the effectiveness* of a scheme that places a great strain on the resources of Victoria Police and the Department of Human Services without, as yet, any clear evidence of its success in reducing child sexual abuse (VLRC 2012, p. xiii).

Two years after this report, the Victorian Government proposed the *Sex Offenders Registration Amendment Bill 2014*. The proposed changes to the current Registration Act focused on strengthening reporting obligations, increasing the length of reporting requirements and clearly defining contact with a child. It did not

include a key recommendation from the Victorian Law Reform Commission (VLRC 2012). This Bill has been criticised by legal stakeholders such as Liberty Victoria who argue:

> The fundamental problem with the Bill is that it sees the Sex Offenders Register further move from being a proactive database to assist crime prevention to a responsive form of data collection. The Registry becomes a vast "warehouse" of information that may be used after a crime has been committed to assist with a prosecution, rather than providing a targeted and refined database of information that can be used to protect the community and prevent crimes from being committed in the first place (Liberty Victoria 2014, p. 1)

This bill is important because, not only does it illustrate the legislative context in which youth sexting is inadvertently situated, it illustrates the pervasiveness of the assumption that all sex offenders are inherently risky (regardless of the degree or context of their offence) and the need to continue the stringent risk averse and net-widening approach to regulating sex offenders. Despite Victoria having implemented legislation that disallows young people who have engaged in non-consensual sexting (which is explored in Chapter Eight) from having to register, the Bill (S*ex Offenders Registration Amendment Bill 2014*) has not focused on Victorian Law Reform Commission's recommendation that young people prosecuted for sexting should have the opportunity to have their registration reviewed after the implementation of Victoria's new defences to child pornography (VPLRC 2013, p. 162). Scholars have connected concerns about the risk of sex offenders and apparatus such as a sex offender register to the broader neo-liberal and risk-averse context within which they are situated. The following section explores theoretical analysis of sex offender registration as a form of risk aversion.

Registration, Risk aversion and actuarial justice

In this section I focus on how the contemporary iterations of sex offender registers occur within a broader neo-liberalistic context in which new penology and specifically how actuarial justice models have informed and sustained these risk management and administrative apparatus (Hebenton & Seddon 2009; Hinds & Daly 2000; Mythen 2014).

The actuarial justice, a concept pioneered by Feeley and Simon (1992) has four components (Robert 2005, pp.11-12). Firstly, it is premised upon the assumption that crime is 'normal', and beyond this, crime is to be expected and the role of the justice system is to anticipate, quantify and manage the risk of offending occurring. Secondly, individual offenders are perceived as sites of risk (and that risk is measured). Thirdly, actuarial justice attempts to manage offending rather than transform or rehabilitate offenders. Lastly, this model is focused on future risks rather than past or present risks.

This preference for risk management rather than rehabilitation, a clear shift from early penal modernism is exemplified by contemporary sex offender registries (Mythen 2014, p. 55) and treatment of sex offenders (Zedner 2003). Sex offender registers are a product of actuarial justice models emerging out of neo-liberalism (Hinds and Daly 2000), particularly because they place emphasis on monitoring and managing registrants rather than punishing (although it can and will be argued that the register in itself is a punishment) or treating registrants (Thomas 2012, p. 32).

This re-prioritisation is exemplified in the words of the Honourable Ms Buchanan, Member for Hastings, in the 2004 Victorian Parliamentary debates for the implementation of the register. Buchanan notes:

> …knowing that people out there, repeat offenders, are abusing other people in our society. It is easy to get emotional and to become vindictive, but this legislation strikes the right balance in that those who have served a sentence and are coming back out into society will be monitored in such a way that, while they will have some sense of liberty, they will never forget that they are being watched (Commonwealth of Australia 2004, p. 143).

As Buchanan explains, registration is not a vindictive punishment, but rather a form of monitoring that should be internalised by those being monitored. While Buchanan comments that the register is not about vindication (a claim that is refuted by scholars focusing on the impact of sex offender registration on the individual, which I discuss later), the clear issue here is about monitoring and managing risk.

However, while the link between registration and risk averse actuarial logics are clear as both have emerged in unison. Zedner (2003, p. 167) argues that make such a clear distinction between the treatment and perception of dangerous offenders (like sex offender) in new and old penology lacks veracity. She posits that 'the old assumptions continue to infect the new scientific calculations of probability…[t]he newly identified high-risk groups are remarkably similar in shape and composition to the old aggregate groups of dangerous individuals'. Furthermore, she argues that perceptions towards sex offenders exemplify pre-actuarial logics that offenders are dangerous and abnormal (Brown and Pratt 2000). Yet we see the sex offender register embrace that each sex offender is both inherently deviant and dangerous, but as a cohort they all present the same risk and are management with actuarial apparatuses.

In this overview of the key legislative framework, I have focused on the general discussions parameters and nature of child pornography law and sex offender registration laws. I now move from the general to the specific, to illustrate how aspects of these different statutes apply to youth sexting. Before examining the intersection between child pornography law and sexting, I give a brief overview of the empirical literature on the prevalence of sexting prosecution in Victoria and the US.

Prevalence of prosecution and types of sexting cases

There has been one comprehensive study on the prevalence of prosecution in the US and none in Australia. Wolak and Finkelhor's (2011) examination of cases from a national survey of law enforcement agencies found that between 2008 and 2009, there were 550 cases in the US involving young people prosecuted for the production and distribution of sexual content featuring other young people (sexting). They found that these cases involved two types of image distribution: aggravated[17] and experimental. Sixty-seven per cent of the cases involved aggravating incidents, 36% involved adults and youths, and 31% involved youths only (Wolak, Finkelhor & Mitchell 2012). However, there were also a number of cases that involved experimental behaviour. This study has demonstrated that while there are a number of occurrences where young people are prosecuted under child pornography law, little is known about how these cases have reached the courts and how legal practitioners negotiate the law in these instances.

[17] Aggravated distribution constitutes the contexts of adult-involved and youth-involved. The youth-involved category involves 'intent to harm' and 'reckless misuse' (Wolak & Finkelhor 2011, p. 1)

While this research in the US has given some insight into the prevalence of prosecution, there has yet to be such a comprehensive study in Victoria. The number of cases that have reached the Victorian courts remains unknown and media reports have been contradictory. In their analysis of sexting in the media, Crofts and Lee (2013) identified gross inconsistencies in media reports on the number of prosecutions in Victoria. When comparing articles from *The Age*, *Herald Sun* and *Daily Mail*, they found that in 2008 *The Age*[18] reported that 32 teenagers had been charged with child pornography offences after sexting without citing a source for this figure. In 2011, the *Herald Sun* reported that there were hundreds of these cases (yet they did not specify whether they have been successfully prosecuted) and in 2012, the *Herald Sun* contradicted this figure by stating that only two young men had been successfully charged under child pornography laws. These figures have been recycled by media scholars. For example, in Lumby and Funnell's discussion of sexting as a moral panic they state:

> A total of 32 minors in Victoria were charged with possession of child pornography, that is 'sexting' images sent or retrieved by mobile phone or the Internet (2011, p. 287).

This data reported in the media remains unsupported by official statements from Victoria Police. For example, in his submission to the Victorian Parliamentary Inquiry into Sexting, the Acting Commander for the Victoria Police Neil Paterson (VPLRC 2012, p. 13) stated:

> We understand the concept of sexting is out there, there are not too many matters that are coming to police attention and certainly of any of the juvenile matters that are coming to our attention, they are not being charged.

[18] Battersby, L 2008, 'Alarm at teenage sexting', *The Age,* 10 July, p. 3.

In the absence of publically available information regarding the prevalence of sexting prosecutions, the inherent contradictions between case numbers cited by media outlets and Paterson's official statement raise more questions than they provide answers about the reality of legal intervention. There is relatively little known about the prevalence of sexting prosecutions in Victoria, and despite the in-depth study by Wolak and Finkelhor (2011), the details of these prosecutions, including the types of legislation used to charge remain unknown in both the US and Victoria. At the time of writing much of the extant literature on sexting and the law has focused on how the law could potentially be applied to youth sexting rather than examining cases where it has been applied.

Prosecuting sexts as child pornography: Key statutory provisions

To illustrate the specific statutory provisions that apply to youth sexting, the following section draws upon legal scholarship that has examined the potential for child pornography law to be applied to youth sexting. Discussion of these key statutory provisions figure prominently in legal scholarship across Australia and the US and have been identified as: broad definitions (Crofts & Lee 2013; Lee et al. 2013; Smith 2008) the age of a child for the purpose of child pornography (Crofts & Lee 2013; Svantesson 2010) and the mandatory requirement that all offenders convicted of a child pornography offence be placed on the Sex Offender Register pursuant to respective state provisions. This section focuses on legal scholars' discussions of these three provisions.

Broad Definitions of child pornography and sexting

As discussed above, in both the US and Australia, it has been argued that broad definitions of child pornography are problematic because the law does not differentiate between situations where young people are creating these images for or of themselves or whether an adult is taking images of a young child (Crofts & Lee 2013; Smith 2008; Svantesson 2010). As discussed in the previous section, this criticism and concern pre-dates youth sexting (Adler 2001; Hamilton 2011). As such, sexting between young people highlights this limitation because the law does not distinguish between images of young people in sexual contexts created consensually and images of child pornography (Crofts & Lee 2013), and although this distinction may be clarified within common law, Kimpel argues that law itself requires 'fine-tun[ing]' (2010, p. 338).

Important here is the potential for all sexual exchanges between young people to be captured by these definitions of child pornography and treated with the same penalties. Critically, these laws were based on an assumption of non-consensual recording of sexual abuse between children and adults. When two young people consensually produce and disseminate these images, the law has no scope for interpreting the differences between these two scenarios. For example, Hamilton (2011, p. 546) notes that under current sentencing guidelines in the US:

> A middle-aged male who receives a photograph of a prepubescent girl actually being sodomized by an adult man would be assigned the same base offense level for sentencing as would an 18-year-old who engages in 'sexting' by using a computer to send a same-aged friend a consensually taken, nude photo of a 17-year-old girlfriend.

In creating broad and subjective definitions, legislators have simply not imagined a future in which young people are deliberately *creating* sexual content, leading some scholars to critique the law as being unable to contend with technological advancement (Calvert 2009; Hiffa 2011) and the use of new information and communication technologies by young people for sexual purposes (Leary 2010; Levick & Moon 2011).

Difference between age of consent and age of a child for child pornography

The second mixture of statutory provisions discussed by scholars is the differentiation between the age of a child for the purposes of child pornography and the age of consent. In Victoria, there is a contradiction between the State and Commonwealth definitions of a minor (Svantesson 2010; Crofts & Lee 2013). The *Classification Enforcement Act 1995* (Cwth) defines a minor for the purposes of child pornography as an individual under the age of 18 years; however, the Victorian age of consent is 16 years (*Crimes Act 1958* (Vic) s.45). This creates a legal grey area where a 16-year-old can lawfully engage in sexual acts but cannot lawfully record that sexual act because images of anyone under the age of 18 years falls under the Commonwealth definitions of child pornography (Crofts & Lee 2013). The implication of this discrepancy is the perception of a crucial difference in the level of maturity required to engage in sexual activity and the level of maturity required to digitally record oneself in such a situation (Carr 2001).

This discrepancy is also an issue throughout the US, where most state and federal child pornography laws define a minor as a person under the age of 18 years, yet 39

of the 50 states define the age of consent as 17 years (Sweeny 2011, p. 954), including one of the three US research sites in this thesis.

In Connecticut and Florida, both ages are uniform; Connecticut defines both the age of consent and the age of a child for the purposes of child pornography as 16 years (Conn. Gen. Stat. § 53a-71a(1); Conn. Gen. Stat. § 53a-193(13)). Similarly, in Florida it is unlawful for anyone aged 16 years or 17 years to engage in sexual acts with an adult aged 24 years or older (Fla. Stat. Ann. § 794.05(1)); a minor for the purposes of child pornography is aged under 18 years. Only Texas had a discrepancy, with the age of a child under the child pornography statute was under 18 years (*Texas Penal Code* § 43.26a(1).) and the age of consent was 17 years (*Texas Penal Code* § 21.11). Drawing from US legislation and case studies, Smith (2014, p. 884) notes that '[t]his inconsistency between age of consent and child pornography laws is present in the majority of our legal systems. Defendants caught at this legal intersection receive no assistance from our courts due to the explicit language used in child pornography statutes'.

In Victoria, this grey area has been identified as key issue by criminologists (Crofts & Lee 2013) because it raises the questions as to how young people are lawfully able to engage in sex acts yet unable to record those acts, potentially criminalising the recording of consensual and lawful sex. The differences between the age of consent and the age of a child for child pornography raise another issue where a person could lawfully create an image as a minor but they would be charged with a child pornography offence for distributing those images as an adult.

Mandatory sex offender registration

The third key area of law addressed in legal scholarship is the mandatory nature of sex offender registers (Sherman 2011). Concerns about registration were raised in the aftermath of *Alpert*. Philip Alpert, now a registered sex offender, revealed in an interview with *ABC Nightline* that having to register as a sex offender meant that his life was severely restricted:

> I can't live like near a school or a playground or a park. There's a whole lot of stuff I can't live near -- bus stops, stuff like that...so basically, I just can't live in a city. It means every six months I have to register as a sex offender (Mabrey & Perozzi 2010, n.p.).

Scholars have critiqued the use of a sex offender register in such cases, in particular the mandatory nature of the register that requires young people to register for non-predatory offences (Forbes 2011; Sherman 2011), and have suggested that sex offender registration should be discretionary rather than mandatory (Day 2010). The implications of mandatory registration for child pornography offences for youth sexting have been raised by Crofts and Lee (2013, p. 86) who argue that 'there is currently little to prevent children from being prosecuted and facing severe sanctions, including placement on sex offender registers with all the flow-on negative consequences'. However, these speculations have not been evidenced in the broader research, and are based on a review of current legislation and how this could potentially apply to youth sexting. The existence of these triggers and the well-publicised cases of *Miller* and *Alpert* raise questions as to how prevalent is prosecution in light of these problematic legal mechanisms. The next section examines the literature on prevalence, and critiques of applying child pornography law to sexting cases.

Critiques of applying child pornography laws to sexting practices

It is important to note that much of the legal critique and analysis of current statutes and statutory provisions relevant to sexting are focused on the potential for child pornography laws to be applied to sexting practices. For example, in his critique of applying child pornography law to sexting, Bosak (2012, p. 173) explains his purpose as 'bring[ing] attention to that possibility: I am not suggesting that this is happening, but rather that it could'. There is, therefore, a gap in the literature with respect to the details of applying and negotiating these laws in cases involving sexting and the types of incidents being prosecuted in Victoria. The following section canvasses the key opponents and proponents of applying child pornography to youth sexting in legal scholarship.

There is a broad consensus that applying child pornography laws to sexting practices is inappropriate for six main reasons. The first argument is that sexting should not be prosecuted under child pornography law because it is not consistent with the fundamental aim of these laws, which are to prosecute adults and protect children (Cannon 2011; Day 2010; Forbes 2011; Hiffa 2011;Levick & Moon 2011; Nunziato 2012; Potter 2011; Richards & Calvert 2009; Ryan 2010; Smith 2008). Second, it has been argued that the prosecution of young people grossly deviates from the offenders imagined by this legislation, that is, adults with a prurient sexual interest in children (Calvert 2009). Third, legal scholars argue that charging young people with child pornography offences undermines the inherent difference between young people and adults that is reflected in the administration of law (Day 2010; Hiffa 2011; Leary 2010). Fourth, punishments for sex offences are too punitive for young people who engage in sexual image exchange, even if these images are exchanged

without consent (Fichtenberg 2011; Hiffa 2011; Kushner 2013); fifth, the harms of non-consensual sexting are not equitable with the harms of child pornography (Birkhold 2014) and sixth, media scholars have advanced the feminist position that these laws function to repress or censor young people's specifically young girls sexuality (Karaian 2012). It is worth noting, however, that many of these arguments are based on the assumption that a young person (i.e. under 18 years old) is being charged and that many of these scholars are critiquing practices in the US where cases such as *Miller*, which involve minors threatened with prosecution, have been prominent.

These arguments are not unanimous. Within the broader legal scholarship, some scholars support the application of child pornography in some instances where the behaviour between young people is egregious (Leary 2007). Leary (2007, pp. 50) postulates that the harms incurred by non-consensually distributing images are synonymous with those achieved by child pornography, particularly the haunting harms that the victim endures and can include breadth of non-consent, lack of control over the posterity of their image, and the potential use of these images by paedophiles or child pornography enthusiasts.

Adolescent stupidity and diminished culpability in non-consensual sexting

Interspersed within these critiques of applying child pornography laws to youth sexting are concerns about youth culpability. This reflects a key issue of understanding culpability in transition from childhood to adulthood in relation to criminal offences (Urbas 2000). With respect to non-consensual sexting, culpability is often qualified or diminished by harking back to traditional understandings of young

people as inherently foolish. Moreover, this behaviour is characterised as a manifestation of youth stupidity or a natural and inevitable foolishness of youth. For example, Hiffa characterises the behaviour as such:

> While punishing minors for sexting should be at the discretion of parents and school officials, it seems as though the punishment is inherent in the act itself… Inherent to adolescence is poor decision making, which is not the same as criminal intent. (2011, p. 530)

This understanding is ever-present in much of the legal scholarship. Scholars argue that the law should not respond to behaviour deemed 'more foolish than criminal' (Jolicoeur & Zedlewski 2010, p. 3) or committed by 'curious and short-sighted young peoples' (Cannon 2011, p. 315). This invocation of adolescence is also evident in arguments that label non-consensual sexting as 'kids… merely doing stupid things' or a form of 'poor decision making' (Hiffa 2011, pp. 507, 524) or 'ill-conceived and foolish' (Shafron-Perez 2009, p. 543). Foolishness has been contextualised as young people being cognitively under-developed and ruled by their hormones. Potter (2011) argues that young people are not cognitively able to understand the implications of their behaviour, a reason given to exculpate young people as child pornographers but which gives an interpretation of this characterisation of behaviour as foolish rather than malicious (Potter 2011). Additionally, within discussions of decision-making and culpability, Calvert (2009, p. 2) has likened youth sexting as the nexus between hormones and technology:

> It is a sure-fire recipe for legal trouble: combine hormone-raging teens with image-transmission technologies, and then stir them together in a sex saturated society replete with out dated laws and a criminal justice system that never could have anticipated such a combustible confluence of forces. Signs of symptoms of this salacious problem are cropping up across the United States.

This view is mirrored by Szymialis (2010, p. 339) who characterises teen non-consensual distribution of images as an 'ill-advised, hormone-driven mistake'. As stated previously, these scholars are reflecting on the law and its potential to be applied to youth behaviour. While they characterise non-consensual sexting as foolish or lacking in forethought, little is known about the cases that reach prosecution, the offenders, their ages or the circumstances surrounding the decision to disseminate images without consent.

Alternative options: What should be criminalised?

Despite the consensus that child pornography law is an inappropriate response to youth sexting, legal scholars have argued there are sexting incidents in which the law should intervene, although proposed solutions are varied (Calvert 2009). An important aspect of these recommendations is how legal scholars define the points at which the law should intervene into sexting and what legal measures should be undertaken. While most scholars agree that the law has a role to play with respect to sexting, there is a lack of consensus with respect to what kinds of incidents should warrant legal intervention. It is important to note that while these recommendations have been discussed within the legal and criminological scholarship, Victoria, Connecticut, Texas and Florida have either implemented or propose to implement law reforms in relation to sexting that create a sexting-specific summary or misdemeanour offence. These law reforms are further discussed in Chapter Eight, but this section draws from the range of arguments presented in the legal and criminological scholarship on the role of law in relation to this phenomenon.

Criminalising both consensual and non-consensual sexting

While US scholars such as Humbach (2010) and Levick and Moon (2011) have suggested decriminalising youth sexting, there are two broad schools of thought in relation to the types of sexting incidents that warrant legal intervention. These include criminalising both consensual and non-consensual sexting (Barry 2010; Duncan 2010; Fichtenberg 2011; Leary 2010; Szymialis 2010) or criminalising only non-consensual sexting (Arcabascio 2009; Calvert 2009; Crofts & Lee 2013). These arguments are crucial because they pertain to the key question of this thesis, namely what should the role of the law be in response to sexting, specifically with respect to distinguishing consensual from non-consensual sexting?

Scholars who take the position that all forms of sexting (either consensual or non-consensual) should be criminalised, characterise sexting as an inherently harmful practice (Barry 2010; Duncan 2010; Fichtenberg 2011; Leary 2010; Szymialis 2010). While not advocating for harsh punishments, these scholars argue that the law should intervene into this behaviour. Leary's (2007; 2010) work grapples with this notion of harm in a way that has been critiqued by others in the US (Smith 2008). Leary (2007, p. 6) considers consensual sexting harmful, defining it as 'self-produced child pornography' and a form of 'self exploitation', arguing that 'juvenile prosecution should be considered, although not mandated, as a viable response to juvenile self-exploitation' (Leary 2007, p. 6).Similarly, Duncan takes a moralistic and protectionist position, arguing that because these images fall under the definitions of child pornography, they should not be supported:

> …Allow[ing] "original participants" to avoid any liability… seems inconsistent with society's goals of protecting the well-being of children and preventing the existence of child pornography. If producing child pornography is wrong, it

> should make no difference whether teenagers are the ones producing (2010: 683).

These arguments illustrate the difficulties in defining harm and the challenges in introducing consent into the debate. Despite arguing that mandatory prosecution is not in the interests of young people or the state, Leary (2010) further argues that the mere existence of these pictures, self-produced or otherwise, is harmful to the individual. While Leary (2010) clearly differentiates between cases that involve the non-consensual production and distribution of images, she still claims that the images themselves are harmful. This is not an isolated viewpoint; Fichtenberg (2011, p. 710), for example, argues, '[s]exting, on the other hand, does not require additional conduct to be harmful because it is the destructive action'. Fichtenberg qualifies this by arguing that the potentially great danger lies when sexts are sent to unintended recipients (Fichtenberg 2011, p. 699).

Scholars who agree with the premise that consensual sexting is problematic or harmful have also taken the position that legal intervention into both consensual and non-consensual sexting is both educational and deterring (Barry 2010; Szymialis 2010). For example, Barry (2010, p. 152) argues that young people who engage in consensual sexting or take images of themselves 'should learn the harmful effects of their conduct and states should insulate them from any stigma that would haunt their futures'. Similarly, Szymialis argues that legal intervention into consensual sexting can deter young people from sexting and protect young people from themselves:

> States should deter sexting because it is in a state's interest to ensure that sexual images depicting minors do not proliferate as the Internet and cell phone communications continue to advance (2010, p. 399).

While the scholars discussed above argue that the law should distinguish between harmful and non-harmful sexting practices, this distinction is often vague. For example, Ostrager argues that:

> The legal system needs to distinguish between sexting as a serious offense posing a danger to others, and when it is simply a romantic entanglement; the act must fit the punishment (2010, p. 722).

However, there are opponents of these approaches, other legal scholars have argued the need for the law to criminalise only non-consensual sexting, and these arguments will be canvassed in the following section.

Criminalising only non-consensual sexting

Beyond arguing that consensual sexting should not be criminalised, legal scholars and criminologists have also argued that there is a role for the law to play in regulating and responding to non-consensual youth sexting (Calvert 2009; Cannon 2011; Crofts & Lee 2013; Nunziato 2012; Powell & Henry 2014). Specifically, they have argued against the prosecution of consensual sexting for a variety of reasons. For example, Briggs argues that '[i]f there is no outside harm to a victim by choice, then the court system has overstepped its bounds by legislating morality' (2012, p. 193). Arcabascio (2009, p. 21) argues that '[as] a voluntary act, sexting should not fall within the punishable acts contemplated by modern child pornography statutes'. Arcabascio further argues that non-consensual sexting *should* warrant legal intervention, but should never be labelled a child pornography offence:

> As a voluntary act, sexting should not fall within the punishable acts contemplated by modern child pornography statutes. Nor should a teenager's voluntary forwarding of nude or semi- nude photos, sent without threat or coercion, be punished as a child pornography offense (2009, p. 21).

Legal scholars have also argued that the law needs to reflect the range of incidents existing beneath the banner of sexting. For example, Bosak (2012, p. 143) posits that the law should aim to address the 'degree of the offence', including the offenders' aims and the breadth of dissemination. Similarly, Weins and Hiestand (2009) propose new legislation that follows an 'aggravating factors model' that lessens prosecutorial discretion and allows for aggravating factors that increase the severity of charges when the incident includes particularly egregious behaviours. This approach of limiting prosecutorial discretion but providing prosecutors with clear guidelines for how to pursue these cases has had support (Day 2010; Leary 2010). For example, Leary (2010) proposes a structured prosecutorial discretion that tailors prosecutorial decisions to the specific nature of each case. Furthermore, Barry (2010, p. 148) suggests that 'states should craft statutes that differentiate among the various categories of possible offenders – juvenile creators of sexting images; innocent recipients; those who merely forward images; juveniles who maliciously distribute them; and teenage recipients only slightly past the age of majority'. Yet Sherman (2011) suggests that this issue can be solved by a combination of legislative and educational reform. This multifaceted approach includes legal reform, in the style of Romeo and Juliet clauses[19] in statutory rape offences for adolescents aged 19 years and under, and increased funding for educational programs that

[19] Pursuant to the majority of statutory rape law in all states of the US sex between minors and adults is a criminal offence, even if that sex is consensual. For example, in Connecticut pursuant to Conn. Genn. Stat. § 53a-73a, a person commits statutory rape if they have sex with a minor under the age of 16 years. Romeo and Juliet laws are affirmative defences to the charge of statutory rape for instances were the two parties are close in age. While these laws do not prevent someone from being charged with a statutory rape offence, they can potentially lessen the charges, or enable the offender to petition to avoid sex offender registration. For example, pursuant to *Fla. Stat. Ann.* § 43.04354 if a 15-year-old and an 18-year-old were engaged in a consensual sexual relationship, this enables the 18-year-old offender to petition the court to remove the mandatory sex offender requirement.

inform students about the ‘social and legal ramifications of sexting’ (Sherman 2011, p. 140).

These contrasting views demonstrate the lack of consensus within legal scholarship on the role of law in response to sexting practices. While harm and consent have been raised within the legal scholarship, Australian scholars Powell and Henry note that merely attending to these factors does not fully encapsulate the basis for criminalising behaviour:

> There are still many outstanding issues, including whether a new criminal offence should be created; and whether the existence of malice or recklessness should determine what behaviours would, in fact, be criminalised under Australian state and territory law. Further discussion is needed around the scope of both civil and criminal justice responses to a wide variety of behaviours that may come under the umbrella term of sexting (2014, p. 123).

For the most part, scholars have made these recommendations by reflecting on the law’s potential to be applied to sexting incidents, but there is limited research that has examined this with respect to real cases, beyond *Miller* and *Alpert*. There is a tension within legal scholarship as to whether the law has a role to play with respect to consensual and non-consensual sexting that connects with broader concerns about consent, risk management and sexuality, as outlined earlier in this chapter. Scholars who argue that the law should intervene into both consensual and non-consensual sexting view consensual sexting as an inherently harmful practice that young people should not be engaging in. This reflects moralistic understandings of youth sexuality and the need for young people to abstain from sexual practices that have the potential to harm them. This remains a key unresolved part of the literature and a key area for exploration, particularly because the question of demarcating

consensual and non-consensual practices in law has been a feature of debate among legal scholars.

While this discussion has emerged in the legal scholarship, all jurisdictions within this research have implemented new legislation aimed at creating an alternative to charging young people who sext with child pornography offences, but there has yet to be an examination of the implications of implementing sexting specific legislation and legal practitioners' experiences post-implementation.

Conclusion

This chapter has focused on examining consensual and non-consensual sexting and the key conceptual issues raised by these practices in addition to examining the legislative framework of child pornography law that can be applied to youth sexting, which was first raised as a concern by the key cases of *Miller* and *Alpert* and reports in Victoria.

This chapter indicates that there is a gap in the literature on the nature of sexting prosecution and the cases being prosecuted, particularly the perspectives of legal practitioners involved with these cases as well as the implementation of alternative legislation used to criminalise and regulate youth sexting. Legal scholarship alerts us to the issues with applying child pornography laws to sexting and the inherent assumptions of this legislation. It also offers perspectives of the way in which the law should respond to these practices, but examines the law *in potentia.*

Much of these examinations of sexting, consensual, non-consensual, and the intersection between sexting and the law raise significant unanswered questions about the nature of legal intervention into these practices. One key set of voices missing from this debate are the legal practitioners involved in these cases. This review of the literature illustrates the importance and necessity of examining sexting and the law from the perspectives of those charged with implementing this legislation, whether that legislation be child pornography laws, sexting laws or family violence laws.

Chapter Five: Methodology

This research was designed to address the absence of detail regarding sexting prosecutions in Australia, particularly in terms of the nature of the incidents being charged and prosecuted. A key barrier to the collection of data on prosecutions related to sexting practices is that there are no accessible records of sexting cases charged under child pornography laws. The aim of this research was to establish an evidence base of prosecutions that have occurred and obtain the details of those cases by interviewing legal practitioners, who had prosecuted, defended or presided over cases involving consensual and non-consensual sexting. This thesis therefore used a qualitative approach because it enables research to 'make visible and unpick the mechanisms which link particular variables, by looking at the explanations, or accounts, provided by those involved' (Barbour 2008, p. 11). This chapter provides an overview of the research rationale, the research design, and the methodology adopted for this research. It outlines the comparative research design used in this study and the rationale behind the selection of the US and Victoria as research sites. This chapter discusses the key contribution of this research project to the literature, highlighting the need for research that focuses on the insights of legal practitioners. Before discussing the specific methodologies employed in this research project, I focus on the aim and research questions guiding this inquiry.

Aim and rationale for this research

The aim of this research was to investigate legal intervention into incidents where young people have engaged in consensual and non-consensual sexting in Australia

and the US. This research sought to answer the following three key research questions:

1. What are the prevalence and details of cases involving consensual and non-consensual sexting practices in the jurisdictions of Victoria, Florida, Connecticut and Texas?
2. How are legal practitioners negotiating existing legislation with respect to sexting? What are the challenges in prosecuting, defending or presiding over these cases?
3. What are the alternative laws in place in the jurisdictions and what are the positive and negative implications of these different laws?

To address these questions, the research design was comparative and qualitative, with a focus on understanding the different jurisdictions and examining the details of legal practice in relation to prosecuting and defending cases that involve consensual and non-consensual sexting.

Criminologists have long used qualitative research, broadly defined as 'situated activity that locates the observed in the world…consist[ing] of a set of interpretive, material practices that make the world visible' (Denzin & Lincoln 2005, p. 3), to make 'visible' the operation of criminal justice by focusing on the insights of key actors within this system, including offenders, victims (Zedner 2002), police (Chan 2001; Dixon 2011; Ericson 1993; Manning 1997; Young 1991) and legal practitioners (Erez & Laster 1999; Erez & Rogers 1999; Fitz-Gibbon & Pickering 2011). This research expands upon this tradition of gaining insight into the operation of the criminal justice system by examining it through its professional actors in the court. It seeks to produce a more detailed picture of the number and elements of the cases that are being prosecuted (a number that is not publically available due to the range of laws that may be applied in related to youth sexting practices and due to the age of the offender and/or victims) than is currently available.

It examines the details of cases involving sexting and how legal practitioners negotiate the laws applied to these cases to illuminate how the law is functioning, particularly with respect to consensual and non-consensual sexting. Legal practitioners' insights into the implementation, application and operation of child pornography laws, sexting statutes and family violence legislation are crucial to the burgeoning research on youth sexting and the law. They provide insight to policy makers, particularly those considering the adoption of similar models or those monitoring the operation of new reforms with respect to sexting.

Research design: International comparison

This research used a comparative research design with the US and Victoria as sites of analysis. Comparative criminology, while already a well-established methodology, saw a resurgence following September 11 (Bennett 2004; Hardie-Bick, Sheptycki & Wardak 2005) when criminology itself 'became global just as the business of crime, crime definition and crime control became matters of global concern' (Hardie-Bick, Sheptycki & Wardak 2005, p. 2). Aided in part by globalisation, and in particular by the internet, new media and information and communication technologies (Howard, Newman & Pridemore 2000), the study of crime now occurs on a global stage, with shared legal concerns emerging beyond domestic borders. While comparative criminological research has a long history as an investigative approach, globalisation and increased international dialogues provide further incentives for research using international comparisons (Howard, Newman & Pridemore 2000; Winterdyk 2009). Additionally, Hardie-Bick, Sheptycki & Wardak (2005, p. 1) noted that 'Federal systems such as Australia [and] the US offer a good basis for comparative work'.

There were three key reasons for using a comparative approach and selecting Florida, Connecticut and Texas and Victoria as the four sites of analysis. Firstly, there has been widespread concern that young people are at risk of prosecution under child pornography laws if they create, possess or distribute sexual images of their peers, but these concerns remain unsubstantiated. While cases such as *Miller* and *Alpert* have received significant criticism from both the legal and wider community, little is known about the range of cases involving sexting or whether these kinds of incidents are being prosecuted consistently. By focusing on legal actors' experiences of these cases, this research offers important insights into the types of incidents reaching prosecution. The US offers a unique perspective on this issue because cases involving the prosecution of adolescents for sexting emerged there in 2007 (Leary 2010; Wood 2009), whereas Australian reports on this legal response began in late 2010. This extended time period in the US provided a broader scope for analysis, allowing for a wider range of sentencing judgments and a larger access to legal practitioners involved in these cases. Secondly, much of the academic and community discussion on sexting is situated within the American context largely because of cases such as *Miller* and *Alpert*. Thirdly, since 2009, 16 of the 50 states in the US have enacted sexting-specific legislation, with 26 other states having introduced bills that either haven't passed or are pending review (National Conference of State Legislatures 2012). While these offences are by no means uniform, they are fundamentally misdemeanour offences that capture young people producing, possessing or disseminating sexual images using information and communication technologies. These misdemeanours were specifically implemented to avoid young people being prosecuted as child pornographers and becoming

registered sex offenders. As of October 2014, legislation focused specifically on non-consensual sexting has been implemented in Victoria.

Therefore, by examining both Victoria and the US, this research is able to consider cases from before and after the implementation of sexting offences, as well as examine different legislative models. This research offers insights into the outcomes of implementing this type of legislation, focusing on how each of these legislative models view and respond to consensual and non-consensual sexting. Furthermore, this research provides insights into the key ideas underpinning these sexting offences and, by proxy, the role of law in relation to regulating youth sexual practices.

This research used a comparative approach to the jurisdictions in the US (Florida, Connecticut, and Texas) and Victoria. The three jurisdictions selected for the US portion of this study were chosen for two key reasons. Firstly, Florida, Texas and Connecticut were among the 16 states that had implemented sexting law reforms since 2009 and implemented sexting specific offences. Therefore, they were jurisdictions in which these reforms had been in place for a number of years making them ideal for comparison. Moreover, Florida was chosen for this study because in that jurisdiction there had been a prominent case where a young (19) man had been convicted of child pornography offences after non-consensual sexting, and had to register as a sex offender. I was able to contact and recruit the Judge who presided over this case; as such this jurisdiction was selected for analysis.

In this project the US served as a representative case and prototypical case for analysis rather than a straight comparison, in which each jurisdiction and the legal issue being examined are equally compared. Prototypical cases are frequently used in international comparisons because they often involve new legal reforms that have yet to be implemented in similar countries or jurisdictions (Pakes 2010), while representative cases involve typical or like comparisons (Pakes 2010). Such cases are used as 'replications of [an] instance or phenomenon' (Mills, Durepos & Wiebe 2010, p. 174).

In this study the US was used as both a representative and prototypical case for comparison to Victoria. It is acknowledged that the Victoria and the US are not identical, and the range of legal practitioners who participated in this study are not representative across each jurisdiction therefore in this thesis Victoria was the primary site of analysis and the three US states functioned as representative and prototypical cases from which to compare and examine. Furthermore, specifically examining those concerns with insights from both the primary location (Victoria) and the comparative location (US) allows for a richer understanding of both the inner workings of that system and the 'relative differences' between them (Nelken 2010, p. 92). While comparative research offers the opportunity to identify best practices of criminal justice (Bennett 2004), this research draws on Nelken's observation that:

> …comparative research should not be treated only as a means of identifying universally valid best practices to be adopted wholesale. We can also explore what happens elsewhere so as to engage in 'internal critique' according to our own standards (2010, p. 23).

Using the US as both a representative and a prototypical case can facilitate an 'internal critique' for Victoria. Specifically, because at the time of writing Victoria had

only recently (October 2014) implemented specific legislation that focuses on non-consensual sexting, while the three states in the US have had sexting reforms implemented for the past four years. Therefore, the data from prosecutors in the US, who have experience in the operation of sexting statutes, allows for a relevant insight into not only the implementation but also the application of these new types of legislation.

Recruitment and participants

Two recruitment strategies were used in each jurisdiction. First, I used the non-random sampling technique of purposive sampling which is defined as 'probability sampling in which decisions concerning the individuals to be included in the sample are taken by the researcher, based upon a variety of criteria which may include specialist knowledge of the research issue, or capacity and willingness to participate in the research' (Oliver 2006a, p. 245). This involved contacting legal practitioners who had prosecuted, defended or presided over child pornography cases involving youth sexting. Here, I focused on contacting State Prosecutors in each jurisdiction where sexting cases had been discussed in the media. I had mixed success with this process. I made contact the Victorian Office of Public Prosecutions and asked them to participate in this study; however, they declined to participate and directed me towards the Victoria Police's submission to the Victorian Parliamentary Inquiry into Sexting for further information. I also contact Pennsylvanian State Prosecutors (where *Miller* took place), but they also declined to participate in the study. In Connecticut and Florida and Texas there was a positive response to my request and this enabled me to identify key informants in these jurisdictions.

In the second stage of recruitment, I used the non-random sampling technique of snowballing (Oliver 2006b, p. 282), which was instrumental in recruiting the majority of my participants. This sampling technique involves identifying and recruiting individuals who are representative of the potential sample group (the purposive sampling stage described above), and then using their knowledge of other similar individuals, to identify and recruit additional participants (Oliver 2006b, p. 282). The snowball technique was essential to the process because participants needed to have been involved in very specific types of cases that were difficult to identify using traditional case databases such as LexisNexis AU and Westlaw AU. Therefore, I relied on recruited participant's recommendations of colleagues who had defended, prosecuted and presided over cases involving sexting (according to their understanding of the term). This was crucial to the recruitment process as it streamlined my identification of participants particularly in both the US and Victoria.

Originally, this project was designed to only include legal practitioners, but during recruitment, one Victorian defence lawyer informed me that he knew of two young men who had been convicted of child pornography offences and placed on the Sex Offenders Register after they had non-consensually produced and distributed images of underage girls (both peers), one via his mobile phone and the other via MSN messenger. These young men were informed of the project and indicated to their lawyer that they were interested in participating in the research to tell their story. These two young men and their parents were included in the research because they were able to provide an added dimension to this data due to their unique perspective and could offer insight into the process and the impact of prosecution.

While young offenders were not the original focus of this research, the willingness of these two young men to participate offered a number of important insights into the prosecution of young people under child pornography law for sexting. Fore mostly, this research recognises the potential for criminology to interrogate the issue of young adults prosecuted as child pornographers as it unfolds in Australia and look at the impacts of this form of prosecution at all levels: the offender, the victims and the courts. In-depth interviews with offenders allow for insights to further contribute to an analysis of 'law in action' (Nelken 2010), as the impact and aftermath of prosecution are essential to this process and to a full understanding of the law's functioning. This is of particular importance in relation to sex offender registrants. While a growing body of work has begun to analyse the impact of registration on registrants (Ackerman, Sacks & Osier 2013; Comartin, Kernsmith & Miles 2010; Evans & Cubellis 2014; Levenson & Cotter 2005; Levenson et al. 2007; Tewksbury 2012; Tewksbury & Zogba 2010) and their family members (Comartin, Kernsmith & Miles 2010; Levenson & Tewksbury 2009), there is a dearth of research on the impact of sex offender registration on young adults and transitional aged adults (Rasmussen 2010). The majority of the research is focused on US registrants leaving a gap in the research for an investigation into young adult registrants in Australia. Additionally, research into the experience of sex offender registration has implications for future policy making. For example, Tewksbury and Lees argue:

> Sex offenders' perceptions of sanctions, particularly of sex offender registry programs, are of considerable value. There are numerous implications that these insights are able to provide to make registries and notification programs more effective and useful. Ultimately, such knowledge can lead to increased compliance with laws and program requirements and provide for changes that lead to lower sex offense recidivism (2007, p. 387).

I also draw from Tewksbury and Lees' (2007, p. 387) argument that the 'collateral consequences of specific sanctions' such as sex offender registration are important information that could inform legal practitioners and legislators in the future. Additionally, this research focused on case details, and allowed offenders participate in semi-structured interviews to discuss the contexts that informed their decisions to participate in sexting and the factors of that behaviour that resulted in legal attention in ways that were useful for this study.

Ultimately, this recruitment process yielded semi-structured interviews with 14 members of the legal practitioners across the US and Victoria, 2 legal resources coordinators in Victoria as well as four offenders and their family members in Victoria. As shown in Table 2, the participants included representatives of the three groups who are involved in the prosecution of cases across the three sites: judges, prosecutors and defence attorneys as well as stakeholders, offenders and legal resources coordinators.

Table 2: Participants interviewed for this study

Jurisdiction	Role
Victoria	5 Defence lawyers 1 Community lawyer 2 Offenders 2 family members 2 legal resources coordinators
Florida	2 Judges 1 Defence Attorney
Connecticut	3 Prosecutors
Texas	2 Defence Attorneys
TOTAL	**20**[20]

Most participants had experience prosecuting, defending or presiding over cases that involved young people sexting[21] or had intimate knowledge of those who had prosecuted, defended or presided over such cases.

Data Collection and analysis

Data were collected in two stages between April 2012 and April 2013. During January and February 2013, I collected data in the US, and interviewed Victorian participants during the remainder of the time. Interviews with legal practitioners ranged in duration from 20 to 120 minutes. These interviews were conducted in a variety of locations. The legal practitioners were interviewed in their offices, while interviews with offenders and their family members took place in their homes. For the two young male offenders, location was particularly important because the subject matter of the interviews (their relationships, their experiences with the criminal justice

[20] I also conducted research in Vermont; however, the data from these interviews was not included in the following chapters as the data collected was not relevant to the research project.

[21] Participants were asked to define sexting for themselves and the cases that fall within this definition. However, they all defined sexting similarly.

system and being on the Sex Offenders Register) was emotionally sensitive. Interviewing these young men and their families at home in a comfortable environment was, therefore, most appropriate.

Semi-structured interviews

Semi-structured interviews were used for this research to allow legal practitioners to discuss their professional experiences and give detailed accounts of the cases reaching prosecution and their experiences negotiating these cases.

A total of 20 semi-structured interviews were conducted; 16 with legal practitioners and 4 with offenders and their family members. Semi-structured interviews involve a limited structure of questions and prompt the participant to use their 'own words' to obtain a response that is personal and open to the possibility of change in topic (Packer 2011, p. 43). An additional benefit of this style of interview is that it allowed each participant to discuss information that they felt was relevant to the broader research topic, as well as enabling the researcher to come to the interviews with a pre-established understanding of the key themes relevant to the study (Noakes & Wincup 2004). Semi-structured interviews with legal practitioners have been used by other criminologists who have sought to illuminate the complexities of implementing the law, the role of the legal practitioners in these practices and their perspective on how the law is functioning and in what capacity (Erez & Laster 1999; Erez & Riger 1999; Fitz-Gibbon & Pickering 2011; Johnson 2000). Semi-structured interviews enable access to legal knowledge and practice that could not be gained, for example, by examining sentencing judgments alone. It allows legal practitioners to

offer explanations of professional decision making in relation to prosecuting or defending cases and/or sentencing.

The semi-structured interviews included a standard series of questions beginning with how legal practitioners defined sexting, the cases they had participated in that involved sexting and young people, and the details of these incidents. Additional questions asked how the law applied to the incidents in question, the legal mechanisms that allowed their prosecution and questions about the outcomes of these cases. The questions also asked about their experiences negotiating these laws and their views on how the law was functioning in response to these incidents (*Appendix B*). The interview schedule was designed to allow participants to provide details of cases involving sexting and how they negotiated the laws being applied to these incidents. The interview schedule was altered for the two Victorian offenders to focus on their experiences on the Sex Offenders Register.

Data Analysis

All interviews were transcribed and then uploaded to nVivo for coding. Data were coded following Saldana's (2009, p. 8) guidelines for the iterative process of coding data, which involves multiple cycles of coding to identify initial then emergent themes and categories (Saldana 2009). The aim of this initial analysis was to create categories from within the data without constraints, and to generate a framework for analysis based on this initial exploratory phase (Boulton & Hammersley 2006, pp. 252–253).

Based on this first cycle of coding, three key categories emerged from the interview data: case details, negotiation of child pornography legislation and implementation of alternative legislation. Data were coded according to these categories and then further coded according to a number of sub-categories that emerged within each cycle of analysis. For example, the sub-categories that emerged under the case details category included: the ages of the victim and the offender; the genders of the victim and the offender; consensual sexting; non-consensual sexting; and relationship status.

Interview data centred on the three key categories, but in some jurisdictions, participants were able to offer unique insights and the codes included more data from those participants. For example, prosecutors from Connecticut were able to talk explicitly about the implementation of sexting offences, whereas Victorian legal practitioners were only able to speculate on the potential for Victoria to adopt similar legislation. The three themes of case details, negotiation of child pornography legislation and implementation of alternative legislation form the key structure of this thesis.

Limitations of this study

This study comprised of three key limitations that will be discussed in turn. The first key limitation was the sampling technique. While snowball sampling was instrumental in accessing participants who had experience with cases involving sexting or knew of colleagues who had prosecuted, defended or presided over these cases, snowball sampling is contingent upon each participant adequately understanding the research project and being able to recommend individuals who

would be suitable (Oliver 2006b, p. 282). While this was successful and the majority of participants were successfully recommended and recruited by others, there were instances where participants were mis-recommended by their colleagues and did not have the experience relevant to this research. Additionally, Oliver (2006b, p. 282) notes that a key disadvantage of this approach is that it does not provide a representative sample of the population being studied.

The second key limitation is also focused on sampling method in addition to sample size. There are limitations in conducting a small number of interviews from a snowballed sample to examine the operation of law in relation to youth sexting in the US and Victoria. Because I examined case accounts from a small number of legal practitioners, it is not possible to generalise findings to the larger phenomenon of youth sexting prosecution, nor is it possible to claim that the findings of this research represent the reality of prosecuting sexting under child pornography law, sexting offences and family violence legislation in both Victoria and the US. This research, however, sought to be illustrative rather than general and to reveal some of the complexities of the cases reaching prosecution (as child pornography offences), legal practitioners' accounts of negotiating these laws and the implementation of alternative frameworks. Issues with sample size also extended to the types of participants recruited for this research. I was unable to recruit a full spectrum of participants (prosecutors, defence lawyers and judges) in each jurisdiction. This was particularly problematic in Victoria where I was unable to gain access to prosecutors. This was a critical absence in this study, which would have benefitted from the comparison between jurisdictions. To paint a clearer picture of the nature of prosecutions in Victoria, insights from police and prosecutors need to be included in

future research. Having these participants from each jurisdiction would have facilitated a clearer comparison between jurisdictions.

The third key limitation was the research design. While I chose to use a comparative research design, I am aware of the methodological issues associated with this approach, specifically the need for comparative research to avoid generalising comparisons (an issue often raised relation to comparing quantitative crime data, cf. Kalish 1988; Bennet & Lynch 1990) and the difficulty in replicating these types of studies and applying their findings to other nations (Howard, Newman & Pridemore 2000). Therefore, to avoid the potential for over-generalisation in this comparative research, I have ensured that the comparisons made in this project are contextualised and qualified.

Ethical considerations

The research was conducted with the approval of the Monash University Human Research Ethics Committee (MUHREC CF12/1508 –2012000806) (*Appendix C*). There were four specific ethical issues that were attended to in designing this research project. Firstly, it was imperative that all participants provided full informed consent to the interviews. In accordance with the Ethical Responsibility to Participants, participants were emailed (prior to the interviews) details of the University ethics approval and a plain language statement outlining the research and their role within it as well as explaining that their participation would be anonymous.

Prior to commencing every interview, as per the requirements for approval of the research according to Monash University's Human Research Ethics Committee, I explained that each participant's data would be de-identified and no identifying information would be included in final reports. I also made it known that the raw interview data would only be read or accessible by me. Prior to the interview I sent each participant an explanatory Statement (*Appendix D*) and the day of the interviews, participants were presented with both the statement and a consent form (*Appendix E*) and reminded that the interview would be recorded. Participants were asked whether or not they consented to the recording, and were also informed that if they could end the interview at any time and the recording would stop.

The second key ethical issue was confidentiality. This was of particular importance to this study because the legal practitioners were speaking about confidential cases and there needed to be no way of linking their interview data with their clients. Additionally, this research involved young men speaking about their experiences on the Sex Offenders Register. Research has illustrated that public notification of registration can potentially result in assaults and fear of assault (Levenson & Cotter 2005; Levenson, et al. 2007). To ensure confidentiality, participants were assigned pseudonyms during the coding phase so that any details they provided were rendered anonymous. Also, participants were de-identified to further ensure anonymity. This is of particular importance because some participants had been discussed in the media and may have been concerned that the study would identify them. I was also acutely aware of the importance of keeping the details of the two young men on the Sex Offenders Register anonymous for their own safety, and I ensured that no mention of their specific locations were included in the study.

The third main ethical consideration was working with young people. This was specifically relevant to interviews with the two Victorian offenders. As discussed above, the topics discussed in their interviews were sensitive and involved participants divulging personal information about stressful events in their lives. To ensure that participants did not experience any undue stress in the research process, they were informed that they were able to discontinue the interview at any time without explanation or fear of repercussions. After the interviews, the participants were informed that if they found the process distressing or needed someone to talk to then they had the opportunity to access counselling.

The fourth ethical consideration was working with offenders. While both the offenders were young adults at the time of interview and not incarcerated, they do not fall within the specific categories of ‘child’ or the category of ‘vulnerable population’ like prisoners do. But they were still young men currently on the Sex Offenders Register, which restricted their lives considerably. Because of this, it was important to ensure anonymity for these young men and their families who could be negatively affected if they were identified as people on the Sex Offenders Register. Moreover, particular care was taken with these interviews as they were asked to speak on the details of their cases and their experiences of legal intervention. An amendment to the original ethics application was submitted and approved by the Monash University Human Research Ethics Committee include these participants (MUHREC Amendment CF12/1508 – 2012000806)

Conclusion

This research was conducted using the qualitative research methodology of semi-structured interviews with legal practitioners, offenders and their family members to critically analyse the operation of child pornography, sexting and family violence legislation in response to youth sexting. Focusing specifically on the insights of legal practitioners and offenders, this comparative analysis between the US (Florida, Connecticut and Texas) and Victoria has been guided by prior criminological work that focuses on incorporating the insights of legal practitioners to conduct an analysis of 'law in action' (Nelken 2010). This specific methodological approach to the research questions in this thesis aimed to address the gap in the research about prosecuted sexting cases and legal practitioners' insights into the prosecution and regulation of youth sexting.

Having outlined the methodological approach, in the following three chapters I present the findings from the semi-structured interviews with 14 legal practitioners from the US and Victoria and the additional interviews with two Victorian offenders and two of their family members. These interviews offer insight into prosecution patterns and practices in Australia and the US, revealing the types of incidents that result in prosecution and legal practitioners' experiences negotiating the laws in relation to these cases.

Chapter Six: Prosecuted sexting cases, insights into trends, patterns and legal processes

Introduction

As discussed in Chapter Four, there is a growing body of research on how child pornography legislation has been written in such a way as to be *potentially* applicable to young people involved in sexting-related practices in both Australia (Crofts & Lee 2013; Svantesson 2010) and the US (Calvert 2009; Cannon 2010; DiFrancisco 2011; Fichtenberg 2011; Hiffa 2011; Leary 2007; Ostrager 2010; Ryan 2010; Smith 2008; Weins and Hiestand 2009). However, little is known about the extent of prosecutions of sexting or the details of these cases including their outcomes. This chapter draws on legal practitioners' and offenders' accounts of sexting cases to provide insight into the circumstances of the cases that are pursued to prosecution and the issues raised by these cases. It focuses specifically on nine cases that were described in rich detail by participants, but also draws on general comments regarding the frequency of cases. The findings presented in this chapter are not intended to be representative of the entire scope of cases prosecuted in any of the jurisdictions included in this study, however they contribute detailed accounts of youth sexting practices that have resulted in prosecution which moves the discussion beyond what is possible to what is happening. This is critical because broader discussions of sexting and the law (and the behaviours it encompasses) give little detailed indication of the type of sexting being prosecuted (consensual or non-consensual) and the contexts of incidents.

Before examining the elements of these cases, I begin by outlining legal practitioners' accounts of the range of legislation being applied and the number of

cases they prosecuted, defended and presided over. The purpose of this section is not to give a full account of the prevalence of cases, but instead to give an indication of whether these types of cases were common or uncommon. This is followed by an examination of legal practitioners' accounts of the number and type of cases they have prosecuted, defended and presided over. This allows us to identify the breadth of cases and laws utilised. The final section of this chapter analyses legal practitioners' and offenders' accounts of these cases focusing on both the legal factors (victims and offenders, images and the use of those images) and the extra-legal factors (the context in which images are used and the intent to harm). Through this analysis this chapter seeks to illustrate the nature of cases reaching prosecution, to highlight the legal issues that they raise and lay the foundation for the following two chapters.

Jurisdictions and prevalence

The cases discussed by participants involved three separate types of legislation, child pornography laws in Victoria (*Crimes Act 1958* (Vic) s.67A) (including Commonwealth Classification Codes: *Criminal Code (Cwth),* s.471.16; s.474.19; s.474.25), and child pornography laws in Florida (*Fla. Stat. Ann*. § 847.0137), Connecticut (*Conn. Gen. Stat.* § 53a-196b; § 53a-196c; § 53a-196d) and Texas (*Tex. Penal Code Ann*. § 43.26a[1]). Legal practitioners in the US also reported the use of specific sexting laws in Texas (*Tex. Penal Code Ann*. § 43.261) and Connecticut (*Connecticut Penal Code* 53a-196h). And one legal practitioner in Victoria reported using family violence laws in the *Family Violence Protection Act 2008* (Vic) in 2009. This variety of legislation illustrates, in part, what Svantesson

(2010, p. 2) refers to as the ‘complex matrix of … law’ that can be applied to sexting-related incidents.

Despite the variety of legislation in place that has the potential to be applied to consensual or non-consensual youth sexting and the broader media and academic speculation about the potential for the law to be applied to a wide range of youth sexting practices, legal practitioners reported that prosecutions were generally uncommon as a proportion of their total caseload, as shown below in Table 3.

Table 3: Number of recounted cases by jurisdiction

Participant	Jurisdiction (role)	Cases
Matthew	Vic (Defence)	4–5
Benjamin	Vic (Defence)	2–3
Adriana	Vic (Defence)	Not more than 10
Kathryn	Vic (Community Lawyer)	Fewer than 10
Thomas	Vic (Defence)	1
Robert	Vic (Defence)	0
Luther	Florida (Judge)	2
Helen	Florida (Judge)	1
Paul	Conn (Prosecutor)	5 or 6 per month[22]
Linda	Conn (Prosecutor)	2 per month
Adam	Conn (Prosecutor)	5–6 cases over the past four years
Simon	Texas (Def/Pros[23])	2
Caleb	Texas (Def/Pros)	0

With the exception of the Connecticut participants, case numbers were characterised as low. For example, in Victoria, legal practitioners noted:

> There is a small number. I would probably estimate that we haven't seen more than ten of these over the last two or three years (Adriana, Victoria Defence).
>
> Probably four to five [over the past eighteen months] (Matthew, Victoria Defence).

[22] Paul indicated that he was also involved in cases that went to the juvenile review board, '[j]uvenile review boards are intended to divert from Juvenile Court children who have committed minor delinquent acts or whose behavior at home or school indicates they are at risk of delinquency. [they are] run by a youth service bureau or police department…[and] people who deal professionally with children such as social workers, teachers, counselors, and police' (Spigel 2004, para. 5-6).

[23] These two participants were practising as defence lawyers at the time of interview but had previously been prosecutors.

Victorian practitioners speculated that the low case numbers they had encountered was indicative of the overall number of cases proceeding to Victorian courts. In the US the majority of legal practitioners talked in similar terms about their cases; there were small numbers of child pornography cases featuring the production and distribution of images between young people in Florida (n=2), and Texas (n=2). However, the number of reported cases differed in Connecticut; Adam (Connecticut Prosecutor) reported five to six cases over the past four years, Paul (Connecticut Prosecutor) reported handling five to six cases per month and Linda (Connecticut Prosecutor) two cases per month. The frequency of cases reported in Connecticut was inconsistent with the frequency of cases in the other jurisdictions in this study, and this can be attributed to the implementation of the sexting statute (*Connecticut Penal Code 53a-196h*) which has effectively created a misdemeanour offence that allows prosecutors to charge young people for consensual and non-consensual sexting as discussed in further detail in Chapter Eight. Overall, the low number of prosecutions suggests that despite concerns present within the legal scholarship (Cannon 2010; Fichtenberg 2011 Crofts & Lee 2013) and the media (Lynn 2010; Podlas 2011) that child pornography law will be used to prosecute young people involved in sexting, from the accounts of these prosecutors there is little evidence to suggest that this is a frequent occurrence in their jurisdictions.

The specific reasons for these low numbers remains unknown, but participants in Victoria did offer some explanations- primarily attributing the relative infrequency of prosecutions to the exercise of police discretion. While not the focus of this study, participants from Victoria talked positively of the important role of police discretion in

diverting young people out of the criminal justice system arguing that police 'gatekeeping' was crucial to keeping the number of cases low:

> The police have been really great… they haven't charged as many people as they could have (Kathryn, Victoria, Community).

> Police by and large are actually sensible [and are] exercising their discretion sensibly (Adriana, Victoria, Defence).

> It would appear that police are exercising policy judgment so they won't be charging people for this sort of activity (Dennis, Victoria, Defence).

Benjamin (Victoria, Defence) also noted that in cases involving minors, he was able to negotiate with police to withdraw the charges. Youth law practitioner Stephen (Victoria, Defence) argued that this use of discretion was a reflection of Victoria Police's understanding of the principles of youth justice:

> The police deal with it quite sensitively and they prefer not to charge. They know that [in] going to the Children's Court that the court's going to be interested in rehabilitation.

While these legal practitioners described the use of police discretion as positive, Victorian defence lawyer Dennis argued that we cannot rely solely on police as gatekeepers to prevent the feared rate of potential prosecutions raised by academics and the media coming to fruition. He reasoned that police discretion is an unreliable mechanism for managing the law's response to youth sexting:

> At the moment the police have a policy – but it is something that could change with this being a potentially growing area, people having more access to social media and these devices – it could start to be something that they want to do something about and it could lead to charging (Dennis, Victoria, Defence).

Dennis' comment echoes arguments put forward by other Australian researchers that that the role of police in pursuing charges requires more dedicated research (Crofts & Lee 2013). While this was ultimately beyond the scope of this research project, these observations remain important to this study. Legal practitioners' low case numbers and Victorian participants' speculations that police are diverting possible cases from the criminal justice system raises questions about the distinguishing features of cases reaching prosecution and why they were proceeding to court. As such, the following section focuses on legal practitioners' accounts of their cases and the key legal and extra-legal factors in their accounts.

Prosecuted sexting cases

One of the first features that emerged from legal practitioners' accounts of sexting cases[24] was that the practices and circumstances were varied, but that there were also important commonalties. During the interviews participants were asked to recount a particular case or cases they had worked on. They spoke in detail on nine specific cases across the four jurisdictions and in general about other cases they had heard of or participated in. The following discussion focus on four distinguishing and common legal and extra-legal aspects of the cases recounted by legal practitioners and offenders. While focusing on these areas limits the unique details of each specific case, it does enable a broad sense of the type and nature of cases prosecuted and this information is critical to making sense of how current laws are negotiated by legal practitioners (Chapter Seven) and how we can make informed decisions regarding the best practice laws to utilise to responding to consensual and

[24] A table of some of the key cases discussed in detail appears in Appendix F

non-consensual sexting. It is acknowledged that given the varied nature of sexting practices, it is difficult to break these circumstances down into separate parts because they are, in many ways, interrelated. However, the need to examine these four key aspects of the cases emerged from the data, which indicated that the similarities of the cases were clustered around these categories. I begin by examining the key parties involved in these cases: victims and offenders.

Age and Gender: Female victims, male offenders and youth

The first common factors of cases discussed by legal practitioners were the ages and genders of the subjects of the image and the recipients and disseminators of the images. All cases recounted by participants across every jurisdiction in the study involved images of young girls and young women who were both underage (i.e. under 18 years old) and young adults (i.e. aged 19-22). For example, Community Lawyer Kathryn (Victoria) reported:

> Now all those subjects have been women, now when I say this I'm not saying we've got a million cases, we've got less that ten at this stage…

This reflects findings from Australian, United Kingdom and US research that young women are predominantly the subjects of sexted images (NCTPTUP 2008; Walker, Ringrose et al. 2013; Sanci & Temple Smith 2013). Just as there were consistencies in the age and gender of victims, so too were there in the age and gender of offenders.

With the exception of one case (*Texas Case A,* which will be discussed in detail later in this chapter), all offenders were men. For example:

> And the people who have been behind the threatening or release have been men. *Now this is a very small group that I'm talking about and I'm not saying that this is always gonna be this case but that's what we've seen*…I have yet to see a case where it's the opposite. I have talked to people who say that they are aware of situations where the subjects [i.e. victims] have been men but it has still been men who are… the disseminators… (Kathryn, Victoria, Community Lawyer: emphasis added)

Consistently, these men were aged 18 years and above at the time of the offence. As discussed in Chapter Four, legal commentary has focused on the potential for child pornography law to be applied to young people who sext (Crofts & Lee 2013; Smith 2008). However, from discussions with Victorian and US legal practitioners and offenders, it emerged that prosecutions involving child pornography charges did not involve offenders who were minors. Of the cases described in detail by legal practitioners and offenders, all involved the prosecution of an adult. Adriana (Victorian, Defence) identified that offenders aged 18 years and above were common:

> A: We certainly see more prosecutions in that age group [over 18], yes.
>
> LV: Would that be the majority of cases you've dealt with that they're eighteen, nineteen, twenty.
>
> A: The sexting stuff yeah, they tend to stop around that age I mean when you get a little bit older you're getting the more serious pornography cases, if I can use that differentiation.

Adriana's (Victoria, Defence) statement that 'when you get a little bit older you're getting the more serious pornography cases' reflects the differences between legal and social categories of child pornography, which differentiate between a 15-year-old and a 19-year-old sending images to one another, and a 22-year-old and a 7-year-

old sending images to one another; the latter being classified as ‘serious pornography’.

This raises a key issue. This aspect of the cases highlights that prosecutions do not tend to reflect the concerns about legislative over-reach (criminalising underage teens) raised by researchers and the media, and suggest that child pornography laws are generally functioning and being applied to cases for which they were intended. However there were ambiguity and competing opinions expressed by participants over the age of offenders, the timing of the offence and the most appropriate role of the law in these cases, an issue I return to later.

The images: subject, content and circumstances

I now turn to the sexted images in the sexting cases recounted by participants, including the persons featured in the images and the nature of the content. This section also highlights the circumstances in which the images were created, being either self-produced, taken by intimate partners or being taken by bystanders. In doing so, I draw on Klettke, Hallford and Mellor (2014, p. 52), who observe that ‘delineating the level of sexual explicitness’ of the images being sexted is crucial to understanding the legal implications of producing, possessing or distributing those images, specifically as they pertain to child pornography legislation.

The teenage girls and young women whose images featured in cases recounted by participants were photographed in a range of scenarios in the images, from being

nude or semi-nude to having sexual intercourse with partners.[25] In nine cases (where participants gave detailed accounts of the content[26]), these images included still images of partial nudity (n=1), still image of nudity (n=1), video of solo masturbation (n=2), still image of minors performing oral sex on an adult (n=2), still images of sexual intercourse between a minor and an adult (n=2) and images of a sexual interaction with an animal (n=1). In some cases there was only one image that was the subject of prosecution in other cases there were multiple images. As noted in the discussion regarding age, some cases involved female minors engaging in penetrative sexual acts with male adults, the types of images that child pornography laws are specifically constructed to capture and prosecute. Despite this, these sexting practices do not reflect the cultural understandings of child pornography because most were created consensually and between similarly aged young people- for example, a 16 year old girl and a 19 year old young man or two 17 year olds.

Participants' accounts of these cases also indicated that most images were taken consensually, however there were some instances where young women and girls were coerced into taking images or where it was unclear whether or not the victim had consented. Of the nine cases recounted in detail, six involved the consensual creation of images. Some of these images were self-produced; for example, Simon (Texas, Defence) prosecuted[27] a case where a 15-year-old high school student recorded a video of herself simulating masturbation, which she sent – unsolicited –

[25] 'Partner' in this thesis includes current partner, previous partner, boyfriend, girlfriend, ex-boyfriend, ex-girlfriend or date.
[26] In all except *Connecticut Case D,* the images involved in cases were described by the participant during the interview.
[27] While he worked as a State's Attorney

to a male high school senior. In other cases, the images were produced consensually between two parties. For example, Victorian offender Damien distributed images from a consensually created video (*Victoria Case A*). Similarly, in 2008, Florida Judge Luther presided over a case (hereafter known as *Florida Case A*) where a young man (aged 19 years) was charged and found guilty of the production and distribution of child pornography (*Fla. Stat. Ann.* § 847.0135, 847.0138; 827.071) after distributing photographs of his girlfriend (aged 15 years) engaging in sexual acts including her performing oral sex on him. In these cases, the image was consensually produced.

There were also cases in which images were produced or recorded by third parties who were witnesses to sexual behaviour (n=3). This scenario was exemplified in *Victoria Case B,* where Victorian offender Nathan, took a picture of an underage girl performing oral sex on his friend:

> …there was me and a couple of my mates and it was just a Sunday after we'd been out and I can't remember. It was lunchtime-ish afternoon and this chick was bugging one of my mates to come see her. And kept sort of saying come up to Main Street and see me. And so we went and then uh he's like let's go pick her up, so we all jumped…in my mates car and picked her up and then things lead on from there. And one of my mates started having oral sex with her and then, without thinking I took a photo.

When asked about whether or not the girl consented to his taking the image, Nathan replied:

> She didn't… sort of care… it was like she liked the attention in a way. She didn't say no or anything (Nathan, Victorian Offender).

Consent was not clearly established here in the account offered by Nathan, but it suggests that consent may be difficult to determine. For example, Prosecutor Linda (Connecticut) highlighted that in incidents involving third parties recording sexual material, it was difficult to ascertain whether the victim understood what they were consenting to at the time.

In addition to cases where consent was neither confirmed nor negated, others involved young women being blackmailed or coerced in the creation of the image. These cases were less prominent in the data and only a few legal practitioners discussed these types of incidents. Three legal practitioners out of the 14 interviewed reported these incidents; Kathryn (Victoria, Community Lawyer) discussed cases that had come to her in the context of her work in the area of family violence:

> [In] two cases the younger women… felt that they needed to resume a sexual relationship [after a partner had threatened to distribute images]. *So it's a way for them to get them to have sex. By having this threat held over them. And as far as I'm concerned that's having sex without consent…* because you felt under duress or coerced to do so. *I have had one young lady say to me that she agreed to be in a video recording because she felt threatened to do so* but that's not a trend. It was just one and it stands out because it is only one, the others have consented to the photos or images being taken of them (emphasis added).

Connecticut Prosecutor Adam also reported a similar case where a young girl's boyfriend threatened to expose images she had previously taken (consensually) if she did not send more. However, in this instance there was the added dimension of an age difference between the two parties:

> We have a case right now a kid moved away- boyfriend girlfriend- he was 19 she was 15. [He said] 'send me some pictures' she sent them, 'send me more

> pictures.' 'No I'm not going to', 'if you don't send me more then I'm going to send them to your employer' she goes to mom, mom takes her to the police and the police arrested her and him.

Connecticut Prosecutor Linda also noted she had dealt with cases where young women were blackmailed by their partners who threatened 'send me these pictures or else I'm going to tell everyone you know that you did this that and the other' (Linda, Connecticut Prosecutor). This echoed findings from other studies that sexting can be coercive and used for blackmail (Bluett-Boyd et al. 2013; Powell & Henry 2014; Ringrose et al. 2013).

While the discussions with legal practitioners pointed to a range of images created in different contexts, these accounts largely indicate that images tended to be more often taken consensually either by the subject of the image or within a sexual relationship where both parties were consenting. While the age of these young women (16 years and under) meant that any consent they gave at the time was not legally valid in any of the four jurisdictions, the production of the images was not the basis for legal intervention or reason that the subjects of the images had sought legal intervention. As will be discussed in the following section, legal intervention was predicated on the non-consensual distribution of images, irrespective of whether the images had been created consensually or non-consensually.

Distribution of images: Non-consensual sexting the key issue for legal intervention

I now turn to the most prominent aspect of the sexting cases recounted in the interviews: the distribution of the images. The majority of cases recounted by

participants involved non-consensual sexting in the form of non-consensual distribution of images (non-consensual sexting). While legal practitioners did report two cases involving the prosecution or attempted prosecution of consensual sexting (cases where images were not disseminated beyond the original producer or the intended recipient) these were not prevalent and were further distinguished from the other cases as they involved large age gaps (i.e. 9 years) between the subjects of the image and the recipient.

In almost all cases, the images in question were distributed without the consent of the subject. Legal practitioners in the four research sites articulated that cases involving non-consensual sexting were paradigmatic:

> Just generally… there [had] been sexual activity… between [a] male and female... [and] there [had] been a photograph… of that… using the camera on the phone... There [had] been some dissemination of [the image] not necessarily by the person who took the photo (Matthew, Victoria Defence)

> When we do see [these cases] we see a boy and girl taking photos of themselves having sex or someone takes a photograph of a girlfriend's breasts… then they send it on to someone else… or they have a fight, they break up and there is some vindictive or inappropriate or nasty sending of this sort of photography to someone else (Adriana, Victoria Defence).

> Nine times out of ten these are sent consensually, obviously people who don't know what they're doing as far as sending the pictures. *If it's a consensual situation, you know we usually don't get involved* and I don't want my investigators to worry about getting involved. If those images are sent somewhere else to a third party, someone that they weren't meant for that's when we usually get involved and do the investigations (Adam, Connecticut, Prosecutor: emphasis added).

To demonstrate how non-consensual sexting was involved in cases, I focus on two cases recounted by Florida Judge Luther (*Florida Case A*) and Victorian offender

Damien (*Victoria Case A*). In these two cases, images were created consensually between couples as a way of recording their sexual interactions and at a later point the young men distributed these images without the consent of the young women in the image. They demonstrate how non-consensual sexting involving adult males and underage girls has resulted in prosecution under child pornography laws in both Victoria and the Florida.

The first case, which occurred in Victoria, involved Damien who revealed that at age 19 years he was found guilty of three separate child pornography offences for distributing images of his former girlfriend without her consent (hereafter known as *Victoria Case A*). The charges included inviting a minor under the age of 18 years to be concerned in the making of child pornography (*Crimes Act 1958* (Vic) s.68*)*, knowingly using an online information service to transmit objectionable material depicting a minor in an indecent sexual manner or context (a Commonwealth offence under the *Classification Enforcement Act 1995* (Vic) s.57A*)* and knowingly using an online information service to publish objectionable material depicting a minor in an indecent sexual manner or context (*Classification Enforcement Act 1995* (Vic) s.57A*).* When Damien and his former girlfriend Sally were both 17 years old, they created a consensual video recording of their sexual activity. After they ended the relationship, Damien created screen captures[28] of Sally from the video. He then sent those images to two or three of their mutual friends via MSN messenger. These friends deleted the photos and informed Sally who requested the photos be deleted (which they had been). Sally's parents also contacted police about the incident. After admitting to distributing the photographs, Damien was charged and appeared at the

[28] Still images from the video recording.

Magistrates' Court in 2008. The charge was proven and he received a *no recorded conviction*[29] and a fine of $2000. Despite this finding, Damien was still subject to the mandatory registration for convictions of child pornography offences, which is an administrative process managed by Victoria Police. The registration is non-discretionary and the length of time on the registry is determined by the number and nature of the offences, in Damien's case he is on the Victorian Sex Offenders Register for 15 years.

Florida Case A, presided over by Judge Luther, involved a similar scenario (a young man distributed pictures non-consensually in the context of a relationship breakdown), but unlike the Victorian case above, Luther identified that the young man disseminating the images was an adult (19 years old) and his girlfriend was a minor (15 years old) when they *created* their sex tape. Additionally, the images were distributed to a much wider audience in this case. In 2008, the young man who disseminated the photos was charged and found guilty of the production and distribution of child pornography (*Fla. Stat. Ann.* § 847.0135, 847.0138; 827.071). When the defendant turned 19 years old, his girlfriend ended their relationship, after which the defendant sourced 15 to 25 sexual photos they had taken consensually and sent them to her teachers, parents, grandparents and friends. Following the dissemination of the images, the defendant was charged and convicted with producing and distributing child pornography, and due to Florida's mandatory register, the young man had to register as a sex offender for 25 years.

[29] *Sentencing Act 1991* (Vic) s. 7(f) allows that a judge may 'with or without recording a conviction, order the offender to pay a fine'. Therefore, you will not have a record of conviction of your police record, however, in keeping with the policy of Victorian Police, others like employers can be notified of findings of guilt despite receiving a no recorded conviction (Fitzroy Legal Service 2015, para. 4).

It is clear from these accounts that the law was not responding to the consensual creation of images by the two parties. Despite the fact that in both cases the behaviour of the girls in the images could be defined as child pornography (prior to the implementation of sexting statutes), yet these young girls were not charged for participating in consensual sexting (as in *Miller*). Florida Judge Luther, who presided over *Florida Case A*, remarked that the father of the victim in this case (coincidentally a lawyer and former colleague of the Judge's) contacted him and made it clear that charging just the young man was unfair because his daughter was also involved in the creation of the images:

> He said my daughter is as much at blame for this for letting him take those photos and being involved in this sexual relationship as he was… he came to me he's a very peaceful man and said look I don't want you to send him to prison, she has got to accept as much responsibility as he does. And she's not being charged with anything and patently that's unjust to me (Luther, Florida, Judge).

These comments highlight the potential for law to be applied to consensual sexting (production) and the potential for the people in the images to be included in the charge. Overall, however, the accounts highlighted a legal prioritisation of unlawful non-consensual sexting in the form of non-consensual distribution of images. Adam (Connecticut, Prosecutor) discussed this distinction, specifically noting that the role of law was not to pursue consensual sexting:

> *Consenting boyfriend girlfriends who are minors…in that type of situation do I think law enforcement should be involved No I really don't*. The thing is you don't really have a complaining witness and without a complaining witness and unless somebody could come in and say I was a victim or I don't have a case so that makes it easy on our end as far as prosecution goes (Adam, Connecticut, Defence: emphasis added).

Identifying non-consensual sexting in cases was not always as straightforward as presented in *Victoria Case A* and *Florida Case A,* where one individual who was involved in making the images consensually later disseminated them to a specific set of recipients. Legal practitioners discussed three cases (*Victoria Case B*, *Connecticut Case B*, *Texas Case* A) that involved third parties distributing images that they had either captured themselves or possessed without the permission of the subject. In these examples, the person disseminating the images was not intimate with the subject. These cases demonstrate some of the more complex scenarios in which multiple people are complicit in non-consensual sexting.

First, in *Victoria Case B* Nathan (Victoria, Offender) revealed that when he was 19 years old, he was found guilty of producing and distributing child pornography after recording oral sex between an adult (his friend) and a minor (a girl they knew) on his mobile phone. In 2011, Nathan was driving with three male friends and they picked up a 15-year-old female acquaintance who Nathan believed was 16 years old at the time. While in the car, the girl performed oral sex on one of the 18-year-old boys and Nathan took a photo of her engaged in this act on his phone. Nathan alleged that afterwards his friend who had been driving the car took Nathan's phone while Nathan was in the bathroom and sent the photo from to another friend without Nathan's permission. The photo was then distributed among their mutual friends and eventually to students at the school the girl attended (and the boys had graduated from). The school contacted the police and Nathan admitted to his involvement in producing the photo. As a result, Nathan was convicted of the production and distribution of child pornography (*Crimes Act 1958* (Vic) *s.68*) and knowingly using an online information service to transmit objectionable material depicting a person

who is a minor under the age of 18 years in an indecent sexual manner or context (*Classification Enforcement Act 1995* (Vic) *s.57A*). The case was subsequently heard in the Magistrates' Court where Nathan received a *no recorded conviction* and a good behaviour bond. Similarly to Damien, Nathan was automatically put on the Victorian sex offender register as a sex offender for eight years. Nathan's account of his case reveals that non-consensual sexting can involve multiple actors disseminating images beyond the victim's control.

In *Connecticut Case A* Linda (Connecticut Prosecutor) discussed a similar case (which was pending at the time of interview) involving the recording and dissemination of sexual activity by a third party. Linda's account of this case involved an 18-year-old male, George, having sexual intercourse with a minor, Katie, while his friend, Bill, recorded the interaction (Linda could not confirm whether Katie was aware that this recording was taking place). Afterwards, Bill uploaded the content to Facebook. George and Bill were both charged with distributing child pornography. These cases illustrate that the victim and the offender do not always have a pre-existing relationship and the person non-consensually disseminating the image can be removed from the person engaging in the conduct.

In these examples, the person disseminating the images was not intimate with the subject. These cases demonstrate some of the more complex scenarios in which multiple people are involved and potentially liable for non-consensual sexting. We can also see this in Simon's (Texas, Defence) account of *Texas Case A* (introduced in the previous section). The case featured young man in his final year in high school

who received an unsolicited video clip from a 15-year-old female student simulating masturbation. The young man's girlfriend, an 18-year-old senior at the same high school, also viewed the video, which she then showed to her friends at school. She reproduced the content and distributed and sold it at the school and then emailed the footage to her entire district. The young woman was indicted for possession or promotion of child pornography (*Texas Penal Code* § 43.26). Simon had left the State's Attorney office before this case had concluded but recalled that the young woman's lawyer had tried to negotiate the charge down to a misdemeanour.

These cases discussed by Nathan (Victorian Offender), Linda (Connecticut Prosecutor) and Simon (Texas Defence) illustrate that cases involving third party recorders and disseminators were more complex and raised specific issues around the role of consent and the breadth of distribution in prosecution. These accounts illustrate that, regardless of the relationship between the people in the images and the people distributing them, non-consent was the focus of prosecutions.

While the majority of cases recounted by participants involved non-consensual sexting by second or third parties (as discussed above), there were a small number of cases that involved consensual sexting, however, the majority of these cases involved large age gaps between the subject of the image and the recipient. Legal practitioners in Connecticut and Texas described three cases where images had not been disseminated, of which only two went to trial (both were successfully prosecuted, *Connecticut Case C* and *Connecticut Case D*). In all other jurisdictions, no such cases had been defended, prosecuted or presided over by participants in

this study. Two of these cases were distinctly different from those discussed in the interviews; they resembled 'traditional' child pornography offences because they involved large age gaps between two parties.

The first case, *Texas Case B*, embodies much of the concern around sexting and the law (Crofts & Lee 2013; Fichtenberg 2011) because it involved a young couple, a boy and a girl both aged 16 years at the time of the offences, being charged with child pornography and obscenity charges after engaging in consensual sexting. The girl had sent naked pictures and videos of herself masturbating to her boyfriend. The photos and the videos were unsolicited although the young man kept them in his possession and did not distribute them. Simon did not recollect how the images were discovered, but they came to the attention of the local school resource officer[30] who confiscated the boy's phone (with the images on it). The photos were brought to the attention of the County Attorney who wanted to prosecute for possession of child pornography. Acting to mitigate on behalf of his client, Simon had conferences with the County Attorney where he successfully argued that the boy should not be charged with the possession of child pornography because the boy and the girl were both 16 years old at the time. This plea bargain was successful and the County Attorney then changed the charge to possession of obscene material (*Texas Penal Code* 43.23). This case was argued for a year before the charge was dropped. While this case was an anomaly in this research, it still illustrates the potential for consensual sexting to be prosecuted as child pornography. As with *Miller*, this case did not end in court or conviction due to a lack of legal avenues to pursue the case.

[30] Officers dedicated to providing security in schools

While *Texas Case B* did not involve a conviction, legal practitioners from Connecticut recounted cases involving the successful prosecution of consensual sexting, *Connecticut Case C* and *Connecticut Case D*. These cases did not involve complaining witnesses, or non-consensual sexting and they were the only cases discussed by participants where young people (aged 18 years or 19 years) had been prosecuted for merely possessing a sexual image of a minor. The clear distinguishing factor in these cases was the age difference between the subject and the possessor. *Connecticut Case C* and *Connecticut Case D* were more akin to the traditionally envisaged child pornography offences that are focused on the abuse of children (Taylor & Quayle 2003).

Connecticut Case C and *Connecticut Case D* were detailed by prosecutors Linda and Adam and involved image sharing between young adult men (aged 19 years) and children under the ages of 15 years (*Connecticut Case C*). Linda detailed a case where a 19-year-old male was dating a 13-year-old girl and recorded her engaging in sexual acts. The young girl would not admit to a sexual relationship with the young man, but there was evidence of sexual activity in the photographs. Linda decided not to pursue her case under the sexting statute. The boyfriend was convicted of possession of child pornography and sex with a minor. He received a one-year mandatory minimum sentence and 10 years on the Sex Offender's Register (Linda, Connecticut Prosecutor). Similarly, Adam (Connecticut Prosecutor) detailed a case where a 10-year-old and an 11-year-old and a 13-year-old and a 14-year-old were sending pictures of their genitals to one another (*Connecticut Case D*). After the police investigated the case, it was found that a 19-year-old male who was the cousin of one of the boys involved was telling the young boy to engage in this

behaviour and send him the images. The 19-year-old man was arrested for possession of child pornography.

Legal practitioners stated that the images in these cases were not created consensually due to the age and power differential between the two parties. Two prosecutors from Connecticut, Linda and Adam, described these cases in different terms; they characterised the actions of the offender in producing the images as coercive, Adam (Connecticut Prosecutor) noted in *Texas Case D* the victim was told to photograph himself and Linda (Connecticut Prosecutor) speaking on *Connecticut Case C* stated, he 'had her do numerous vile things'. These cases were characterised as different because they showed manipulation and an age difference between the two parties involved.

Cases like these fall outside the definition of sexting, because unlike cases involving teenagers close in age, they resemble both the social and legal definitions of child pornography where an older adult preys on and manipulates a young child. This distinction was made by other participants for example, Judge Luther opined that despite the small age difference between the person in the image and the person non-consensually distributing the images, this difference meant that the offences *should* be considered child pornography:

> Do I think an image of some guy getting oral sex from a 15-year-old girl and he's 18 or 19, yeah I think it is. To me lewd photographs of anyone under 18 is child pornography. Now what you do about that is a whole different story, but I do think it is child pornography. I don't approve of it I don't approve of people over 18 taking photographs of people under 18. Lewd photographs it doesn't offend me near as much if a 15-year-old is taking photographs of

> another fifteen year old, but when you've got an adult doing this to children… (Luther, Judge, Florida)

These comments not only indicate the view that there is a clear demarcation between sexting and child pornography, but also that the legal demarcation by age – which accounts for a power differential- is an important factor in distinguishing between the two. As such, despite participants including these cases in their discussions of sexting prosecutions, the broad and unqualified term sexting is inadequate for these cases; at no point could these cases be classified as a consensual exchange between two similarly aged adolescents or young adults.

Overall, participants' case descriptions reflect other findings that women and girls are more likely to have their images disseminated without consent (Bluett-Boyd et al. 2013). They highlight that the law is not responding to general sexting, which is considered a consensual mediated sexual engagement; rather, the law was being used specifically as a response to non-consensual sexting, where older men abuse the consent of young girls and women and share their images. These accounts disrupt a number of narratives surrounding youth sexting prosecutions, including those that characterise sexting prosecutions as the 'law's explicit censorship of teens' digital sexual expression' (Karaian 2012, p. 63), or 'risk governance… encompass[ing] the abhorrence of child pornography…and the angers of unregulated childhood sexuality' (Lee et al. 2013, p. 44). They also challenge the narratives that characterise the behaviour in these cases as a form of youthful stupidity (as evident from legal commentary on *Alpert*). As evident from these accounts, the behaviour of the individuals disseminating the images was deliberate and egregious. This commonality between the cases alters the prism through which

sexting and the law can be viewed. Rather than drawing upon understandings of youthful agency, these cases raise questions more specific to the legal intervention into non-consensual sex acts. These accounts exemplify Powell and Henry's (2014, p. 119) argument that there needs to be a clear 'conceptual and legal' distinction between consensual and non-consensual sexting, because, as these accounts illustrate, there is a clear legal distinction that is currently being made in the operation of law.

Context of dissemination: Intention to harm, intimate partner violence and adolescent stupidity

This section moves away from the legal aspects of these cases (offenders, victims, images and distribution) and focuses on legal practitioners' accounts of the contextual circumstances that emerged from their sexting cases. Specifically, this section focuses on legal practitioners' accounts of the intentions of the offender (the person disseminating the image) and the impacts on victims and how this allows us to make better sense of these offences beyond simply considering whether they contradict community understandings of child pornography. This is a crucial part of this research because these cases cannot be readily accessed using legal databases, and this level of detail is essential to understanding the characteristics of non-consensual sexting as a legal offence.

This section comprises two parts. Firstly it examines legal practitioners' accounts of the circumstances of their sexting cases. This revealed that that these cases often involved offenders intentionally distributing images for the purposes of harming,

humiliating or seeking revenge, often in the context of a relationship breakdown. Secondly, this section focuses on the practitioners' accounts of the impacts on victims. Participants' discussion of the impact on victims highlighted that non-consensual sexting results in harms that are often gendered and compounded by the technology used to disseminate the images. Despite these accounts suggesting that the actions of offenders were intentionally harmful, legal practitioners often described these cases as a form of 'adolescent foolishness'. These contradicting characterisations of the cases are explored below.

Legal practitioners' accounts of their sexting cases illustrated that images were disseminated with the intent to harm, humiliate, control or seek revenge upon the victim. For example, Simon discussed how, when prosecuting *Texas Case A*, the attitude of the young female offender was unrepentant and her intention was to harm the girl in the image. He noted that, by selling the video and sending it out via mass emails, the offender had a clear intention to 'embarrass the fool out of [the] young girl' (Simon, Texas, Defence). While this account alerts us to the potential for nude images to be used by like-aged (although adult) peers, legal practitioners also observed that images were commonly disseminated to harm victims in the context of a relationship breakdown.

In eight of the cases discussed by participants, young men non-consensually sexted images of their former partners after the dissolution of their relationship. One legal practitioner spoke of this as a paradigmatic situation that encompassed her sexting cases:

> When we do see [these cases] we see a boy and girl taking photos of themselves having sex or someone takes a photograph of a girlfriends breasts…then they send it on to someone else…or they have a fight, they break up and there is some vindictive or inappropriate or nasty sending of this sort of photography to someone else (Adriana, Victoria, Defence)

As discussed by Adriana, these circumstances were common across the cases referred to legal practitioners, regardless of jurisdiction or position. For example, Kathryn, a Victorian Community lawyer specialising in family violence, identified the circumstances outlined by Adriana as common, but she added that the photos were used as a way of preventing women from leaving relationships in addition to seeking revenge. For example:

> The image might have been created consensually and the beginning or even shared consensually at the beginning [of the relationship]…And what we've noticed is that when the women are indicating that they want to leave the relationship or have left the relationship, then *whatever it is that they have engaged in or created has been used as a way to either reconcile or not leave the relationship* (Kathryn, Victoria, Community: emphasis added).

Kathryn elaborated on the use of images in the aftermath of a relationship by discussing one case where the distribution of images had been used as a form of emotional abuse after the dissolution of a relationship:

> One of my first clients was a victim of sexting. The way she said it to me was not that she was a victim of sexting but that her ex kept contacting her, she wanted him to stop contacting her and in the past he had taken naked photos of her and she had consented to that, then they had broken up and he'd put them on his Facebook is what he'd done. And I didn't use the word sexting with her because she didn't use that word (Kathryn, Community, Victoria).

Moreover, Kathryn continued by noting that the non-consensual distribution of images was often part of a suite of violent behaviour against women in and after relationships.

The role of relationship breakdowns in non-consensual distribution of images was evidenced in detail in *Victoria Case A* and *Florida Case A*. In *Victoria Case A*, (discussed in the section above), Damien sent sexual images of his ex-girlfriend to her friends. Damien and his father implied that the breakdown of his relationship was the catalyst for his behaviour:

> He and his girlfriend had a two-year long relationship and she's come back from a south Pacific cruise. They'd broken up at some stage and she called him and said that she's met some handsome fellow on the boat and they'd had this massive affair (Damien's Father).

Damien characterised the break up and the subsequent arguments as a form of provocation for his actions:

> She went and told me that story and I was like now you're just trying to provoke [me]…we haven't spoken for three or four months and I'm doing great and now you're provoking me and that's when I got angry and sent the images (Damien, Victoria Offender).

The accounts from Damien, Kathryn and Adriana reaffirm the importance of locating non-consensual sexting within the context of intimate partner violence and as a form of revenge or harm. In this case, images were used as a tool for enacting revenge as a response to the breakdown of a relationship; as such this finding affirms the importance of recognising non-consensual distribution of images as a mechanism of intimate partner or family violence (Powell 2010a; Powell & Henry 2014). Moreover, it connects with arguments from Australian criminologists that non-consensual sexting occurs against the backdrop of gendered violence and the legitimation of male revenge for injured pride. For example Salter, Crofts and Lee argue:

> Among men as well as boys, perceived injuries to masculine pride in the aftermath of a relationship breakdown, or generalised aggression towards girls and women, can be expressed through the non-consensual circulation of compromising digital imagery of girls and women (2013, p. 311).

Despite observations that these offenders disseminated the images without consent, and in a context of a relationship breakdown, some participants characterised this behaviour as a manifestation of adolescent foolishness and more 'stupid' than 'criminal'.

As within the legal scholarship, some participants contextualised sexting in general, and the sexting practices of the young people in their cases, in terms of adolescent foolishness in general and the naiveté of young girls. Five of the 14 legal practitioners held the view that the production and distribution of images was indicative of young people's foolishness and lack of forethought. One participant implied that young people were inherently naïve:

> They're naïve about it…I've been in the business over 30 years and the one thing I learned dealing with kids is that *they don't appreciate consequences, they don't think about consequences and even if they do they don't have enough life experience to understand the full consequences of their actions* so they just do these things spontaneously on a whim and when you finally bring them around and say what about this this and this possibility they say. Oh I never would have thought of that and they're kids I never would have expected them to (Paul, Connecticut, Prosecutor: emphasis added).

The motif of adolescent stupidity was also evinced in Connecticut Prosecutor Linda's comments about young people's capacity for forethought, 'they don't think, they don't think about anything. Let's be honest'. These observations were suggestive of the limited ability of young people to fully understand the future implications of their behaviour.

While these comments suggest that naïveté is a by-product of a universal adolescence, inherent within Linda's criticisms was a judgment of young women's

decision making, particularly because they are the ones who created or distributed the images in the first instance. This view is exemplified in Linda's discussion of how to educate young people about sexting and Simon's discussion of *Texas Case A*:

> Let's go out to the schools and say 'you send it you live with the consequences' and you send it, how well do you know that person, how really well do you know that person that they're not going to send it on, or you're not going to lose your phone and somebody goes I know her and sends it on. I know the puppy dog love stuff 'oh he'd never hurt me' (Linda Connecticut).

> I don't think kids think in terms of how that's going to impact them at all. I was trying to impress this boy, I figured that's what he would like it was just intended for me to him and it just turned into this whole deal.

The culpability of the (mostly) young male offenders was contextualised, and by proxy excused, by these references by diminishing this behaviour as silly or stupid. A key example of this was evinced by Adriana (Victoria, Defence) who was speaking in general about the range of sexting cases her office dealt with (the majority of which she indicated involved non-consensual sexting), Florida Judge Helen & Nathan's mother

> [It is] usually young people being a bit silly about their sexuality (Linda, Victoria, Defence).

> How much do you really want to punish children for doing stupid children things (Helen, Florida, Judge)?

> …you're ending up criminalising teenagers for experimenting with their sexuality and experimenting with their phones (Diane, Nathan's Mother).

While these legal practitioners recognised the harmful and egregious aspects of these cases, some couched these understandings of young people in foolishness

and therefore differentiated their behaviour from a ‘sex offence’. Connecticut Prosecutor Paul made this distinction clear:

> The difference between the child pornography and the sexting is that the sexting is the recognition that it’s a stupid decision that some kid made. Once you get into the child pornography you label it as that you’re talking about a person that needs to be separated from society, because of their actions.

Adriana (Victoria, Defence) discussed the distinction between youthful immaturity and intentional sexual predation, when referring to the non-consensual distribution of images she stated it was ‘an offence of bad manners or you know… vindictiveness [rather] than a sexual offence really’.

We can see parallels in how these legal practitioners interpreted these cases and arguments within the sexting literature. The literature that has differentiated sexting practices from child pornography often relies on describing the sharing of images as a form of youthful sexual expression whereby these behaviours are constructed as a modern version of ‘you show me yours and I’ll show you mine’ (Fichtenberg 2011, p. 710) or kissing behind the bike shed (Bond 2010). As such, scholars have made clear delineations between adolescent foolishness and criminal intent (Hiffa 2011, pp. 507, 524). As Jolicoeur and Zedlewski (2010, p. 13) suggest in their report on sexting and the law to the US Justice Department, there is a ‘general belief that this behaviour is ‘more foolish than criminal’.

Contextualising this behaviour in this way has been criticised as a mechanism for minimising the egregious nature of non-consensual distribution of images. For example, Salter, Crofts and Lee argue that:

> …a malicious sexting incident may signal a host of other issues beyond 'adolescent immaturity' including the willingness of boys or young men to use technology and other means to abuse, stalk or harass girls (2013, p. 302).

This reasoning presents some of the crucial issues with the law's role to intervene into young people sharing images. The notion of culpability and enduring concepts of adolescence as a state of foolish endeavours can, as Salter, Crofts and Lee (2013) argue, obfuscate the egregious nature of these behaviours and annex them as adolescent foolishness rather than as intentional and vindictive behaviour. Intentional distribution of images in particular was evident in cases where images were distributed without consent.

Yet, the cases detailed by legal practitioners differentiate foolishness from serious harm. While the offenders in these cases did not know that they were committing a child pornography offence, cases such as *Victoria Case A*, *Florida Case A* and *Texas Case A* clearly illustrate instances in which the law is responding to the intentional distribution of images by an adult with the intent to harm or embarrass a minor, often in the context of the breakdown of a relationship. Indeed legal practitioners' recognition of this scenario as paradigmatic suggests that narratives of adolescent stupidity are not adequate in explaining the nature of these incidents. Attitudes from some participants that favour explanations of stupidity and foolishness highlight competing understandings of the nature of the incidents being prosecuted.

These observations about offenders' intentions and culpability lead to a discussion of the impact on victims. While victims were not the focus of this study, some legal practitioners discussed the impact of non-consensual sexting on the young women in

the images, and their accounts illustrated that these outcomes were often gendered and exacerbated by technology.

Impacts on victims: Reputation, gender and technology

As the literature attests, the impact of non-consensual sexting on victims are emotional (Day 2010), gendered (Powell & Henry 2014) and in some rare cases, fatal (Kaye 2010). These impacts have been located within gendered double standards around sexual behaviour where young girls participating in sexting are reprimanded and young boys are rewarded (Ringrose et al. 2013; Walker, Sanci & Temple Smith 2013). The cases recounted in this research emphasise the negative impact on young girls who have their images disseminated without consent. The harms that follow the non-consensual dissemination of images include shame and social exclusion and are interlinked with notions of sexual reputation. These outcomes were often compounded by the fact that the images disseminated by offenders were disseminated to people known to the victim. Before focusing on legal practitioners' accounts of the impacts on victims we shift out focus to the notion of reputation and how it appeared in the interviews.

Both of the offenders interviewed for this study raised the link between non-consensual sexting and gendered reputation. While this was not prominent in the data, these observations cannot be discarded, especially considering the gendered nature of the sexting practices in the cases discussed by participants and the predominance of young female victims. This section functions as a segue into a deeper discussion of victim impacts. Sexual reputation was discussed by Damien,

who reflected on the impact that distributing images had on his ex-girlfriend and her decision to contact the police after he disseminated her images to three friends:

> People's reputations are important, she was trying to clear her name…she didn't want…she was quite a pure girl. Especially for someone like that to get looked at like a whore or a slut because of those [images] (Damien, Victoria, Offender).

Damien's recognition of the impact of publishing sexual images on the pure reputation of his girlfriend illustrates that the images in the cases were not simply sexual but 'sexed' in the sense that they were recognised as signifiers of young women's sexual morality. Damien's observation about the impact of this action on his former girlfriend alert us, not just to the negative impact of non-consensual sexting on girls and women, but that this impact is inherently gendered. Damien noted that his girlfriend contacted police because she didn't want to be seen as a 'whore' or a 'slut' and needed to safeguard her 'reputation'. Damien's comments that she needed to 'clear her name' implied that, despite the fact that they had taken the photos together, in having the images exposed (her engaging in her sexuality) her legal redress was a mechanism to address her shame.

The importance of sexual reputation in interpreting harm was also illustrated in the interview with Nathan and his mother Diane when discussing the 15-year-old girl he non-consensually photographed and whose image he shared without consent.[31] Both Nathan and Diane made it clear that this girl was already sexually active and insinuated that her sexual activity was evidence that she was complicit in the production of the photo:

[31] Nathan claimed in the interview that a friend had sent the images from his phone without *his* consent.

> But for a girl of that age of any age really to be wanting to be a car with boys. And she initiated any sex by taking her clothes off; it was attention-seeking kinds of behaviour (Diane, Nathan's Mother).

In their discussion of the victim and her culpability they both alluded to her sexual reputation:

> LV: Did you know her before [the incident]
>
> N: She wasn't in our friendship group as such... um… She'd done things, sexual things with other people, other boys that were eighteen and nineteen that we knew.
>
> D: … there was no [legal] responsibility for the girl who lured the boys and I know she was younger, but the same girl has statuses on Facebook that she wants to be a porn star. And is very sexually active…

Despite the fact that this girl was 15 years old when Nathan took the photos of her and the young men in the car with her were 19 years old, Nathan's and Diane's discussions of the victim imply that her pre-existing sexual reputation is indicative of consent and that she is less likely to be harmed by such an exchange due to the fact that she was complicit by 'lur[ing]' these young men. Moreover, Diane's comments suggest that, despite the young girl's age, her pretension to innocence and vulnerability is undermined by her open displays of sexuality.

Damien, Nathan and Diane's comments affirm findings from scholars who have pointed to the gendered double standard around sexting practices. Ringrose et al.'s (2013) study of young people's negotiation of exchanging of sexual images highlighted how images of girl's breasts operate as a form of currency, and this results in their male and female participants 'read[ing] the production of images of girls' bodies through hierarchal codes of gendered morality' (Ringrose et al. 2013, p.

314). Literature on young people and sexting has highlighted that sexting is underpinned by the gendered double standards that praise men for engaging in their sexuality, yet shame women (Albury et al. 2013; Ringrose et al. 2013; Walker, Sanci & Temple Smith 2013). As such, young women who engage in consensual sexting have been labelled as sluts (Lenhart 2009, p. 9). Moreover, in their writing on the Revenge Porn, Citron and Franks (2014, p. 353) remark that the non-consensual dissemination of women's images and the display of those images in online forums for consumption must be contextualised as gendered, as like sexual violence they have gendered impacts like constraining women and their potential:

> Nonconsensual pornography, like rape, domestic violence, and sexual harassment, belongs to the category of violence that violates legal and social commitments to equality. It denies women and girls control over their own bodies and lives. Not only does it inflict serious and, in many cases, irremediable injury on individual victims, it constitutes a vicious form of sex discrimination (Citron & Franks 2014, p. 353)

Scholars have long indicated that girls' sexual reputations are crucial part of their social identity, for example Lees' (1989, p. 31) early research one hundred 15-16 year old girls in London found that that young girls reputations were constantly and publically speculated upon, arguing that a bad reputation (being known as a slag) had significant impacts, Lees argues the 'effect of the term is to force girls to submit voluntarily to a very unfair set of gender relations'. This loss of reputation, according to Lees, in and of itself, presents unique consequences for young women. This is exemplified in Stewart's (1999) study on young women's engagement in sexual practices, which revealed that managing and maintaining a reputation was a key facet in the lives of young women. Not only is managing reputation (or as Stewart call is 'technologies of reputation' (1999, p. 308) a key project for young women, young women perceive the loss of reputation as having both social and practical

consequences, including shame and stress (Stewart 1999, p. 379). While not seen elsewhere in the data, Damien's, Nathan's and Diane's comments highlight that the harms for non-consensual sexting can be seen through a gendered lens where the impacts on young girls are inherently linked to their sexual reputations and therefore their perceived social identities. As such, they affirm arguments that the harms of non-consensual sexting as gendered.

Beyond these observations, legal practitioners' accounts of these cases highlighted that the impacts of sexting were also linked to the technology used to disseminate the images and the people they were disseminated to. Most cases (n=7) involved images or videos disseminated to a wider audience. The size of these audiences ranged from: two to three people (*Victoria Case A*), entire schools (*Florida Case A*, *Victoria Case B*, *Texas Case A*), social networking sites (*Connecticut Case A*) and local communities (*Texas Case A*).

Participants consistently identified technology as an enabler and as a significant factor in the breadth and impact of dissemination because the images were inevitably disseminated to many people. For example, images were distributed using communication devices such as mobile phones (*Victoria Case B, Florida Case)*, email (*Texas Case A*), MSN messenger (*Victoria Case A*) and social networking sites (*Connecticut Case A).* The speed with which images can be disseminated to people known to the victim was demonstrated in Nathan's account of his own case:

> LV … Could you give a sense of how many people received the image
> N: Wouldn't have a clue.
>
> LV: A few or….

N: Oh. Well she got it and it went around the school that she was there. So I don't know how many people before it got stopped.

LV: when did you realise that it had gone around to multiple people more than this one person Christopher

N: Oh the next sort of day I think…. A few days later. I'm not really sure

Nathan's experience of a message 'going viral' and spreading across a school population is indicative of the significant role digital technology plays in sexting cases, both in capturing police attention and in the impact the mode of distribution has on the victim. These two issues were essentially interconnected because public dissemination – whether it small or widespread – was linked to the police intervention and to the dissemination's impact on the victim.

In all cases where images were disseminated without consent, the victim's image was distributed to people they knew, including friends, schoolmates, family members and employers. In these cases, distribution via information and communication technologies often involves dissemination to people known to the victim. Three of the 20 legal practitioners emphasised that distribution of images to family and friends was particularly egregious because of the negative impact it had on victims. Kathryn (Victoria, Community Lawyer), Simon (Texas, Defence) and Luther (Florida, Judge) reported that cases involving images distributed to people known to the victim had long-term personal and social impacts, including ostracism and shame. Florida Judge Luther recounted that the father of a victim whose images had been disseminated to family members, friends and employers described the outcome as 'humiliating and embarrassing'. When I asked Community Lawyer Kathryn, whether

her clients were more concerned about the fact that their images had been distributed to multiple people or to people they knew she responded:

> [Clients were concerned] about the images going to a large amount of people or that the image would go to people they know…I think both [but] the people that they knew is the main one…but also because it would be out there to unknown people. The main concern [for victims] was that people that they knew would know about it.

Kathryn's observation that victims were most affected by the exposure of explicit images to people they knew was also illustrated in Simon's observations on the outcome of *Texas Case A,* for example:

> You have this 15-year-old girl who was shamed out of the school. Her parents had to move they had to move to a completely different area, totally different school and those rumours just kind of follow you and then there's these images and pictures of her out there that to this day lord knows who has those pictures of her.

Simon's comments illustrate the emotional harms (Day 2010, p. 72) of non-consensual sexting experienced by victims when the images are distributed broadly and to people known to them. The emotional injuries manifest in practical and long-term consequences for the victims and their families once their privacy is violated are not recounted in detail here but they are evident in these accounts to a limited degree that can including shaming and social ostracism (see Stewart 1999) and the need to leave the local area. When images are disseminated without consent online, it can produce the long-term impact of 'haunting'. Haunting harm refers to the experience of having your images circulating in perpetuity on the Internet and has been used to articulate the impact of online child pornography on its victims (see Kimpel 2010). While scholars have described the impacts of non-consensual sexting on victims as 'haunting harms' and supported the rationale for prosecuting certain

sexting cases under child pornography laws (Kimpel 2010, pp. 320–321), the legal practitioners' descriptions of the impact on victims of non-consensual sexting revealed that they were uniquely affected because their images were sent to people they knew and had regular contact with. This was a unique aspect of the offence in which offenders specifically targeted people known to the victim to expose their images. Unlike the harms conceptualised under child pornography laws, where images are (typically) disseminated to an unknown mass, legal practitioners' accounts suggested that people known to the victim were the targets, and in some cases this had a specific impact on the victim's ability to remain in their local community. Therefore, the haunting harms arising from these offences, as articulated by Simon's comments 'lord knows who has those pictures of her', need to be linked to the fact that these harms are also linked with the exposure to their social network including family and friends.

These accounts illustrate that not only is this behaviour intentionally harmful, but it understanding these harms can be viewed through the lenses of intimate partner violence, gender, shame and technology. Motives to harm, injure or seek revenge that emerge from these case descriptions further illustrate the legal demarcation between the boundaries between normalised consensual sexting and non-consensual sexting. The accounts from legal practitioners and offenders illustrate the importance of distinguishing between these two practices and challenge the assumption that that sexting is a continuum with consensual at one end and non-consensual at the other. Accounts of the intent of offenders to harm victims by non-consensual sexting of their images and the impacts on victims illustrate that non-consensual sexting is a fundamentally different practice that has serious impacts on

victims. The intent to harm also raises issues with respect to culpability, while many legal practitioners characterised the behaviour of offenders as ‘stupidity’, case descriptions revealed actions that were specifically intended to wound the individual in the images.

More specifically, participants in this study indicated that the paradigmatic sexting case involving non-consensual sexting was one that involved the breakdown of a relationship and the use of images as a form of revenge. This factor is commonly acknowledged as a catalyst of non-consensual sexting in the literature (Citron & Franks 2014; Hand, Chung & Peters 2009; Dimond et al. 2011; Powell 2010a; Powell & Henry 2014; Salter, Crofts & Lee 2013; Southworth et al. 2007) but has only recently come the fore as a key part of discussions around non-consensual sexting and the law. Reports from these participants, in addition to the research focused on contextualising the use of technology to harm women as intimate partner violence, indicate that there are broader and less technologically deterministic discussions to be had about the nature of non-consensual sexting, particularly the criminalisation of this practice and whether the context of a relationship breakdown ought to be at the forefront of discussions rather than youth sexting.

Conclusion

Examination of legal practitioners and offenders’ accounts of sexting cases illustrates a variety of scenarios in which images were produced and distributed. Despite this there were a number of common factors including: the gender of victims and offenders, distribution of images and intent to harm. Together, these common factors

painted a clear portrait of the type of behaviour that the law was responding to across jurisdictions and legal frameworks. They revealed that the cases that reach prosecution involve images of underage girls, non-consensual distribution by (mostly) young adult men and often occur in the context of a relationship breakdown with the intent to harm. In some respects, these key factors challenge the narratives around the criminalisation of sexting and how these practices have been framed as a problem for law, in particular the narratives that suggest all young people who engage in consensual sexting are at risk of prosecution due to the potential for child pornography law to be applied to these practices (cf. Cannon 2011).

The cases recounted in this chapter subvert narratives that characterise sexting prosecution as the criminalisation of consensual sexual activity (Karaian 2012; Lee et al. 2013), or as Barry (2010, p. 140) terms it 'the comparatively innocuous behaviour of immature adolescents'. While the circumstances of these cases did not reflect traditional child pornography, they also did not reflect 'innocuous behaviour' or 'policing female sexuality' (Geyer 2009, p. 3). Instead, the law had captured a harmful and non-consensual practice that was affecting young girls.

Moreover, that, the offenders in cases described by participants were young adults and not adolescents suggests that these cases are not an example of legislative over-reach or misapplication that is often characterised by the argument, 'Laws were not meant to be both a shield to protect children and a sword to punish them' (Day 2010, p. 72). The circumstances of most cases discussed by the participants

highlighted that child pornography laws were being applied to incidents where adults disseminated sexual images of children.

While the cases recounted by participants which involved child pornography offences, did not involve the types of offenders these laws intend to capture (Hiffa 2011), the cases discussed by participants in this study displayed egregious and harmful behaviour and explicit sexual content of minors distributed by adults. Most cases that fell under the parameters of sexting misdemeanours and family violence frameworks exhibited the same features: they involved adult males non-consensually distributing nude images or videos of mainly underage girls and young adult women. These accounts challenge the narratives focused on the potential for law to be applied to consensual exchanges between teenagers and instead highlight the prosecution of adults for non-consensual sexting against young girls, a type of incident exemplified in Crofts and Lee's description

> Those cases where an image is taken and distributed without the consent of the subject are far from the paradigm cases of sexting. Where an underlying criminal offence has been committed, it may more readily be akin to the rationale of child pornography laws (2013, p. 105).

As such, labelling this issue as the prosecution or criminalisation of sexting is clearly inadequate. The term sexting suggests consensual production and distribution of images, yet the prosecuted cases involved non-consensual distribution of images of young girls by adults. These cases therefore fall into the wider project of prosecuting harmful interactions that violate the consent and bodily integrity of individuals, particularly minors. Some scholars have argued that there is a need to distinguish between sexting that is consensual and sexting that is non-consensual (Crofts & Lee

2013; Hasinoff 2013), and these case descriptions reinforce the need for such a demarcation. As Hasinoff argues:

> A teenager who chooses to send sexually explicit images to a peer is engaging in a very different activity than someone who distributes a private image with malicious intent or coerces another person to produce an explicit image (2013, p. 450)

As such, the cases studied here point to the need to use specific terminology that recognises these incidents both as non-consensual and inherently different from sexting. These cases also suggest the need to depart from some of the proposed terminology in the literature, such as Wolak and Finkelhor's (2011) term 'aggravated sexting', which suggests that when images are distributed without consent, this is an 'aggravated' iteration of sexting. This thesis is alert to the problematic and historical implications of using language that conflates non-consensual sexual interactions with aggression or enthusiasm (Smart 1995), where violence and abuse is situated at one end of the normative spectrum of sexual interactions. I specifically use the term *non-consensual sexting* (as opposed to consensual sexting) to describe this non-consensual behaviour and to make that distinction. This differs from, and should not be linked to, the production of the image due to the irrelevance of consent, which will be expanded upon in Chapter Eight.

These case descriptions bring to bear a key tension within the legal scholarship around the basis of criminalisation. As discussed previously, some scholars have labelled consensual sexting as harmful and worthy of legal intervention, albeit not punitive legal intervention (Barry 2010; Duncan 2010; Fichtenberg 2011; Leary 2007, Leary 2010; Szymialis 2010). Others argue that it is non-consensual sexting that

should be criminalised due to breach of consent. As the cases reaching prosecution involved non-consensual sexting, it became apparent that it was the lack of consent that predicated legal intervention. The accounts presented in this chapter highlight the need to explore non-consensual sexting through the lens of gendered and intimate partner violence to extend a more in-depth understanding of sexting prosecutions and disrupt dominant narratives that have focused on sexting and the law as the criminalisation of youth sexuality.

By analysing legal practitioners' and offenders' accounts of sexting cases, this chapter sought to lay the foundation for successive chapters that examine the operation and implementation of law in relation to youth sexting. The following two chapters examining how legal practitioners negotiate specific legislation in relation to the sexting cases outlined above. Chapter Seven focuses on child pornography legislation, while Chapter Eight focuses on alternative legislation such as sexting specific legislation and family violence legislation. I now shift focus to the mechanisms that have enabled and allowed avoidance of prosecution in these cases. The following chapter examines Victorian defence lawyers', US prosecutors' and Victorian offenders' experiences of negotiating existing child pornography law in some of the cases described in this chapter.

Chapter Seven: Negotiating the application of child pornography laws to youth sexting – Experiences of legal practitioners and offenders

Introduction

It is widely accepted that child pornography legislation raises concerns when applied to youth sexting, but little is known about the ways in which legal practitioners negotiate charges in practice. This chapter moves from an examination cases details to an examination of the accounts of Victorian defence lawyers, US prosecutors and Victorian offenders regarding the application of law in relation to these cases, with a focus on cases where offences were charged under child pornography law[32].

As discussed in Chapter Four, a number of scholars have reviewed child pornography legislation and how it applies to youth sexting practices in Australia (Svantesson 2010; Crofts & Lee 2013) and the US (Weins & Hiestand 2009; Nunziato 2012; Ryan 2010; Tang 2013). Common concerns emerged from this cross-jurisdictional literature and focused on the State and Federal legislation that enables the application of child pornography law to sexting. These concerns include the breadth of definitions (Crofts & Lee 2013), the age of a child for the purpose of child pornography, the mandatory requirement that all offenders convicted of a child pornography offence be placed on the Sex Offenders Register pursuant to respective state provisions (Crofts & Lee 2013) and the reliance on prosecutorial discretion in decisions to initiate criminal proceedings (Tang 2013; Weins and Hiestand 2009).

[32] This research was undertaken prior to the implementation of the *Victorian Crimes Act 1958* s. 70AAA exceptions to child pornography offences, which were implemented in late 2014. This law reform will be discussed in more detail in Chapter Eight.

In Chapter Four, these four concerns are discussed extensively in both legal scholarship and the media (Brady 2011a; Brady 2011b; Brady 2011d). However, the legal scholarship on sexting has largely focused on the *potential* for law to be applied to youth sexting, and as such, there is a dearth of information regarding the operation of the law in relation to youth sexting. More specifically, the perspectives of legal practitioners who are in charge of the implementation of the law and who have experience in prosecuting, defending or presiding over these cases have not been incorporated in the literature. Therefore, this section discusses the professional experiences of legal practitioners with respect to the application of child pornography laws to youth sexting, with a specific focus on interviews with Victorian defence lawyers, Connecticut Prosecutors and offenders as well as the stages of criminal proceedings: trial, sentencing and post-sentencing.

This chapter is divided into three sections. The first draws on interviews with Victorian legal practitioners and focuses on their experiences negotiating on behalf of clients who had been charged with child pornography offences after sexting. This section also includes discussions with two Victorian offenders and their accounts of the criminal proceedings in relation to their cases. Defence lawyers' highlighted the following key difficulties in applying child pornography laws to sexting practices: broad definitions, limited access to the Criminal Justice Diversion Program (CJDP) (which would enable a young adults charged with a child pornography offence the opportunity to have their case diverted from the courts), grouping offences in the Magistrates' Court (which allows for offences committed as minors to be grouped with offences committed as adults), and limited defences offered on the basis of age differences between the person in the image and the person distributing it. In many

ways, the defence lawyers were prevented from achieving a result that was not sex offender registration.

The second section of this chapter shifts the focus from defence lawyers to prosecutors. It examines how prosecutors in Connecticut and Texas negotiate child pornography statutes with respect to cases involving youth sexting. The inclusion of this US data provides an opportunity to examine how prosecutors were using their discretion in these cases. Because the Victorian Office of Public Prosecutions declined to participate in the study, experiences from prosecutors in the US offer an insight into prosecutorial decision making in sexting cases. While not transferable to a discussion of Victoria, these interviews highlight some of the key factors that prosecutors take into account when deciding to begin proceedings in child pornography cases involving sexting.

The third section of this chapter focuses sex offender registration. It draws on the interviews with two Victorian offenders and examines the operation and administration of the Victorian Sex Offenders Register. It is important to note that incorporating their experiences on the register is not an attempt to downplay their actions or the impacts of those actions. This is of critical importance because no victims were interviewed in this study and therefore only these young men's narratives are given a platform. The aim of this section is to illustrate the difficulties in placing young adult men who have committed egregious offences on a register that is intended to risk manage older predatory offenders.

Throughout this chapter, I draw from key legal scholarship on child pornography, sex offender registration and the imagined sex offender and discourses of risk to examine legal practitioners' and offenders' accounts of defending, prosecuting and being prosecuted for child pornography offences after sexting.

Insights from Victorian defence lawyers: difficulties defending child pornography cases involving sexting

Despite efforts to access prosecutors, judges and defence lawyers in Victoria (see Chapter Five) only defence lawyers (and two offenders) participated in the research. In the Victorian defence lawyers' accounts of defending clients who had been charged with child pornography offences after sexting, a consistent theme was the inability for the law to distinguish youth sexting from child pornography. Their accounts affirm the legal and criminological scholarship that has discussed problems with the definition of sexting content as child pornography and the subsequent and mandatory registration of young sexters as sex offenders.

Broad definition of child pornography

The legal definitions of child pornography across Victorian and Commonwealth law do not recognise that children may consensually self-produce sexual images or videos that they share with others who may or may not be over 18 years old. Therefore, children can potentially be prosecuted for taking sexual images of themselves or other children (Crofts & Lee 2013). Broad definitions of offences are often adopted when creating law – in Australia's legal system, it is common law that enables clarification and the setting of precedent for when and how the law applies. However, what makes the area of child pornography law distinct is judicial discretion

is removed from the process of imposing the mandatory sex offender registration as detailed in the *Sex Offender Registration Act 2004* (Vic). Mandatory registration limits the common law's ability to counteract the definitional breadth of child pornography.

As defence lawyer Dennis explained, 'State and Federal [law] define it as a picture of someone that is explicit and underage it doesn't matter who you are, it's child pornography'. Furthermore, Adriana (Victoria Defence) noted that the law makes no distinction based on age regardless of social and cultural mores that view an older adult having images of a minor as different to a young adult just over the age of 18 years:

> The term sexting actually in the context you are speaking of is actually "possess transmit use produce" child pornography very much in the same way that an older man say would be charged with having a photograph of a very young girl. So…the same type of offences that are charged for paedophilic or predatory behaviour…[is] also charged in relation to young people (Adriana, Victoria Defence).

Victorian defence lawyers argued that a distinction is necessary because child pornography laws were created for paedophiles or serious sex offenders, not for young people whose offences were not linked to serious sex offending:

> *[T]hese laws were not intended for sexting offences at all*. So they weren't intended for young people making videos of themselves or videos of the ones they're in relationships with. They were intended for adults who were doing that [recording sexual images] to children. And not 18 year old adults too (Kathryn Victoria Community Lawyer: emphasis added).

> The problem [with child pornography law] is that it is too blunt an instrument to actually pick the people who are a risk out of this group (Adriana, Victoria Defence)

As Adriana (Victoria, Defence) and Kathryn (Victoria, Community) noted, child pornography legislation is underpinned by the assumption that the people being charged as adults are abusing children, yet their experiences with young men just over 18 years old who were charged with child pornography offences after non-consensually sexting was that they are not abusing young children and that they posed minimal risk to the community.

Victorian defence lawyers also identified a concomitant concern with prosecuting youth sexting practices as child pornography offences, the automatic sex offender registration process. They noted that the mandatory registration nullified the ability of a defence lawyer ability to mitigate on their client's behalf for an outcome that didn't involve registration. As Matthew explained:

> When they [clients] first came to me…it was apparent…because of their age, being over the age of eighteen that there would be a mandatory [registration], if the case was proven against them…there would be no option…they would end up on the register. So it was highly likely that they would.

The only option to avoid prosecution under child pornography law in Victoria is to be placed on the Criminal Justice Diversion Program, which is discussed below.

Negotiating diversion

The Criminal Justice Diversion Program was created to offer first-time and non-violent offenders in Victoria the opportunity to avoid a criminal record by adhering to a set of extra-legal conditions (*Criminal Justice Procedure Act 2009* (Vic) s.59). Access to the CJDP is decided before the defendant enters a formal plea, and unless they fail to meet the conditions of the program, there is no record of their offence going through the courts. These conditions are aimed at benefitting the victim, offender and community alike and may include: writing a letter of apology to

the victim, counselling for anger management, drug or alcohol treatment, education courses (e.g., defensive driving courses or drug awareness programs), donations and community service (Victoria Legal Aid 2013b). The court adjourns proceedings for up to 12 months while the defendant completes the terms of their program (*Criminal Procedure Act 2009* (Vic) s.59 ss.2-2c).

Access to the program is dependent on four factors. Firstly, the offence needs to be heard and determined summarily,[33] secondly the offence cannot be subject to a minimum or fixed penalty sentence, thirdly the accused needs to acknowledge their responsibility for the offence (*Criminal Procedure Act 2009* (Vic) s.59), and lastly, as shown in Figure 1., the prosecution has to recommend the offender as a Criminal Justice Diversion Program candidate and the court has to agree to their recommendation.

[33] A summary offence is one heard exclusively in the Magistrates court. While all summary offences are heard in the Magistrates court, indictable offences can be heard and determined summarily in the Magistrates court if they involve less serious offences such as drunk and disorderly and defacing property offences (*Summary Offences Act 1996*). Child pornography offences aren't listed as an indictable offence that can be heard summarily (Magistrates Court Act 1989 Schedule 4), but the transmission of child pornography via a carrier device is listed in the (*Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* (s. 57A).

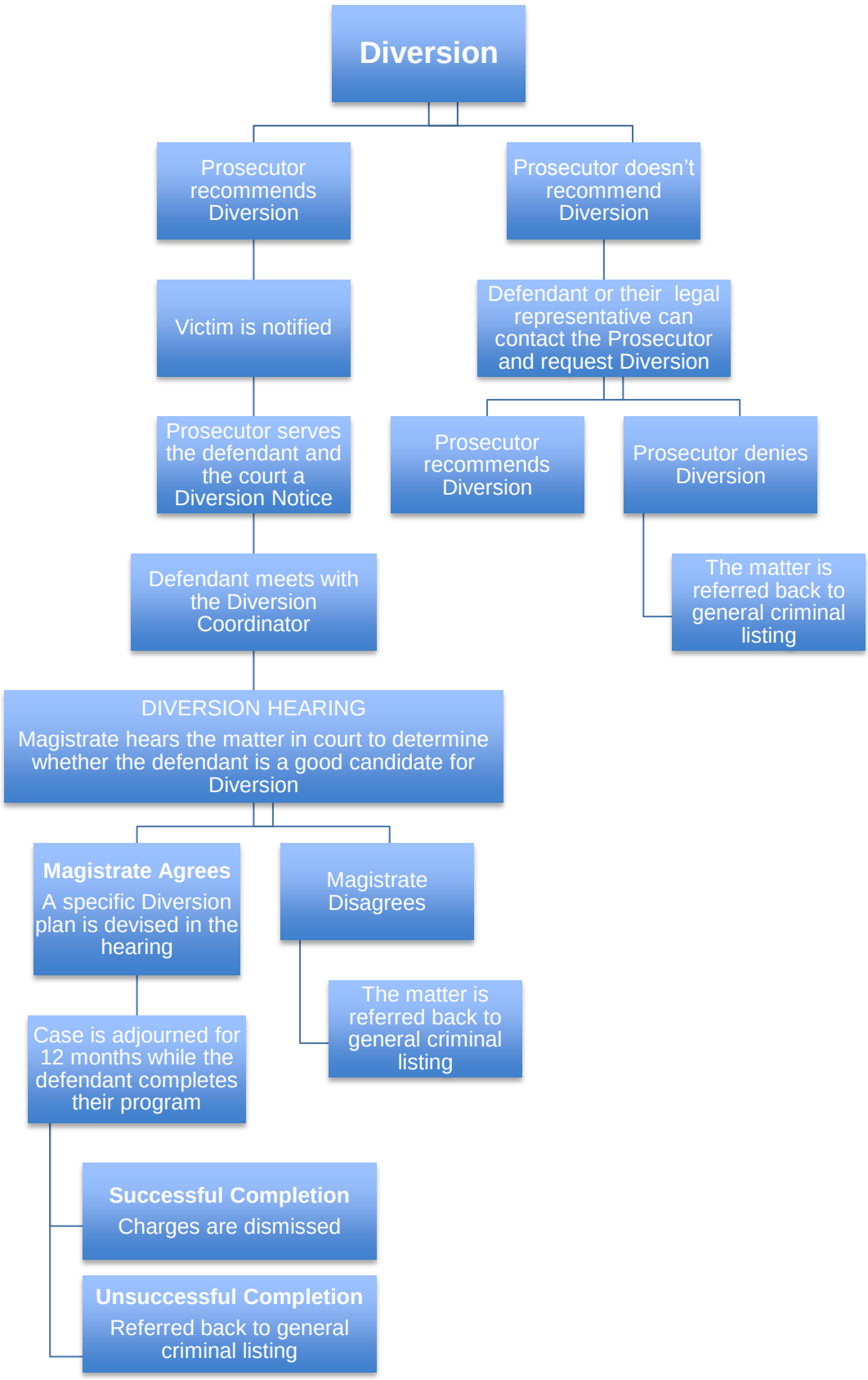

Figure 1: Access to the Criminal Justice Diversion Program, Adapted from Magistrates' Court 2014

While the CJDP is aimed at first time offenders, the most recent statistical overview of the program in the Magistrates' Court (2006–2007) found that young offenders aged 17 to 19 years made up the largest group of defendants to receive diversion (17.4%) followed by individuals aged sixty-five or above (16.1%) (Sentencing Advisory Council 2012, p. 4). This reflects the understanding that, while crimes rates peak at ages 17 to 19 years (Farrington 1986); young offenders in this tend to 'grow out' of criminal behaviour (Fagan & Western 2005). It also illustrates the rehabilitative ethos of youth justice that is driven by a 'heavy emphasis on diversion for young people' (Sentencing Advisory Council 2012, p. viii) and reflects the disadvantage of a criminal record for future prospects and the understanding that older persons pose more risk and are less likely to be rehabilitated, a theme that endures throughout legislation focusing on child pornography and sex offender registration.

Victorian defence lawyers identified the Criminal Justice Diversion Program as the only alternative option for young people charged which child pornography offences. They identified it as an important alternative because it avoids a criminal record for child pornography charges and thus ensures the mandatory application of the register is not applicable, as Matthew explained:

> The Sex Offender's Registration Act says any sentence. So in order to avoid mandatory registration as an adult you need to obtain from the court a disposition that does not involve a sentence. There is only one disposition that does not involve formal sentencing, which is diversion (Robert, Victoria Defence).

While Commonwealth child pornography offences appear in the *Magistrates Court Act 1989* (Vic) (Schedule 4) list of indictable offences that can be tried summarily[34], state level offences of distributing child pornography do not. During the period 2004 to 2007, 95 per cent of child pornography cases were heard summarily (Sentencing Advisory Council 2008). Offenders who are charged with offences such as producing child pornography (*Crimes Act 1958* (Vic) s.68) or procuring a minor for the purposes of child pornography (*Crimes Act 1958* (Vic) s.69) are not eligible for the Criminal Justice Diversion Program. Despite this, some Victorian participants discussed the importance of diversion as a potential appropriate option for cases heard in the Magistrates' Court where offenders have been charged with both producing and distributing. For example, Robert viewed young people charged with child pornography offences after sexting as good candidates for diversion:

> *You would think that would be a good example for diversion…and if you were a police officer you might think well these people were perhaps immature they could perhaps benefit from counselling* they could perhaps benefit from some sexual behaviour education there would be a whole lot of things (emphasis added).

However, no Victorian practitioner or offender had his or her cases dealt with by way of diversion. Matthew, a Victorian defence lawyer, reported that while all five of the cases he had defended resulted in good behaviour bonds (non-punitive outcomes), all had sought and been denied diversion and this was linked to prosecutorial discretion over the application of diversion.

Both offenders who participated in this study had their legal representation seek diversion, but both were also denied. For example, Nathan was charged with producing and distributing child pornography after using his phone to send an image

[34] Tried in the lower Magistrates court

of a 15-year-old girl performing oral sex (*Victoria Case* B). Nathan's lawyer requested diversion prior to his first court date and both the police and the Magistrate articulated in court that diversion would be appropriate for his case. However, the Director of Public Prosecutions overruled:

> We went to the Magistrate's Court and…the police had agreed to diversion so we were going [to court] very confident. But on the day the prosecutor said no [to diversion]…Ultimately we went as high as we possibly could and tried different things but the DPP kept saying no (Diane, Nathan's Mother)

As evident here, the Director of Public Prosecutions holds control over access to the Criminal Justice Diversion Program and the reasons why diversion was not recommended remain unknown[35]. Two Victorian defence lawyers speculated that reluctance to recommend diversion was politically motivated. For example, Matthew (Victoria Defence) observed that the increasingly politicised landscape of child pornography was an influential factor:

> Politically [prosecutors are]… sensitive about [child pornography] it's a topic that's of great debate…I think that because it is a sensitive issue politically, that there is general reluctance and fear-incorrectly so- to deal with it by way of...[diversion]. [It is] an unsubstantiated fear on the prosecutions' part.

Similarly, Robert (Victoria, Defence) argued that the label of 'child pornography' could influence prosecutorial decision-making:

> Child pornography is a pretty emotive issue… if you're trying to have the charges withdrawn it just doesn't happen… because it's child pornography I don't think people will rationally respond to what they're looking at because It's child pornography or they see it as child pornography.

The extent to which politicisation or other value judgments inform these decisions remain unknown because there is no transparency regarding prosecutorial decision making on access to the Criminal Justice Diversion Program; there is no requirement

[35] As discussed in Chapter Three, the Victorian Office of Public Prosecutions was approached to be involved in this research but declined.

that the prosecution specifies why diversion is denied and there is no appeal process available[36]. Critically, as Robert (Victoria Defence) explained, Magistrates are bound to the decision of the prosecution in relation to diversion; they cannot recommend a case be diverted:

> The problem with [diversion] is that the gate keepers are the police [prosecutor] you're sitting there and you're a Magistrate and you're hearing a case and you're thinking- and you might say overtly- this a case that warrants diversion unless the police [prosecution] consent to it you can't get into the system.

Matthew argued that placing diversion in control of the prosecution subverts the principles of the adversarial system:

> So one of the dispositions in the Sentencing Act the Criminal Procedure Act [is] diversion is totally in the hands of a prosecutor. Which I think is inappropriate I think that [this] is an adversarial system if the prosecution opposes diversion that's fine. That's what they should be arguing, that's their position but it ought to be an independent person who makes the decision about its value or not about whether it ought to be applied or not. At the moment that's not the case. If the prosecution doesn't agree to diversion you cannot get diversion so the judge does not even get to consider it (Matthew, Victoria Defence)

Robert agreed with Matthew's argument, proposing that the Magistrate should make this decision:

> It would be better set up whereby in appropriate cases a magistrate who takes the view that diversion ought to be considered as an option can get past the gate keeper and that wouldn't pose particular problems for the police [prosecutor] because then [they] would be in a position to make submissions like they do with everything else. And the magistrate can say I agree with you it's not appropriate for that reason …or I disagree with you therefore I'm going

[36] The clandestine nature of this decision-making process and the power of the police will be reviewed in 2015, as Chief Magistrate Peter Lauritsen ordered a review 'amid concerns it is being manipulated by "subjective" police', these concerns have also been raised by the Victorian Criminal Bar Association and the Law Institute of Victoria (Bucci 2015, para. 1).

> to do it. But until such time as the police [prosecutors] are taken away as the gatekeepers there is that problem. (Robert, Victoria Defence)

Diane articulated the impact of prosecutorial discretion on diversion, noting that in Nick's case the Judge and Prosecutor did not agree on the decision to not pursue diversion:

> You've got the judge sitting there saying 'you've got to resolve this'. [He said] it's one image and he couldn't believe it. And you've got the DPP who's not even in the courtroom who's looking at paperwork going no (Diane, Nathan's Mother).

While there is no formal process for the Director of Public Prosecutions to clarify the reasons for their refusal to support access to Criminal Justice Diversion Program, Nathan's mother Diane recalled the police prosecutor offering an explanation when she questioned him:

> I spoke to the [police prosecutor] and at that stage he was just adamant that 'no we're here to educate the rest of the society that [recording sexual images of minors] is not on'.

These comments from the police prosecutor highlight that prosecution aimed to use the law as a general deterrent and pedagogical tool to 'educate' society. It also contradicts arguments from other participants in Chapter Six that police are exercising their discretion not to charge, illustrating that police decisions in relation to child pornography are politicised and suggests that decisions to pursue diversion are not solely focused on the individual but also on broader social concerns. Moreover, Diane's comments highlight that not only has the DPP pursued these cases but they have done so contrary to the Judge's belief that these cases did not warrant registration. As such they indicate a policy with the DPP that child pornography cases, despite their circumstances, should be treated as registrable offences. This points to the need for further study in this area of prosecutorial decision-making,

sexting and child pornography offences particularly to investigate whether this is a policy supported by the DPP or whether this case was an anomaly.

While diversion was not accessible for these offences that it exists as an option highlights that there are legal mechanisms available in Victoria that could enable sexting cases to be separated from child pornography cases. This adds a further dimension to the debates on the way the law should function in response to youth sexting and whether or not there should be new laws in place to deal with sexting as an offence. These discussions also echo the recommendations of the Victorian Parliamentary Law Reform Commission's inquiry into sexting which recommended:

> Victoria Police review its policies to ensure that opportunities are provided for adults charged with offences in relation to sexting-type behaviour, where there is no evidence of exploitative behaviour, t*o be offered diversion by Police prosecutors* (VPLRC 2013, p. 121, my emphasis).

Beyond the discussion of limited access to diversion, Victorian defence lawyers indicated that sexting cases also raise a number of issues with respect to defences to child pornography charges, specifically, that the defences to child pornography (at the time of interview) were unable to recognise the relative youth of people who sexted, an issue examined below.

No age based defences for producing child pornography

As discussed in Chapter Four, Victoria has a range of child pornography offences including the production of child pornography (*Crimes Act 1958* (Vic) s.68), the procurement of a minor for child pornography (*Crimes Act 1958* (Vic) s.69) and possession of child pornography (*Crimes Act 1958* (Vic) s.70). However, before the implementation of exemptions to child pornography (*Crimes Act 1958* (Vic) s.70AAA)

in 2014, these separate offences had different and often limited defences. For example, the defences for the possession of pornography in Victoria include:

> (b) that the film, photograph, publication or computer game possesses artistic merit or is for a genuine medical, legal, scientific or educational purpose; or
> (c) that the accused believed on reasonable grounds that the minor was aged 18 years or older or that he or she was married to the minor; or
> (d) that the accused made the film or took the photograph or was given the film or photograph by the minor and that, at the time of making, taking or being given the film or photograph, the accused was not more than 2 years older than the minor was or appeared to be; or
> (e) that the minor or one of the minors depicted in the film or photograph is the accused (*Crimes Act 1958* (Vic) s. 70 (2b)(c)(d)(e))

However, prior to the implementation of the 2014 exemptions, which make specific exceptions for minors producing, distributing and disseminating sexted images of other minors (*Crimes Act 1958* (Vic) s. 70AAA), there were no defences for the production of child pornography (s. 68) and procurement of a minor for child pornography (s.69) beyond provisions that make it lawful for law enforcement agents (*Crimes Act 1958* (Vic) s.68(2)) to 'print or otherwise make or produce child pornography in the exercise or performance of a power, function or duty conferred or imposed on the member or officer by or under this or any other Act or at common law' (s.68(2)). Additionally, the relative youth of the accused to the minor is irrelevant to both the *Criminal Code Act 1995* (Vic) (s. 474.19, s. 474.20) and (prior to the legislative reform in Victoria that is discussed in the following chapter) the *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* (Vic) (s. 57A), which focus on the transmission of such images.

Defence lawyer Benjamin, in his discussion of Commonwealth statutes, argued that the absence of consideration of consent to producing the image, which does not

factor into defining the content as child pornography in the law, is a major flaw in the (then) existing legislation:

> And consent is irrelevant, certainly in the federal jurisdiction. So you can have a situation where a girlfriend or boyfriend has sent something on and there is no complaint but it's still sexting, it's still child pornography; it's still using a telecommunication device to send child pornography. And the charging of that and the subsequent finding of guilt because there's not any defence to it.

This raises an important consideration. The cases that have been prosecuted to date, as described by participants, involved a mixture of production and distribution of child pornography and procurement of a child for child pornography, as such the exception two-year age difference exception (*Crimes Act 1958* (Vic) s. 70 (2d)) was not relevant. For example, Matthew identified that in the five cases he had defended; all of the offenders were no more than three years older than the victim. These cases involved young men being charged after non-consensual distribution of images, rather than the possession of sexted images, and, therefore, the Victorian defences are inaccessible for this type of offending.

Effectively according to the law the production of child pornography cannot be mitigated by age of the offender. Adriana argued that the law required change because age and life-stage *are* important mitigating factors in these cases:

> In many ways [their actions] need to be contextualized around the notion of their youth and their exploring of their sexuality (Adriana, Victoria Defence)

The implications of removing age and consent as defences to producing child pornography and procuring a minor for the purposes of making child pornography are illustrated in *Victoria Case A*. In this case, Damien and his former girlfriend recorded a digital video of themselves engaging in sexual intercourse when they

were both aged 17 years.[37] When they broke up at 19 years, Damien took a screenshot from this video and sent it to some friends. After hearing from one of the recipients that the images had been sent, Damien's ex-girlfriend and her family contacted police who then confiscated Damien's computer. Damien was also questioned by police and admitted to having sent the image. He was issued a charge and summons sheet by a local police informant and was ordered to appear in the Magistrates' Court in late 2008. He was charged on four counts including: making child pornography (*Crimes Act 1958* (Vic) s. 68); inviting a minor under the age of 18 years to be concerned in the making of child pornography (*Crimes Act 1958* (Vic) s. 69(1)(a)) and two counts of knowingly using an online information service to publish objectionable material which depicts a person who is a minor under the age of 18 in an indecent sexual manner or context (*Classification Enforcement Act 1995* (Vic) s.57A). These were all indictable offences that were heard in the Magistrates' Court.

While the charges for disseminating the images occurred when Damien was an adult, he was also charged for producing child pornography and procuring a child for child pornography, despite being underage when the original video was made and alleging that the video had been taken consensually:

> She was 17 and three quarters. Three months older than Damien. Three months later presumably it wouldn't be an offence to make it; it was consensual… Damien was a minor. So unfortunately on the paperwork [he was charged with]... producing it [and] sending it out (Damien's Father).

Damien reported that they created the video consensually (although without speaking to the young woman in the video it is impossible to ascertain the veracity of this statement).

[37] Therefore minors in Victoria.

This case demonstrates the rigidity of the conditions around accessing defences on the basis of age and context of the image. As Adriana highlighted, the specificity of the defence (requiring both parties to be in the image) allows for a young person to be charged with the production of child pornography even if they created or participated in the creation of the content when they were underage and with the consent of the other party. While a crucial issue, defences were not the sole issue raised by participants. I now turn to another key issue raised by Victorian defence lawyers, the grouping of offences in the Magistrates Court.

Grouping offences

The *Children, Youth and Families Act* 2005 (Vic) places specific age limitations on defining a 'child' and the age at which a case can be heard in the Children's or Magistrates' Court. Pursuant to the *Children, Youth and Families Act* 2005 (Vic) (s.31a), the criminal division of the Children's Court can only hear cases:

> In the case of a person who is alleged to have committed an offence, a person who at the time of the alleged commission of the offence was under the age of 18 years but of or above the age of 10 years but does not include any person who is of or above the age of 19 years when a proceeding for the offence is commenced in the Court.

Therefore, 'if a young person has turned 19 before his or her case is commenced in the Children's Court the case will be transferred to the adult Magistrates' Court' (Chu & Ogloff 2012, p. 326). Two Victorian defence lawyers identified this as problematic because (as demonstrated by the cases in Chapter Six) cases can involve an offender producing an image as a minor and distributing it as an adult. Stephen illustrated this point:

> If a 17 year old takes sexual images of their partner and then once they're nineteen they forward it on to someone else. The stuff they did when they were 17, the producing of sexting images, that's child pornography. What you did when you were nineteen you forwarded it onto someone else, that's child pornography (Stephen, Victoria Defence)

Adriana (Victoria Defence) highlighted that this is problematic because if the first offence related to 'production' was committed as a minor but the distribution offence was committed as a legal adult, these two offences of producing and distributing are grouped together and heard in the Magistrates' Court. The grouping of offences committed as a minor with those committed as an adult has important implications for sentencing outcomes because, if the charges are grouped and heard in the Magistrates' Court and there is a conviction, this has the potential to affect the length of time that an offender spends on the Sex Offenders Register. Specifically, because the length of registration (8 years, 15 years, or life) is based on the *number* and *type* of offences committed. Adriana (Victoria Defence) articulated how the length of registration is calculated by the number and severity of the offence:

> You have a Class A, Class B, Class C and class D. Class A and B more serious offences than Class C or D. And you basically add them up so if you have two Class A offences…you're on for life… so basically you add up the type of offence and it gives you the consequences, so quite frequently people are on for life. Because it is not unusual if you have one sexual offence you've usually got a few against the same person. So they add up quickly (Adriana Victoria Defence).

The effect of Victorian's retrospective grouping is illustrated in Damien's case. Even though he committed his first offence as a minor, his offences were grouped together and heard in the Magistrates' Court because he was 19 years old when he committed the later offences. Without this grouping of offences, Damien's case could have been heard in the Children's Court. For example, Damien's father noted:

> The Magistrate herself said why am I hearing this, this is a Children's Court matter (Damien's Father).

Including the production charge as an offence in the Magistrates' court had detrimental impact on Damien's case. In addition to the Commonwealth charge of knowingly using an on-line information service to transmit objectionable material which depicts a person under the age of 18 in an indecent sexual manner or context (*Classification Enforcement Act 1995* (Vic) s.57A), Damien had been charged with inviting a minor under the age of 18 years to be concerned in the making of child pornography (*Crimes Act 1958* (Vic) s.69). Both of these offences fall within the boundaries of 'Class 2 Offences', and as a result, the length of his registration was increased:

> And they looked more closely at it and they said it's three offences and three offences means you've 15 years on the register. And… legal aid even wrote a letter to the chief commissioner laying it all out… that that first offence he was underage and they replied after many months saying no he's on it (Damien's Father).

This is problematic because the Sex Offenders Register is an administrative requirement- there is no opportunity for registrants to appeal the decision and have special circumstances recognised. Further, the consequences of grouping offences are not just about sentencing but also about the mandatory aspect of the Sex Offenders Register, which are discussed in more detail in the final section of this chapter. Damien's father's comments illustrate the inability for the defence to mitigate on behalf of the defendant and argue that the length of registration should be altered to reflect the nature and context of the offence or the potential for re-offending.

Damien's case illustrates that this legal issue is not simply about a child pornography framework; rather it is the intersection between Victorian and Commonwealth child pornography laws and the *Children, Youth and Families Act 2005* (Vic) and the mandatory nature of the Sex Offenders Register. In Damien's case, the broad definitions of child pornography, the lack of age-based defences, the absence of consent as a defence (to the production of an image) and the practice of grouping offences all affected the outcome of his case. These mechanisms enable the application of child pornography law to this behaviour and allowed the successful prosecution of Damien's case in the Magistrates' Court where the penalties are higher and the grouping of offences meant the term of his registration for two offences was longer.

Sentencing outcomes in Victoria: No recorded convictions

The following section draws upon discussions with Victorian defence lawyers and offenders about sentencing. Before examining Victorian defence lawyers' discussion of sentencing, it is important to acknowledge some of the difficulties associated with sentencing child pornography offences. Warner argues:

> Child pornography offences and possession offences in particular, create real problems for judicial officers in determining an appropriate range of penalties for an offence which has few parallels in the criminal law. This is complicated by the fact that there is some ambiguity about the basis for criminalisation. If it is primarily criminal because it causes harm, the harm in cases of possession of child pornography is indirect and rather remote (2010, p. 391).

The discussions with the defence lawyers highlighted the prevalence of the sentencing disposition of no recorded conviction, particularly the ability for the defence to mitigate on behalf of their client for the lowest sentence possible. Seven

of the cases discussed by Victorian defence lawyers received a *guilty with no conviction recorded* disposition. The finding of guilt with no recorded conviction is an option afforded the judiciary, where the recorded conviction is seen as harmful to the defendant's future. In using this sentencing option, the court must reflect upon three criteria:

> The nature of the offence; the character and past history of the offender; and the impact of the recording of a conviction on the offender's economic or social well-being or on his or her employment prospects (*Sentencing Act 1991* (Vic) s.8).

Therefore, the accused is found guilty of the offence, the conviction is not recorded but the defendant does have a police record which is accessible by employers (Winford 2010, n.p.). Victorian Defence lawyer Matthew described how he achieved this no recorded conviction outcome for his clients:

> You… figure the circumstance of the offending in an attempt to portray it as can be seen to the court as what we would describe as the low end for this type of offence. So there is always a spectrum of offending with any charge be it a burglary or mak[ing] child pornography and at the high end you will get the person who does it for commercial gain and exploitation reasons and at the lower end you will get a person who is virtually experimenting with sexuality but committing an offence at the same time. So you'd look at describing as the low end of this type of behaviour you'd focus on their perhaps lack of prior convictions and their lack of maturity at the time.

Damien's (Victorian Offender) lawyer had a similar approach. While his lawyer declined to be interviewed, Damien provided access to the law firm's review of the case[38], in which his lawyer noted:

> The matter was then called on in front of Her Honour ---. You had previously attended upon [the lawyer] and provided him with various references from your employer, your ex-employer and your business partner. There was also a helpful letter from your girlfriend outlining the changes in your relationship. [The lawyer] mitigated on your behalf pointing out the emotional time it was

[38] This is a confidential document not included in the reference list.

> and how you are now a successful man now making his way in the world. I am happy to say Her Honour ---was convinced in relation to the matter that these were a one off and it was a highly unlikely that you would come before this court again. Therefore…she fined you…and did not record a conviction.

As illustrated in this excerpt, good character, evidence of employment and potential for future success as well as evidence of the emotional circumstances in which the images were distributed was used to successfully mitigate on behalf of the client for a lenient sentence. Although these decisions were irrelevant to the application of the Sex Offenders Register, the sentencing outcomes from Nathan and Damien's cases demonstrate that judges and Magistrates act within their discretionary purview with regards to sentencing.

The sentencing outcomes of these cases suggest that the behaviour of these two Victorian offenders sits on the lower end of the offending spectrum, but sex offender registration treats them as dangerous sexual offenders in need of long-term registration. The clear discrepancy between these outcomes highlights the inconsistencies between sentencing and registration and the impact of allowing for considerations of the child pornography offender beyond whether or not his or her behaviour falls within broad definitions of producing child pornography. These lenient sentences must also be contextualised by considering that '[b]y progressive increases in the maximum penalty for these offences, parliaments have signalled that it as an offence that is to be regarded seriously' (Warner 2010, p. 391).

The problem for defence lawyers was that having no recorded conviction was the best achievable option. For example, Matthew (Victoria Defence) stated that the aim of including these mitigating factors was for the purpose of 'having the court deal

with it in the most compassionate way that they can'. While in the context of sentencing a child pornography offence, no recorded conviction is the most lenient outcome available, but it does not circumvent the Sex Offenders Register.

Mandatory registration

In Victoria sex offender registration is a post-sentencing administrative apparatus that requires those convicted of various sex offences to automatically register. As discussed in Chapter Four, there have been longstanding criticisms of mandatory registration including its lack of effectiveness, lack of judicial oversight (see *Federal Violent Crime Control and Law Enforcement Act 1994* § 170101A; VLRC 2012) and its inability to distinguish risky from non-risky offenders. These criticisms are accentuated and expanded in relation to youth sexting. There is a consensus among legal scholars and commentators across the US and Australia that registration for those charged with child pornography offences related to sexting practices is inappropriate (Arcabascio 2009; Shafron-Perez 2009; Weins & Hiestand 2009). These criticisms were echoed by Victorian defence lawyers in this study.

In Victoria, every adult convicted of a child pornography offence is placed on the Sex Offenders Register for a minimum of eight years and a maximum of life; a juvenile offender may be placed on the register from three years to seven and one-half years (*Crimes Act 1914* (Vic); *Crimes Act 1958* (Vic)*; Sex Offenders Registration Act 2004* (Vic)). Dennis (Victoria Defence) reported that the defence lawyer is ultimately constrained by mandatory registration:

> Well it is mandatory if they are convicted or even a without conviction disposition It doesn't matter if the sentence is what they call 'proven and dismissed'…but [Magistrates] can't do anything about the moment they plead

> guilty without a defence, it doesn't matter what penalty they give them there is no discretion [for sex offender registration] (Dennis, Victoria Defence)

Contrary to the core principle of sentencing in Victoria, that 'sentencing is not a mechanical process. It requires the exercise of discretion' (Storey [1998] 1 VR 359, para. 366), Victorian judges and Magistrates have no discretion in the application of the Sex Offenders Register to child pornography offences committed by adults because the register is a post-sentencing scheme (VLRC 2012). The rationale for this decision was described in the Victorian Law Reform Commission's' review of the register in 2012:

> The Sex Offenders Registration Act is based on two premises. They are, first, that the incidence of child sexual abuse in the community requires the existence of a regime to monitor people who have prior convictions for child sexual offences and, second, that a registration scheme deters and reduces re-offending by those people (p. xi).

All seven Victorian legal practitioners criticised the lack of judicial discretion in relation to the application of the Sex Offenders Register in these cases. The crux of this criticism was that it reduced flexibility in sentencing by removing the ability for mitigating and contextual factors to contribute to the outcome, and diminished the opportunity for common law to re-balance the broad definitions of child pornography. This was also problematic for defence lawyers because it reduced their ability to mitigate on behalf of clients to achieve a different outcome. As Adriana (Victoria Defence) noted:

> So you could argue in court till you were blue in the face that you shouldn't go in the register. It doesn't matter it is an administrative consequence of being found guilty of certain offences.

They viewed registration as a restrictive scheme designed to manage the risk of sexual recidivism, and felt it overly punitive for the offences in question. For example,

Thomas (Victoria Defence) emphasized that there is a categorical difference between a young adult offender who has sexted and a 'sex offender':

> I would find it difficult to believe that for your 16-year-old school boy that distributed photos of his or someone else's girlfriend while I *certainly think there's room for them to be punished I don't know whether that should set the tone for the rest of their lives that by them being placed on the sex offender's register for eight years* and it seems to me that there's no place them for them [there] (Thomas, Victoria Defence: emphasis added).

Defence lawyers identified judicial discretion as specifically important in the prosecution of youth sexting practices because it is a legal mechanism for the inclusion of contextual factors such as age for consideration. As such, Dennis (Victoria, Defence) commented that judicial discretion could act as a panacea to the broad definitions of, and limited defences to, child pornography in relation to non-consensual sexting:

> And most Magistrates, all Magistrates would exercise – and I very lightly say that…. But I would say all Magistrates wouldn't place a young person on the sex offences register for this behaviour, but they can't do anything about it the moment they [young adult offender] pleads guilty

Furthermore, Robert (Victoria, Defence) maintained:

> I think the great quality of the common law is that the common law allows judges and Magistrates to deal with all situations and [sexting] is a good example… if you have the discretion the common law will adapt to it and the common law with deal with it and that's the great beauty of the common law and if you take it away then you're going to have problems.

Legal practitioners' discussions of this administrative apparatus in relation to sexting cases affirm long-standing critiques of mandatory registration in Victoria (VLRC 2012), particularly with respect to the problems arising from the absence of judicial oversight. As Robert (Victoria, Defence) argued, sexting cases accentuate the inherent problems of mandatory registration, particularly because they subvert the

ability for common law to counteract broad definitions of child pornography and respond to non-consensual youth sexting in a way that reflects the offence itself.

In addition to affirming these broader critiques, the defence lawyers' accounts reveal that in the absence of access to the Criminal Justice Diversion Program there is little to prevent young adults convicted of child pornography offences for non-consensual sexting having to register as sex offenders, regardless of whether or not the Magistrate has identified them as low-risk offenders. As such, the final section of this chapter focuses on how young adult offenders experience and negotiate the Sex Offenders Register. This illustrates how the law is functioning with respect to youth sexting and highlights the contradictions between the imagined risky child pornography offender and the young adults whose behaviour falls within the same boundaries. The offenders' experiences on the Sex Offenders Register suggest a manifestation of the inherent contradictions between legal and cultural understandings of child pornography.

Implications of the imagined sex offender and child pornography victim on youth sexting and the law

The concerns relating to the application of child pornography law identified by Victorian defence lawyers include a combination of statutory legislation (definitions and defence), procedures (diversion and grouping of offences) and discretion. A common theme in the discussions of the various legal mechanisms at play was the lack of avenues for differentiating between youth sexting (albeit non-consensual sexting) from child pornography, particularly mechanisms that allowed defence lawyers to mitigate on behalf of their clients based on age and consent.

Victorian defence lawyers' discussions on negotiating child pornography laws for youth sexters illustrate some of the pervasive fictions about youth sexuality, child pornography and child pornographers and also demonstrate how these are embedded within the statutory and procedural elements of the legislative framework that encompasses these offences. In her seminal critique of child pornography law in the US, Adler noted that:

> This conception of child pornography-that it is sexual abuse, that it is in fact the core of sexual abuse-persists as the foundation of the approach taken by courts, legislators, politicians, and the media (2001, p. 217)

Victorian defence lawyers' accounts of the lack of legal avenues to raise a defence on the basis of age, consent or context of the offence illustrate just how resolute this link is, not only in the definition of child pornography, but also the absence of defences (prior to the implementation of *Crimes Act 1958* (Vic) s.70AAA) and the lack of access to the Criminal Justice Diversion Program. Together, these elements of law create a situation where the contextual factors of a case cannot detract from the label of the offence. In other words, there is no way to manifest a legal defence to child pornography because all images of children are child pornography. Describing the product of child pornography legislation, Adler (2001, p. 2010) refers to 'a world in which we are enthralled-anguished, enticed, bombarded-by the spectacle of the sexual child'. Furthermore, child pornography legislation is based on the presumption that all people who produce or disseminate these images are child pornographers, replete with the assumed risks of child pornography offenders. The dissonance between this legal fiction and these youth sexting cases was evident in part by the lenient sentences afforded in these cases. This illustrates the judicial interpretation of these offences as non-violent, and the offenders as non-risky,

whereas the statutory definition and assumptions about their behaviour contradict those assessments.

One of the additional issues raised by discussions with Victorian defence lawyers was discretionary decision making by the prosecution. The Victorian defence lawyers raised specific questions about the reasons for prosecutors initiating criminal proceedings. Because the Office of Public Prosecutions in Victoria declined to participate in this study, the following section draws from interviews with prosecutors in the US for insights into prosecutorial discretion in relation to sexting cases and child pornography law.

Prosecutorial decision making in child pornography cases involving sexting: Discussions with US Prosecutors

As the majority of participants in Australia were defence lawyers, I now focus on the insights of prosecutors in the US into prosecutorial decision-making in sexting cases. This is of particular importance because prosecution agencies in the US have been criticised for prosecuting these incidents as child pornography cases (Bailey & Hanna 2011; Tang 2013). These insights add to the broader discussion about the ways in which prosecutors are using their discretion in relation to sexting cases.

In relation to child pornography cases involving youth sexting, US prosecutors' explained in interviews that their decisions to initiate criminal proceedings were firstly based on evidentiary concerns including the age of offender or the age difference between the victim and the offender. Prosecutors were, for the most part, using their broad discretion and charging minors with lesser offences to avoid a child

pornography outcome. This discretion was based on a mixture of case-based and extra-legal factors predominantly linked to the severity of the incident. Before exploring the factors influencing their decisions to pursue cases, this section first focuses on the some of the procedural aspects of the law that prosecutors identified as essential to their decisions, including adult transfer and sentencing guidelines.

Connecticut prosecutors highlighted that their discretionary decisions were framed by two key legal procedures: adult waiver and sentencing guidelines. In 1995, Connecticut implemented legislation requiring the automatic transfer of juveniles (aged 14 and 15 years) to adult criminal court for Class A or B Felonies,[39] and the transfer of juveniles for a Class C, D or Unclassified Felony at the prosecutor's discretion[40] (*Conn. Gen. Stat.* § 46b-127). In addition, criminal court prosecutors are able to file a motion to send juveniles who commit Class B, C, D and Unclassified Felonies back to juvenile courts. There have been a number of catalysts for this legislation. Firstly, this legislation emerged within the broader context of a 'tough on crime' approach to violent juvenile offenders in the US, represented by the 'adult time for an adult crime' rhetoric that spawned an overhaul of the juvenile system and the implementation of automatic transfers from juvenile to adult courts (Myers 2003, p. 173). Secondly, Allard and Young argue that this legislative reform was

[39] Class A felony (murder) 25–60 years imprisonment and up to a $20,000 fine; Class A felony 10–25 years imprisonment and up to a $20,000 fine (Conn. Gen. Stat. §§ 53a-35a, 53a-41); Class B felony 1–20 year imprisonment and up to a $15,000 fine (Conn. Gen. Stat. §§ 53a-35a, 53a-41).

[40] Class C felony 1–10 years imprisonment and up to a $10,000 fine (Conn. Gen. Stat. §§ 53a-35a, 53a-41); Class D felony 1–5 years imprisonment and up to a $5000 fine (Conn. Gen. Stat. §§ 53a-35a, 53a-41).

underpinned by shifting understandings of young offenders, which they characterised as:

> Fear of out-of-control juvenile crime fuelled by the image of a "super-predator" generation [which] reversed a century-old practice of treating young offenders as different from adult criminals–less culpable and more amenable to rehabilitation because of their age (2002, p. 66).

While there has been widespread criticism of the practice of transferring juvenile offenders to adult courts in general (Allard & Young 2002), the role of prosecutors as key decision makers in the waiver of cases from adult to juvenile courts has also engendered criticism. Angel (2010, p. 366) argues that this power in the hand of prosecutors is misplaced and such a crucial decision regarding the legal fate of the juvenile should be in the hands of juvenile court judges who have the necessary experience and, importantly, approach cases with a rehabilitative rather than punitive spirit. Despite these criticisms, juveniles charged with child pornography offences in Connecticut are subject to both automatic and prosecutorial waiver. As Connecticut's child pornography provisions include Class B (*Conn. Gen. Stat*. § 53a-196b; *Conn Gen. Stat*. § 53a-196b); Class C (*Conn. Gen. Stat. Ann*. § 53a-196e) and Class D felonies (*Conn. Gen. Stat. Ann*. § 53a-196f), juveniles found in possession of or distributing nude, semi-nude or sexual images of other juveniles will have their cases automatically transferred to adult criminal courts. The implications of adult transfer on youth sexting cases was articulated by Linda, who reported that another Prosecutor who worked within the juvenile courts was transferring sexting cases to her:

> It's two different questions…when did it come to our attention I'd say like at least 4 years ago…Paul has the juvenile I have the adult…*we started seeing where he was transferring up cases of kids that were jumping into…and not*

> *even into our lower court which could consider youthful offenders…they were jumping right to adult [court] because of the content of [the images], that's when I started noticing what am I gonna do*. Because you actually go from a misdemeanour that could be handled in juvenile court to mandatory minimum one year as high as five years mandatory minimum felonies and they bypass this whole youthful offender. The youthful offender is anyone under the age of 18 (mumble)...the record gets sealed at twenty-one so there's no registration as a sex offender there's no mandatory time there's no felony conviction…everything was just jumping up (emphasis added).

This predicament of young people 'jumping up' to adult courts resulted in prosecutors using their discretion to either lower the charge against young adult perpetrators or pursue the child pornography offence if they saw fit. This was enabled by discretionary powers that Connecticut prosecutors reported as far reaching:

> Well we have a ton of...prosecutorial discretion…. I can do anything I want, Paul [juvenile prosecutor] can send me up a case and I can shove it back down, I can bump it up I can lower the charges I can drop it to a breach of peace… So our prosecutorial discretion- we're lucky in Connecticut it's huge, huge. It can be up to the five-year mandatory minimum ruining your life or down to totally throwing the case out (Linda, Connecticut Prosecutor).

The second issue that Connecticut prosecutors reported as essential to their decision-making were regulated sentencing structures. In an effort to reduce discrepancies in sentencing outcomes, the US has restricted judicial discretion in sentencing and installed regulated sentencing structures that allow sentences to be decided by case-specific factors (Savelsberg 1992). These sentencing reforms in the US – which have effectively displaced discretion from the hands of the judiciary at the time of sentencing and instead placed it in the hands of prosecutors (Engen & Steen 2000) – engender a process of discretionary manoeuvring in which

prosecutors are able to alter the charges to manage the mandatory sentencing structure in the US. Franklin articulates this process:

> Working within the context of determinate sentences, then, many prosecutors have the ability to fit the charge to the desired sentence as prescribed by the relevant sentencing statutes (2010, p. 185).

Filing charges based on the sentencing outcome rather than the specific aspect of the cases has been labelled the 'instrumental approach' (Levine 2006, p. 727). US prosecutors revealed that they were using an instrumental approach to their sexting cases.

For example, in Connecticut, despite prosecutors' ability to lessen the charge, they were still limited to what charges they could pursue before the 2010 implementation of the *Possessing or transmitting child pornography by minor* statute (*Conn. Gen. Stat.* § 53a-196h). Before this, prosecutors described being 'stuck with pornography charges' (Linda, Connecticut Prosecutor), which they managed to avoid by charging young people using the lesser charge of 'breach of the peace' (*Conn. Gen. Stat.* § 53a-181).[41] Linda reported that this was essentially a makeshift response that they used as a result of having few other options:

> I saw this coming five years ago, yeah because we were putting them under breaches of peace because we didn't know what to do you know (Linda, Connecticut Prosecutor).

[41] A broad offence covering behaviour that causes inconvenience annoyance; creates risk; assaults another; threatens to commit a crime; publicly promotes offense behaviour; makes an obscene gesture or uses obscene language.

Prosecutors reported using their discretion specifically to avoid young individuals who had been caught producing or distributing sexual content having to register as sex offenders:

> There are some instances where I have taken those cases and reduced the charges [so] that [they] didn't require sex registration or didn't require mandatory jail time depending on the individual (Adam, Connecticut Prosecutor).

Their articulation of this discretionary manoeuvring suggests that while the definition of child pornography is broad and applies to a wide range of sexual image exchange between young people – regardless of consent – prosecutors were not constrained by this definition. They were able to respond to the incident and its aggravating and mitigating factors within each case and treat each incident as an offence to be paired with a sentencing outcome.

From their discussion of these cases, it was clear that their decisions to avoid child pornography charges were influenced by a mixture of legal factors and extra-legal factors. Legal factors included the type and seriousness of offences, the defendant's culpability and the victim's attitude towards the court. The extra-legal factors included the ability of schools to manage the incident as disciplinary agents and the educational prospects of offenders. These legal and extra-legal factors are explored in more detail below.

Prosecutors Linda and Paul noted that the character and the educational opportunities available to the offender (which indicate their potential for rehabilitation) altered their decisions to prosecute:

> I can drop the charge completely if the kid is beyond remorseful and we've made him jump through every hoop in the book and he's about to go to medical school and this is preventing him (Linda, Connecticut Prosecutor).

> [I consider] how is the kid presenting? Is he going to Cornell University and in one angry fit sent this out and now kept trying to get it back and nobody would give it back? (Linda, Connecticut Prosecutor)

The decision to prosecute was also based on the effect the offence had on the victim and their parents as well as the impact of court on the victim:

> I personally try to take everything into consideration how angry is the victim…And some of them are well…how much is the parent screaming [complaining]...Or is the victim 'I just want this to end I don't want' cause remember these pictures come into court as well, the jury will see them. Often these girls are like I don't want that I don't want people to see this. They want this go away and to go away fast (Linda, Connecticut Prosecutor)

Prosecutors also reported that they differentiated between the seriousness of the offence by the number of people who received the images:

> I mean each one [case] is taken individually…there is a big difference between 'I sent it on to a few of my buddies' and 'she caught wind of it'…. (Linda, Connecticut, Prosecutor)

The factors discussed above were largely legal factors that pertained to the cases, but prosecutors also identified that there were extra-legal factors that influenced their decisions to pursue these cases. For example, Linda revealed that the decision to prosecute was influenced by whether the victim and offenders' schools were able to

take disciplinary action in response to these incidents, suggesting a preference for disciplinary action rather than state action in these cases. She also reported that the level of publicity surrounding these cases could also influence the decision to prosecute:

> Has it gotten so out of [hand] that we have to do something, so the press has gotten involved or something like that (Linda, Connecticut Prosecutor)?

The conditions upon which they based prosecutorial decisions, both legal and extra-legal, indicated a consideration of what makes these cases worthy of prosecution rather than a need to prosecute at all costs. This contradicts the concerns, which emerged from *Miller,* that prosecutors were pursuing every case involving young people exchanging sexual images, or as Tang articulates:

> The digitization of teenage sexuality has found an unlikely and frightening antidote: child pornography laws. Once used to criminalise the behaviour of sexual deviants…prosecutors now wield these criminal statutes against the very children they are supposed to protect (2013, p. 107).

These considerations and discretionary decisions were exemplified in Linda's account of *Connecticut Cases B* and *Connecticut Case C and* Texas Defence Lawyer (former Prosecutor) Simon's account of his prosecutorial decision making in *Texas Case A,* which is discussed below. In Linda's account of *Connecticut Case B*, in which a young woman sent videos of herself engaging in sexual acts with an animal to a number of young men in her high school, Linda revealed that while she had the opportunity to charge both the young woman who sent the images and the young men who received them, she was able to exercise her discretion to avoid prosecution of both under child pornography statutes, even though these were applicable:

> Technically [this case is] possession of child pornography... But this is where we're saying technically did I run around and charge all the boys, no and honestly we are still debating whether to charge her if they can get us a mental health treatment for her we're probably not going to.

However, Linda also noted that her decision was based on whether the images were being distributed beyond a small network of friends to a wider social network:

> But then again if this keeps spreading the way the news is spreading I may not have a choice [but to prosecute] (Linda, Connecticut Prosecutors).

Similarly, one prosecutor from Texas discussed his decision-making process to pursue a child pornography charge in *Texas Case A* (where an 18-year-old high school senior circulated images of another young girl simulating masturbation to her school, family and county). These accounts illustrate prosecutorial discretion working both to avoid a child pornography charge in one case and to pursue child pornography charges in the more serious case. Faced with the certainty of sex offender registration for the 18-year-old girl who had disseminated images, Simon sent the case to a grand jury[42] so they could decide whether to pursue this case. Simon's decision to involve a grand jury was underpinned by his reservations about prosecuting a young adult for a child pornography offence that would drastically alter her life:

> And so I really went back and forth over whether this was the appropriate thing to do or not and one of the nice things is in Texas we have a grand jury so I went to the grand jury and although I can't talk about what happens in the grand jury but when I represented that case I let twelve people make that

[42] Grand Juries in Texas are essentially a panel of citizens (between 15 and 40 jurors) (*Criminal Procedure Act*. § 19.060) that approve felony cases put forward by the district attorney and issue an indictment. They are a failsafe in place to ensure that felony charges are worthy of the time, expense and impact on the accused, if they agree the evidence warrants a trial then the accused is issued an indictment, if not they are allowed to go free (Texas Politics 2014).

> decision, I wasn't the one that made that decisions. So I basically turned it over to them and said basically, here's what we've got y'all tell me if you think this was a crime this is the statute and the grand jury finds probably cause and they said say we believe that a felony was committed and so now, it can be…. If 12 of y'all think s it's a crime then I'll go to court and prosecutor (Simon, Texas Defence).

After Simon presented his case to the jury, they were convinced that it satisfied the requirements of being labelled a felony:

> So a grand jury is supposed to be a screening mechanism between you know the prosecutor and the defendant but it doesn't always work that way a lot of times it's just a rubber stamp that goes through but in that particular case it was- I mean I went in to the grand jury saying y'all help me and [the result] is sort of a community saying yeah this is wrong (Simon, Texas Defence)

Simon's uncertainty illuminates the difficulties facing prosecutors who are confronted with cases involving non-consensual sexting, where the behaviour is clearly egregious but there is a sense that it does not constitute a child pornography offence. Simon's use of the grand jury as a third party oversight illustrates that, in child pornography cases involving sexting, prosecutors have used procedural apparatus to ensure that the charges reflect community understandings of legal wrongs. It is important to note that while a grand jury is intended to be a protective measure from '…hasty, malicious and oppressive persecution' (*Branzburg v. Hayes, 408 U.S. 665, 688 [1972])* or as a way of seeking community input, there have been longstanding criticisms of this mechanism. Critics have focused on the role of the prosecutor in this process, asserting that grand juries are influenced by how prosecutors frame their cases (Arenella 1980; Campbell 1973; Leipold 1995; Morse 1931) and have become 'the total captive of the prosecutor' (Campbell 1973, p. 174). While it is impossible to ascertain Simon's influence on the grand jury from this

interview, it is clear that these cases raise complex legal issues for prosecutors and that initiating criminal proceedings for child pornography offences is not a hasty or immediate decision. This affirms accounts from prosecutors in Connecticut that their discretion was used to avoid charging young people with child pornography offences in relation to sexting incidents. In Simon's case, discretion was used to exhaust the decision-making apparatus to ensure that prosecution reflected community attitudes rather than the prosecutor's own interpretation of the behaviour.

These prosecutors' accounts of their decisions to pursue child pornography charges reveal that the cases they only prosecuted child pornography offences where adult offenders non-consensually distributed images of child victims. These decisions were based on their assessment of the potential for offenders to be rehabilitated, whether the victim wanted to pursue prosecution and endure the rigors of court and whether the matter could be addressed through disciplinary actions within schools. Overall, the interviews revealed reluctance on the part of prosecutors to pursue child pornography charges at all costs, except in incidents where the cases involved older adults disseminating images of minors. Ultimately, this allays some of the concerns about prosecutorial discretion within the sexting literature and suggests that prosecuting young people under child pornography laws for sexting is less about using the apparatus of the criminal justice system to pursue and punish minors (these prosecutorial accounts illustrate quite the opposite) and more about the absence of prosecutorial discretion when offenders are adult age and disseminating images of children. While these accounts illustrate some of the decisions of the prosecution in initiating criminal proceedings and the impetus to avoid charging young people with child pornography offences, the impacts of successfully

prosecuted cases is yet to be explored, particularly as behaviours contradict traditional definitions of child pornography. To examine this in detail, I now focus on the two Victorian offenders' experiences of sex offender registration.

Victorian offenders' experiences on the sex offender register

This section examines the experiences and challenges for young adult offenders negotiating the Sex Offenders Register in Victoria, a group that has yet to be researched in detail (Rasmussen 2010, p. 236). These interviews offer a unique insight into how registration affects the lives of young adults who have been convicted of child pornography offences and their family members. This has been termed the 'collateral consequences' of sex offender registration (Levenson et al. 2007, p. 590). As alluded to in the introduction, these views, partial as they are, are included as a way of illustrating the implications of applying a child pornography framework to incidents of non-consensual youth sexting. The offenders' experiences provide detailed perspectives of the 'law in action' with respect to youth sexting. The inclusion of these accounts is not intended to downplay the seriousness of their actions or to create sympathy for these young men, as is evident in some of the accounts of *Alpert*. Instead, the offenders' insights are used to examine the use of registration as a way of responding to and managing their offences. It also allows examination of the implications of using child pornography laws intended for a certain type of offender against young men who have non-consensually sexted. The offenders' experiences serve as illustrations of the pre-existing arguments focused on the contradiction between the imagined paedophilic sex offender and youth sexters. Three main issues emerged from the accounts of both offenders. Their

experiences managing the register were underpinned by their beliefs that they were not the intended subjects of registration. They also reported difficulties managing registration due to their age and the unclear nature of the system and its facilitation by police that results in the register functioning as a form of punishment. I explore these difficulties in the following section, which culminates in a discussion of how the challenges faced by these offenders illustrate the internalisation of risk-management.

But I'm not a paedophile

One of the key issues highlighted by both offenders was that they felt they did not belong on the register because they were not 'sex offenders':

> I took one photo as a mistake when I was eighteen. I'm not a forty-year-old man that's got pictures of little kids everywhere. Or rape a girl or... I'm not a risk to society one bit (Nathan, Victorian Offender).

> I think the sex offenders registry you know it's very valuable but it's for paedophiles (Damien, Victorian Offender).

> I'm all for them catching the creepy sex offender that hang around the primary schools but unfortunately the act has just scooped up people it shouldn't (Damien's Father).

Clear within these comments is the understanding that the imagined sex offender is the older predatory stranger paedophile who preys on children. Additionally, there is a clear differentiation here between the paedophile as a source of risk, and these two young men. Nathan clearly distinguishes himself from someone who is 'at risk' of committing sex offences. While this distinction is one that has been made within the legal scholarship (Fichtenberg 2011; Hiffa 2011; Kushner 2013) and by legal practitioners in this study, researchers studying the impact and experience of

registration on convicted sex offenders have found that distancing techniques (which diminish the registrants' behaviour) are frequently employed by registrants to distinguish between themselves and individuals who 'belong' on the register (Hudson 2005, p. 66). Indeed, Nathan's perception of his place on the register affirms findings from research into registrants in the US (Tewksbury & Lees 2007) and the United Kingdom (Hudson 2005) where registrants clearly differentiated themselves from the intended paedophilic offender.

Nathan's qualification of his actions against his young age and their relativity to other serious offences (different from rape) and rarity (I took one photo as a mistake) are examples of the distancing techniques identified by Hudson (2005, pp. 66–67), which included 'consent', 'age', 'level of premeditation' or 'temporary aberration'. Identifying that diminishing one's offences is a common practice in relation to sex offences is not to discount the distinction made by Nathan and others in this study, rather it is to qualify perceptions of culpability against an inherent bias. While this is personal conjecture, this distinction highlights the actual function of the register when an individual who is not a risk has to submit to the rigors of risk management and the label of a sex offender. These are discussed in the following section.

Challenges and barriers of sex offender registration: Administrative requirements, work opportunities and contact with children

Offenders identified that negotiating and managing sex offender registration was difficult for three key reasons. Firstly, because of the administration of the register by police and the requirements are articulated to registered offenders were often vague, secondly, because it hindered their employment opportunities and thirdly, because it

interfered with contact with family members and people their own age. As such, these participants posited that registration was particularly detrimental to young people.

Negotiating an unclear system

One of the first issues to emerge in interviews with Victorian offenders was their difficulty managing the register. These difficulties were identified as a lack of clarity with surrounding acceptable and unacceptable behaviour, police knowledge of registration and reporting times.

Victorian defence lawyer Adriana noted that negotiating the register is difficult for offenders because of complexities within the *Sex Offender's Registration Act 2004* (Vic):

> And it became really apparent over that 6 months just how complex that legislation is and I don't think it is particularly well drafted and generally people including lawyers, don't have great understanding of it and people who are on the register don't have a great understanding of it (Adriana, Victoria Defence)

The difficulties in managing the complexities of the register alluded to by Adriana were illustrated in interview data with both Victorian offenders and their families who found that the conditions of registration were both overly stringent and complex. The offenders' interviews revealed that this complex process was often made more difficult by the police's misunderstanding of the 32 registration processes.

Once registered, a registrant needs to have an annual reporting session with police where they must reveal changes in relevant personal details, intended travel plans from the state and changes of travel plans while they leave the state. These requirements can be grouped into four categories: personal details (names, addresses, date of birth, residences, phone numbers, tattoos, nature of employment, vehicles), internet usage details (internet service provider, email addresses, usernames), travel plans and contact with children (regular contact with children, names and ages of children who reside in the home and children who they are in contact with (*Sex Offender Registration Act 2004* (Vic) s. 14). Nathan described the obligations as all encompassing, noting that 'everything in my life I have to report to them, whether I change cars, go interstate [or] go overseas' (Victoria Offender). Notwithstanding the reporting of personal details, the restriction on these offenders with respect to children is a key focus of registration. Subsection 1(e) of the act specifically stipulates that an offender must report to police the 'names and ages of any children who generally reside in the same household as that in which he or she generally resides, or with whom he or she has regular unsupervised contact'.

While these requirements appear clear, these restrictions were difficult to negotiate for the two offenders. One of the key complexities that hindered their management of the register was the restriction on contact with children. Nathan (Victorian Offender) highlighted the distinction between acceptable and non-acceptable contact with minors:

> I'm not allowed to see kids under the age of 16 more than three times in a year without telling them. Like as long as…that's more so if I'm actually spending time with a kid, if I go to a mate's house and he's got a little brother running around that's fine. Doesn't mean I can't see my mate. But if I [can't] go over to a house to see a 15-year-old a few times a year.

Damien discussed the vagaries of defining appropriate and inappropriate contact with a child, when it should be reported and how it was measured. At 25 years old Damien is self-employed as a gym owner and personal trainer. As such, contact with children makes up a regular part of his work, and although the register regulates this contact, he described the rules around contact as vague and difficult to manage. This was particularly problematic for him in his day-to-day work:

> [The police] say you can't have electronic contact with a minor. And I said ok but I get business phone calls…I don't know their age when they call me, do I hang up the moment I think they're a child? And they said no…that shouldn't be a problem. They said you can't be alone with a minor and I said by that logic I could still take the junior classes if there are parents watching … and they said no…Like when I've stopped taking the junior classes …suddenly I stop taking it and it just looks like I hate kids and best example is the parents will come up to be and ask why is the main coach not working with our kids anymore…and I'll just say I'm too busy an they'll say I can see you're not too busy your just walking around. You've got nothing to do in that hour and it is just obvious that you don't want to take the kids (Damien, Victoria Offender).

The difficulties in identifying the parameters of contact with minors for these young offenders was not always due to the offenders' misunderstanding of the legislation but at times because of the lack of understanding from the police administering the register. For example, Damien identified times when he asked legitimate questions about the limits of contact that the police were not able to answer. For example:

> D: And I remember telling myself like ok I think I'm four years in and I've got four more years to go at least I'm not going to be on the register when I'm married and I want to have kids. And there's the next question like I'm on it until I'm 35-ish. I might want to have kids am I not allowed to have kids? Because I can't have unsupervised contact with a minor (Damien Victoria Offender).
>
> LV: Have you queried that with police?
>
> D: Yeah they couldn't answer… But even what I said where is the line drawn does this mean I can't have a kid before I'm 35... *They just said well you*

> *aren't going to have kids in the next few years so we will discuss it when it happens* (emphasis added).

Damien's experience highlights the vagaries of defining the remit of restrictions, and how they rely on police interpretation of registration requirements rather than a clear definition. This echoes concerns raised in the Victorian Law Reform Commission's' review of the register, which identified that the absence of a definition for unsupervised contact with a minor created difficulties 'for registered sex offenders to understand the precise content of their reporting obligations and for police to know whether they are receiving complete and accurate reports' (VLRC 2012, p. 96). Damien's comments reveal that police have a level of discretion in deciding which requirements to enforce. Labelling non-physical contact with a minor on the telephone as acceptable yet supervised physical contact with minors in a teaching format as unacceptable illustrates that the registered sex offender is treated as the 'imagined paedophile' as though they pose significant risk to children. Furthermore, the police's inability to properly advise Damien on how registration would affect his ability to raise children reflects the police's lack of clarity on the range of implications of registration on the offender. It also demonstrates how registration is particularly difficult for young people to negotiate. The fact that Damien brought this to the attention of police demonstrates that it's a concern specific to a young person considering the reality of their future. The police's inability to answer illustrates that a young person's experience on the register accentuates its vagaries and the fact that the register is designed for older offenders.

The young men's difficulties managing the register were also evident in their breaches of the administrative conditions, which they attributed to their

misunderstanding of the conditions. After receiving his no recorded conviction, Nathan was unclear as to whether he needed to contact police about registering and received a breach for failing to report to the police a day after his conviction. Damien also breached the requirements of the register after administrative failures. He bought his current girlfriend a motorbike that was registered in his name. He believed it was a gift and therefore did not disclose the vehicle during his annual registration meeting. When he did disclose this information, he was charged with breaching his registration.

> D: …I completely forgot that I owned it because it wasn't really mine but it was under my name. And so they called me up…no I went to one of the interviews one time. I think it was four, five or six months after I bought the motorbike. And you collect all your papers all your rego papers…
>
> LV: So these are regular interviews you have to go to?
>
> D: Every year. They just ask the same questions. Then I gave them that and they said, you haven't told us you have a motorbike. I said oh sorry it just slipped my mind and it's not mine and yada yada yada. Sure enough just by bringing my papers I got myself into a whole lot of trouble.

Damien noted that due to the fact that he had not admitted to owning a vehicle within two weeks of buying it, this constituted a breach of the register. He then had to appear at the Magistrates' Court where the Magistrate heard he had breached the register but the nature of the incident or the context of his case was not discussed; he received a $400 fine.

These experiences of issues maintain the register and the subsequent breaches also connect with reports Day et al.'s (2014), study of Western Australians sex offender professionals' facilitation of the register, which highlighted that the failure to promptly report raises a consistent issue for registrants. For example, one officer reported:

> And we have guys who do breach, sorry who do disclose things they've done, because they want to do the right thing, they want to cover themselves, so they will tell [the police], ''I've done this,'' and then they will get breached for it. You know what I mean, so that's very difficult. (SW5) (Day et al. 2014, p. 181)

This suggests therefore that not only the information that needs to be reported but also the conditions of its reporting are problematic particularly for low-risk registrants.

Overall, the two offenders identified that managing the register was a constant challenge, one that was affected by what they reported as issues with police administering the register. This is perhaps unsurprising, as recent research into Victorian police officers managing the register has found that these officers have limited resources to manage the increasing number of Victorian registrants and have limited assistance from mental health professionals as to how to assess risky and non-risky offenders (Powell et al. 2014). In addition to the lack of oversight from police, the second difficulty offenders discussed in their interviews was hindered career options. Underpinning these discussions was the constant recognition that these difficulties arise because the offenders imagined by this legislation are older and pose risks to children.

Impact on career opportunities

One of the main issues with sex offender registration is the impact it has on the employability of an offender (Potter 2011; Smith 2008). A key aspect of this is the restrictions on contact with children. Offenders are not allowed to come into contact with children and any basic police check or working with children check excludes them from many employment opportunities. Legal practitioners discussed this impact of registration, but they highlighted that limiting career opportunities was particularly detrimental for young offenders, for example:

> Because it means that you'll be cutting them out of every professional calling that there is… It seems a huge impact. I think for a young person in particular (Thomas, Victoria Defence).

While registration affects the employment opportunities to all registered offenders, Thomas's comments highlight that this is particularly problematic for young people because these limitations apply when they are at the start of their careers. The impact on Damien and Nathan's career opportunities as a result of registration supported speculations by legal practitioners. Nathan had aspired to become a Physical Education teacher, but the conditions of registration and the working with children check infringed on this aspiration:

> Nathan has to change career path now (Diane, Nathan's Mother).

> Can't be a Phys Ed teacher…it was my interest in terms of doing sport study. If there was any course at Uni it would probably be along the lines of exercise science and with teaching or something. And I like coaching and obviously that's out the window at junior level (Nathan Victoria Offender).

> Because even the courses with Uni is fieldwork and if they have a working with children check (Diane, Nathan's Mother).

Damien also feared for future career opportunities in light of having to disclose his criminal record. Even though he was self-employed at the time of interview, he worried about seeking work in the future. He said:

> I'm lucky that I employ myself so I'm ok with that situation but good luck to me getting a job at any other gym if I needed to. Let's say my business failed and I needed another job I would have to find a new field of work… Anything with contact with children I am very unlikely to get that job until I'm 35 so a long time to go.

The comments above reiterate the comments made by Stephen (Victoria Defence) that registration functions to limit the options of the young people. Furthermore, through these processes there is an active construction of these young men as

threats to children who require monitoring, without any consideration for the offences that they have committed. The Victorian Law Reform Commission (VLRC 2012) has argued that this is a critical flaw in the drafting of the act because disallows the chance for individual-specific conditions after registering. While this is recognised as a flaw, the mandatory application of the Sex Offenders Register reflects the assumptions on which it is based. Interviews with these two offenders demonstrated the challenge these assumptions create for a young person who has registered, particularly for a non-violent or predatory offence. The negative impacts that were raised by these young men directly contradict the rehabilitative interests enshrined in the *Children and Young Persons Act 1989* (Vic), specifically, the recognition that solid family life education and job prospects should be protected when considered sentencing outcomes for young people.

No contact with children

Both young men, who were living at home at the time, discussed the register affecting their ability to have contact with younger family members. For example, Nathan disclosed to the police that he lived with his mother, stepfather and younger siblings. They reported that child services had been notified that he lived with a younger sibling and were scheduled to do an inspection. Nathan noted '[Department of Human Services] we just need to catch up… she's coming to the house next Monday to speak to us about it all. Like about my brother… I think it's making sure he's safe'. Similarly, Damien and his father reported that his relationship with a younger family member was not permitted under the terms of the register:

> At the time his niece was 15. And she really greatly admires Damien. And she emails him or Facebooks[43] him and he doesn't reply and she takes it very [personally] (Damien's Father)

These precautions demonstrate both the imagined offender in the administration of the register and how limited the experience is for a young person, particularly when that young person is likely to live or have close relationships with younger family members. They also affirm arguments that sex offender registers are not calibrated to the experiences and circumstances of young and young adult offenders (Comartin, Kernsmith & Miles 2010).

In identifying these issues, participants highlighted how contradictory and inappropriate registration is for young people, and how these restrictions do not account for young people's natural contact with other young people. This further characterises the imagined offender as an older adult predatory offender. Despite specifically stating that they were not the intended or typical registrants, in discussions on their experiences managing the register, both offenders indicated that they had adopted behaviours such as being aware of children or being consistently mindful of children at work. These behaviours illustrated an internalisation and performance of a risky subject. As such these two accounts exemplify concerns that broad registrable offences, no risk assessments and the mandatory nature of the register will detract limited resources from high risk offenders, for example Thomas (2009, p. 257) argues that these interlocking circumstances creates 'meaningless ritual for many low-risk offenders who could be in danger of silting up the register and distracting from the work with high-risk offenders'. This is a consistent issue identified by a wide range of stakeholders involved in administering the register. For

[43]Sends a message via Facebook.

example Day et al.'s (2015 183) study of professionals tasked with administering the register and keeping in contact with registered sex offenders found that professionals thought the register was 'both over-inclusive and place unfair restrictions on some offenders'.

Registration as punishment: Emotional impacts and breaching requirements

In interviews with the offenders, both young men reported that registration had specifically negative impacts. These included both emotional punishment in the form of negative emotions and formal intervention for breaching registration requirements. Nathan and his family revealed that the impact was negative and acted as a punishment. For example, Diane (Nathan's Mother) articulated the emotional impact registration had on their family, 'It is damaging to our whole family, emotionally…after diversion was knocked back… [Nathan] said, 'boys would commit suicide over this mum'. Both offenders described the impacts of registration as being internal and beyond the practical inconveniences of having to report to police, For example:

> It's always on m[y] mind. If you're with friends or with your girlfriend and doing something you sort of forget about it. But every day I think about it of sometime of the day. Especially when you're by sitting yourself and you're just relaxing you can't sort of sit and relax because of it (Nathan, Victorian Offender).

Damien described the impact registration in similar terms. He stated 'It never really leaves my mind it's kind of debilitating' (Damien, Victoria Offender). These negative impacts also extended to formal punishment for breaching the register.

At the time of interview, both young men had breached their registration requirements due to difficulties managing the administrative requirements of the register (as discussed above). These two breaches (Damien's failure to report the purchase of a motorbike and Nathan's failure to report after court) were problematic. In particular, Damien noted that the stringent nature of the register and its inflexible demands meant that further breaches were inevitable and he believed would result in his eventual arrest:

> But to be honest in my mind I can't… I'm not going to get to 35 without stuffing up a few more times it's impossible. That's the sad thing in my line of work at some stage I might be alone with a kid… *I think I could go to jail for it because I've already breached and that breach with the motorbike thing was kind of like my big warning and if anything happens again* and if I breach again for a motor vehicle they're not just going to say ok here's another warning so I'm running out of spare life's really (Damien, Victoria Offender: emphasis added).

These administrative breaches highlight the problematic nature of the register. These breaches are treated as serious risks for individuals whose offences do not indicate that they pose any threat to children and whose offences do not fit within the traditional definition of child pornography. Damien's view that errors in maintaining the conditions of the register could result in imprisonment, regardless of the context of the offence, illustrates some of the fundamental issues between the factional administration of police, the courts and the individual, where the nature of the breach is not contextualised with respect to the offender and their offences. This further illustrates the issues with a register that conceptualises registered offenders as contact offenders and high-risk individuals.

The range of difficulties described by legal practitioners and experienced by these two offenders raises specific questions about the practicability of having young people on the register. As is evident from the above, many of the difficulties raised

by lawyers and offenders pertain to registration being specifically punitive and difficult to negotiate for young adult offenders. These difficulties also demonstrate that, despite being a monitoring tool over which the police have control, the monitoring is largely completed by the individual and is subject to external review. The behaviour of both Nathan and Damien demonstrated that, despite their mistakes, they had become largely self-regulating and this shaped their work and social life. Additionally, their self-regulation was accentuated by the lack of services and guidance provided by police and the Department of Human Services who monitored without providing any assistance. As such, these two men operated within an information vacuum.

Internalising risk management

These interviews illustrate the ever-presence of the imagined paedophile in the application and enactment of the Sex Offenders Register. An imagined figure made more pronounced by the contradictions between the offences these young men committed (although egregious) and the behaviours they now have to adopt to manage their post-conviction 'sex offender' label. Their experiences correspond with key discussions around sex offender registration as a neo-liberal tool for risk management, specifically discussions that focus on the impetus for offenders to internalise and then manage their own risk. Self-management has long been acknowledged as a manifestation of a risk society (Garland 1996), and while registration is discussed as a tool for the state to monitor its citizens, a key argument in favour of the register in Victoria was not only for police surveillance but also that, in being placed on the register, risky individuals would internalise this surveillance and self-monitor. I return again to the comments of the Honourable Ms. Buchanan,

the Member for Hastings, in the 2004 Victorian Parliamentary debates for the implementation of the register, Buchanan notes:

> [sex offenders] will be monitored in such a way that, while they will have some sense of liberty, they will never forget that they are being watched (Commonwealth of Australia 2004, p.143).

As is evident from this argument, the impetus is placed on registrants to manage their own risks using the requirements. Buchanan quite prophetically captured the experiences of these two young men, who in their interviews illustrated both the effects of being watched and having to self-manage and internalise that surveillance. The clear difference was that, in doing so, these young men must perform the part of the risky offender and embody that performance by avoiding contact with children in their day-to-day lives.

Neither of the participants I spoke to stated that the police managing their cases had administered a risk assessment test. Yet, Powell et al. (2014), in their interviews with Victorian Police officers, found that most officers tasked with managing registrants would administer a questionnaire-based risk assessment test (without the assistance of a trained medical health professional) or employ informal methods of testing whether the registrants were more likely to re-offend than others. These non-systematic and often subjective interpretations of risk were not discussed by participants in this study. As such, the experiences of these two offenders resonates with much of the critique focused on the Sex Offenders Register, specifically that it needs to be employed on a case-by-case basis to avoid capturing individuals significantly different from the intended sex offenders (VLRC 2012).

Conclusion

This chapter has discussed how Victorian defence lawyers and US prosecutors negotiate child pornography laws applied to sexting practices. The findings indicate that a key issue for legal practitioners (both defence and prosecution) and offenders centred on differentiation between youth sexting and child pornography. There are a number of conclusions to be drawn from this chapter.

The first key issue to highlight is the limitations of discretion and transparency. Interviews with Victorian defence lawyers indicated that they had limited options to mitigate on behalf of young adult clients seeking to avoid sex offender registration. Consistently, the defence counsel participants indicated that this is a concern because child pornography law is inflexible and the broad definitions and limited defences available to specific child pornography offences hinders the ability of defence counsel to contextualise their clients' behaviour on the basis of youth or other mitigating factors. While the Victorian defence counsel identified that the Criminal Justice Diversion Program is an available legal avenue, it has been inaccessible due to prosecutorial control regarding who can and cannot access this legal pathway. While there are now new laws in place for sexting related practices in Victoria, these findings point to the need to ongoing research about Victorian prosecutors' decision-making processes in suggesting diversion for these types of cases.

The Connecticut prosecution interviews revealed – in line with previous research – that prosecution of sexting using child pornography laws was due to aggravating factors such as non-consensual distribution (Wolak & Finkelhor 2009) rather than a

pursuit of cases featuring consensual exchanges. Prosecutors used their vast discretion to pursue lesser charges based on a number of legal and extra-legal factors including the impacts on the victim and the offender and their chances for rehabilitation.

While some defence lawyers successfully mitigated on behalf of their clients to achieve the lenient sentencing outcome of no recorded conviction, and while prosecutors attempted to pursue lesser charges, these outcomes did not circumvent the application of the Sex Offenders Register. The impact of being on the Victorian sex offender registration reported here arguably reflect a system created with an imagined risky sexual predator who has no relation to the young adult sexters interviewed for this research. There was a consensus amongst participants that sex offender registration is not warranted in cases of sexting related offences.

Each of the sets of participants in this chapter, defence lawyers, prosecutors and offenders were faced with challenges in negotiating the distinction between the conceived child pornography offender and the offenders at hand. These accounts serve to highlight, in a new context, the pervasive and often flawed assumptions underpinning the legislative frameworks surrounding child pornography law, including both the definition of child pornography and the understanding of child pornographers. As discussed in Chapter Four, some of the pervasive assumptions underpinning the construction of child pornography laws and the rationale for this type of legislation are the protection of child innocence (Adler 2001; Danay 2005; Ost 2002) and the assumption that all people who use child pornography are potential contact offenders (Taylor & Quayle 2003). Concomitant risk narratives linked to

managing these types of offenders are reified through the experiences of these legal actors, exemplified by defence lawyers whose limited ability to mitigate on behalf of their clients illustrated the pervasive assumptions that all images of nude children are legally defined as child pornography. Moreover, the limited defences indicate the lack of consideration for contextual circumstances that would mitigate the production, possession or distribution of images of nude images.

The tension between youth sexting and child pornography frameworks was most evident in discussions with the two Victorian offenders. Their discussion illustrated the internalisation of risk and risk management requirements despite the disassociating from traditional child pornography offending and/or contact offending. This is not to suggest, however, that non-consensual does not directly and seriously harm. It does highlight, though, the need for nuanced law surrounding child pornography offences that fits both the behaviour and appropriate sentencing demarcations. While, not the primary focus of this research, the experiences of these two young men suggest the need for further dedicated research on the administration of the Sex Offender Register, specifically in relation to clarity of the requirements, police interactions with offenders and contextualising requirements in relation to the specifics of the offence.

Chapter Eight: Alternative frameworks, implementation and application of sexting statutes and family violence legislation

Introduction

Throughout the interviews conducted in this study, discussions of sexting and the law raise key concerns about the conceptual and practical applicability of child pornography law to youth sexting. As such, discussions from participants prompt an investigation of alternative legislation that may be better tailored to regulate and respond to youth sexting. As discussed in Chapter Four, legal solutions to the criminalisation of sexting as child pornography have spawned critical debate within the legal scholarship. In proposing their views on alternative frameworks, legal scholars fall into two broad schools of thought. Some scholars argue that the law should criminalise consensual and non-consensual sexting (Barry 2010; Duncan 2010; Fichtenberg 2011; Leary 2010; Szymialis 2010) and others argue that only non-consensual sexting should be criminalised (Arcabascio 2009; Calvert 2009; Crofts & Lee 2013).

This point of difference plays out in this chapter, which examines the implementation of alternative models to criminalise or regulate sexting, including sexting statutes in the US (with a specific focus on Connecticut) that criminalise young people who produce and distribute sexual images regardless of consent, recently implemented Victorian offences (distribution of intimate images (*Summary Offences Act 1996* (Vic) s. 41DA) and threat to distribute intimate images (*Summary Offences Act 1996* (Vic) s. 41DB) which specifically criminalise non-consensual sexting in adults and young people and Victorian family violence legislation. This chapter then examines how these models conceptualise and criminalise sexting, with particular attention on

whether each jurisdiction is criminalising consensual and non-consensual sexting. In addition, this chapter examines the implications of regulating sexting under each model, paying particular attention to the participants' experiences in the implementation of the legislation, their assessment of the usefulness of this legislation and whether this legislation is appropriate for the sexting incidents that are coming to their attention.

This chapter is divided into three sections. The first section explores the implementation of sexting statutes in Connecticut. It draws from submissions made to the Connecticut General Assembly on the Act Concerning Sexting Bill (Substitute House Bill No. 5533). This section uses Feinberg's (1984) and Dworkin's (1971) work on legal paternalism in conjunction with Bavelas and Coates' (2001) work on the rendering of non-consensual sex acts as mutual to examine the paternalistic and protective assumptions underpinning this statute. In addition to examining the problems these statutes create for differentiating non-consensual from consensual sexting and recognising victims, it also draws from interview data and examines prosecutors' views of the positive and negative outcomes of applying these new statutes to youth sexting.

The second section examines the statutes distribution of intimate images (*Summary Offences Act 1996* (Vic) s. 41DA) and threat to distribute intimate images (*Summary Offences Act 1996* (Vic) s. 41DB) that were recently implemented in Victoria. This section also incorporates the Victorian Parliamentary Inquiry into sexting (VPLRC 2013) and Parliamentary Debates focused on these Amendments (Commonwealth

of Australia 2014) to examine how the emphasis placed on non-consensual sexting constitutes a harm model.

The third section shifts focus from the criminalisation of sexting to the use of family violence frameworks as a response to sexting. This section draws predominantly from an interview with Victorian Community Lawyer Kathryn, whose experience with non-consensual sexting involved making intervention order applications for clients whose images had been distributed (or had been threatened with image distribution) by their partners and former partners. In this section I examine non-consensual sexting as a technique of intimate partner violence and focus on the implications of using intervention orders as a mechanism to stop partners or former partners from posting or distributing images. This discussion connects with the findings of Chapter Six that non-consensual sexting occurred in the context of a relationship breakdown and with arguments from within the burgeoning sexting scholarship that non-consensual sexting occurs on a continuum of violence against women and girls (Powell 2010a; Powell 2013; Ringrose et al. 2013; Walker, Sanci & Temple Smith 2013). We begin this chapter by outlining legal paternalism for the purposes of the following analysis.

Legal Paternalism

Dworkin (1971, p. 67) broadly defines legal paternalism as the 'interference with a person's liberty for his own good', with one's own good defined as one's 'welfare, good happiness, needs interest or values' (Dworkin 1971, p. 123). Prior Jonson, Lindorff & McGuire (2012, p. 261) have argued that paternalistic legislation is underpinned by two rationales, 'intervention must involve a violation of the

paternalised person's autonomy. Second, the intervention must be motivated by concern for the welfare of the individual who is paternalised'. Paternalism underpins a broad variety of legislation, including but not limited to laws pertaining to mandatory wearing of motorcycle helmets, forbidding persons to swim at public beaches when unmanned by a lifeguard, criminalising suicide, limiting the work women and children can do, regulating sexual conduct between consenting adults and some drug restriction laws (Dworkin 1972, p. 66). As is evident from this list a, the examples of paternalistic legislation are varied. Some are examples of one's 'own good' (Dworkin 1971, p. 123) and are linked to physical safety, like seatbelt regulation (*Road Safety (General) Regulations 2009* (Vic) RR 264[1]). However, others examples such as the historical criminalisation of homosexuality illustrate the problematic moral dimensions of paternalistic legislation particularly when it focuses on sexuality

Paternalistic legislation that focuses on regulating sexuality has traditionally been underpinned by a subjective interpretation of harm that is rooted in (hetero)normative assumptions about appropriate sexual intercourse, particularly when this legislation is focused on limiting the boundaries of youth sexuality. This was exemplified in debates during the 1990s regarding the discrepancy between the homosexual and heterosexual ages of consent. For example, Ellis and Kitzinger's (2002) analysis of Parliamentary debates on the equalisation of the ages of consent revealed that opponents to equalisation evoked arguments that, above all, this issue was about protecting children rather than equality. These opponents argued that equalising age of consent would leave young boys vulnerable to older homosexual men or coercion (Ellis & Kitzinger 2002, p. 14). Ellis and Kitzinger (2002, p. 14) argued that '[r]hetoric

around young (adolescent) men as vulnerable and in need of being protected by society were… frequently employed to deny gay men equality with heterosexuals'. As evident from the above, the nexus of legal paternalism and youth sexuality can be fraught and this intersection will be examined with the respect to the implementation of a sexting statute in Connecticut, as discussed in the following section.

Paternalistic Model: Criminalising consensual and non-consensual sexting in Florida, Connecticut and Texas

Since 2009, and against the backdrop of widespread concern about sexting (Wood 2009) that has been fostered by the news media's dominant negative attitudes toward prosecuting teens (Podlas 2011), 16 of the 50 states in the US have enacted legislation that focuses on the phenomenon of sexting, with 26 other states having introduced bills that either haven't passed or are pending review.[44] These statutes are multifarious in their conceptions of the offence and the punishment (Jolicoeur & Zedlewski 2010). Each of the three US states where fieldwork was conducted had adopted new legislation that labels both consensual and non-consensual sexting as a misdemeanour offense. Florida (*Fla. Stat. Ann.* § 847.0141) is the only jurisdiction to use the term sexting; Connecticut named the offence 'possessing or transmitting child pornography by a minor' (*Conn. Gen. Stat. Ann.* § 53a-196h); Texas used the phrase 'electronic transmission of certain visual material' (*Tx. Stat. & Code Ann*. §

[44] States that have successfully passed bills include Florida (*Florida Crimes Statute* § 847.0141) Texas (Texas Penal Code § 43.261), Vermont (*Vt. Stat. Ann.* § 2802b.), Pennsylvania (*Pa. Con. Stat.* §§ 5702, 6321.), Hawaii (*Hawaii Revised Statutes Annotated* § 712-1215.6.), Nevada (*Nev. Rev. Stat.* § 200.737.), New Jersey (*N.J. Stat. Ann.* § 2A:4A-71.1.), New York, (*N.Y. Pen. Law* §§ 263.00, 263.05, 263.10, 263.11, 263.15, 263.16.), North Dakota (*N.D. Cent. Code* § 12.1-27.1-03.3.), Rhode Island (*R.I. Gen. Laws* § 11-9-1.4), South Dakota (*S.D. Cod. Laws* § 26-10-33.), Missouri (*Mo. Ann. Stat.* §§ 573.010, 573.023, 573.025, 573.035, 573.037.) and Connecticut (*Conn. Gen. Stat. Ann.* § 53a-196h).

43.261) and placed the offence as a sub-category misdemeanour with a range of obscenity offences. Despite this variation of labels, each jurisdiction has implemented a misdemeanour offence (either Class, A, B or C[45]) that pertains to young people producing, possessing and distributing sexual, nude or semi-nude images of other young people.

Each of the state provisions mentioned above adopts a similar definition as well as similar affirmative defences to such charges. Specifically, they each include an affirmative defence if the minor took reasonable steps to destroy the images (*Fla. Stat. Ann.* § 847.0141 s.1b; *Conn. Gen. Stat.* § 53a-196 s.g1c; *Tx. Stat. & Code Ann.* § 43.261 s.f3.) and/or if they did not solicit the images that they received (*Fla. Stat. Ann.* § 847.0141 s.1b, *Conn. Gen. Stat.* § 53a-196 s.g1b, *Tx. Stat. & Code Ann.* § 43.261 s.f1). As misdemeanours, the penalties for these offences range from small fines and community service orders to state-based forms of education and restitution. For example, in Florida it is within the court's purview to mandate a minor to take part in training and education programs in conjunction with, or instead of, community service (*Fla. Stat. Ann.* § 847.0141 s.3a).

A key similarity between all four jurisdictions, and the focus of this section, is that they criminalise both the production and the distribution of an incriminating image, and as such, there is no legal distinction between consent and non-consent. These statutes criminalise (as a misdemeanour) the production and distribution of images

[45] For example, in Connecticut a Class A misdemeanour can receive a punishment of up to one year imprisonment, a $2000 (maximum) fine or both; a Class B misdemeanour up to six months imprisonment, a $1000 fine or both, and a Class C misdemeanour up to three months in prison, a $500 fine or both. A judge may set both the fines and imprisonment up to the maximum amount (Rheinhart 2012).

of minors to other minors, regardless of whether or not the individual producing the image is the person who distributes it. This is exemplified in the Texas statute, which provides that a minor may be prosecuted if he or she intentionally or knowingly:

> (1) By electronic means promotes to another minor visual material depicting a minor, including the actor, engaging in sexual conduct, if the actor produced the visual material or knows that another minor produced the visual material; or
> (2) possesses in an electronic format visual material depicting another minor engaging in sexual conduct, if the actor produced the visual material or knows that another minor produced the visual material.

Therefore, it is the participation in sexting that forms the basis of criminalisation and reflects arguments within the legal scholarship that all forms of sexting should be criminalised to deter young people from participating (Szymialis 2010). This lack of distinction is a key concern to this project, in which there is a clear distinction in the legal practitioners' accounts of sexting cases. To examine the implementation, application and implications of this model in more depth, the following section focuses on examining the Connecticut sexting statutes as a case study on the implementation, application and implications of this new type of legislation. To begin this analysis, I focus specifically on the legislative debates on the implementation of these laws in Connecticut to explore how the key rationales that underpin this legislation constitute it as a paternalistic model with moralistic undertones.

Implementing the paternalistic model in Connecticut

In June 2010, the Connecticut General Assembly introduced the *Act Concerning Sexting 2010 Bill* (sHB 5533) (hereafter referred to as the 'Bill'); it proposed the creation of two separate offences that criminalise young people producing and distributing sexual content (of themselves or others) with the specific aim 'to protect

children from the dangers and consequences of inappropriate use of technology' (Connecticut General Assembly 2010, n.p).

Before the Bill was approved, the Connecticut General Assembly called for submissions on the implementation of the statute and received submissions from state actors, members of the public and members of the medical community (Connecticut General Assembly 2010, n.p). Fourteen out of the 16 submissions were in support of the Bill and it was lauded by the majority of stakeholders who submitted to the Judiciary Committee as an appropriate and proportional response that reflected the level of wrongdoing (Connecticut General Assembly 2010). For example, John Danaher, Co-chairman of the Department for Public Safety stated:

> The age group covered by this supposed bill appears to be largely ignorant of the potentially life altering consequences of being included in the Sex Offender Register. This bill strikes a good balance between asserting the illegality of activity. While at the same time removing the age population from the serious consequences of being required to register as a sex offender (Danaher 2010, p. 2).

State Representative Rosa Rebimbas – described by interview participants as its major political advocate – also supported the Bill. In her submission she stated:

> This proposal will truly allow the punishment to fit the crime. The bill provides another option for prosecutors to hold youth accountable for their actions where probably causes exists without having to charge a minor under the existing laws of child pornography which carries with it a felony conviction (Rebimbas 2010, p. 2).

Moreover, she characterised this Bill as a way for:

> Connecticut [to take] a proactive role to both protect and teach our teens about the consequences of their decisions…We did not wait for another tragic story in order to pass a good law. Instead we took the opportunity to update our penal code by incorporating electronic communication devices (Bazinet 2010, p. np)

This rationale for using the law as a deterrent is aimed at preventing the harm before it occurs. In these arguments the law positioned as a pedagogical tool to educate teenagers about their behaviour with the added benefit of avoiding sex offender registration. However, the vagaries around the harm of the behaviour leaves it open to assumptions that merely engaging in the practice of producing and distributing content is harmful. This reflects arguments within the legal scholarship that the law has a role to play in preventing young people from engaging in sexting, due to the perception of this behaviour as inherently harmful (Barry 2010; Duncan 2010; Leary 2007; Fichtenberg 2011; Szymialis 2010).

From these submissions, it was clear that respondents viewed the Bill as an illustration of, in part, reflexivity in the law to the issue of sexting, but the 16 submissions in support of the Bill did not highlight the importance of a legal distinction between consensual and non-consensual sexting. State Victim's Advocate Michelle Cruz and Chief Public Defender Deborah Sullivan addressed this problem in their submissions opposing the Bill. Implicit in both their criticisms were concerns with the viability and appropriateness of criminalising sexting, despite the fact that this is only a misdemeanour. For, example State Victim's advocate Cruz noted that:

> The OVA [Office of the Victim Advocate] understands the need to address this troubling issues, however, rather than expose children to the criminal justice system as young as 13, I believe the issues could be better addressed through education (Cruz 2010, p. 1)

In addition, Cruz observed that within existing child pornography statutes, the subject of the image is not prosecuted (Cruz 2010). Deborah Sullivan (Chief Public Defender; Sullivan 2010, p. 1) made a similar criticism, arguing that Connecticut law

already provided that teenagers engaging in consensual sexual activity, including sexual intercourse, will not be prosecuted if their age difference is three years or less, noting that this Bill would criminalise consensual sexting.

Despite these criticisms, the Bill was passed without amendment and the offence criminalises both the consensual and non-consensual distribution of images. While it is difficult to fully ascertain the reasons why the Judiciary Committee ignored these recommendations, a potential answer lies in the premise of the Bill, 'to protect children from the dangers and consequences of inappropriate use of technology' (Connecticut General Assembly 2010, n.p.). This protective rationale, evinced in Rebimbas' rationalisation that such legislation serves to simultaneously protect young people from and teach them about the consequences of their actions, is termed in the Bill (but not fully explained) as the 'inappropriate use of technology' and is arguably an example of both legal paternalism and legal moralism.

The paternalism of this Bill is evident in the three assumptions underpinning arguments supporting its implementation. Firstly, that all sexting is inappropriate; secondly, that young people need to be protected from their own use of technology; and thirdly, their consent to their presumed inappropriate use technology is irrelevant. These assumptions frame young people as being unable to make an appropriate decision to sext, challenge the premise that consensual sexting can be appropriate and lend support to legislation that nullifies consent to protect young people from themselves. What they are being protected from remains implicit in arguments from the Bill's supporters. For example, Rebimbas' claims that the law proactively protects and teaches teens 'about the consequences of their decisions'

rather than ‘wait[ing] for another tragic story in order to pass a good law’ (Bazinet 2010, p. n.p.). This suggests that criminalising consensual sexting (as well as non-consensual sexting) is protecting young people by preventing them from contributing to the tragic outcomes of non-consensual sexting. This implicit link and paternalistic rhetoric is important because it shifts focus from the role of law as a response to the breach of consent to focusing attention on the image’s production and distribution as a problematic behaviour that young people need to be protected from.

In the following section, I extend this discussion about the lack of distinction between consensual and non-consensual sexting and paternalism by drawing upon interviews with prosecutors from Connecticut. Before examining the connections between the prosecutors’ insights into implementing this law and legal paternalism, I explore their views of the positives and negatives of implementing this legislation.

Applying the paternalistic model Connecticut: Limits of a base level offence

In 2010 in Connecticut, the Bill was passed and implemented a new Class A misdemeanour offence for the practice of sexting in certain contexts. The definition of a sext follows the definition of felony child pornography charge. It is defined as a:

> Visual depiction (photograph, film, videotape, picture, computer generated image, or picture) produced by electronic, mechanical, or other means, of sexually explicit conduct, where the production enclosed the image of a person under age 16 engaging in sexually explicit conduct (Conn. Gen. Stat. Ann. § 53a-196h).

However, the offences of possessing or transmitting child pornography by a minor (*Conn. Gen. Stat. Ann.* § 53a-196h) involve different conditions for those who create the content and those who are receive it. Under this statute, a person aged 13 to 15

years who knowingly and voluntarily transmits a visual depiction of themselves engaged in sexually explicit conduct by means of an electronic communication device to a person aged 13 to 17 years commits the offence of transmitting child pornography by a minor. Conversely, a person aged 13 to 17 years who receives a visual depiction of an individual aged 13 to 15 years engaged in sexually explicit conduct by means of an electronic communication device also commits the offence of possessing child pornography by a minor (*Conn. Gen. Stat. Ann*. § 53a-196h). Connecticut prosecutors indicated that this legislation was enabling flexible options to prosecutors:

> Yeah it does temper law enforcement at least the response to it if it's just kids being kids then we have the ability to charge the sexting misdemeanour and not charge the felony and not worry about someone…having to register as a sex offender (Adam, Connecticut Prosecutor).

Despite this, there were three main issues with this model. They included the breadth and parameters of the offence, age-based restrictions, and oversimplification of the multifarious nature of sexting incidents.

One of the primary criticisms was that the broad definition of sexting did not distinguish between sexting incidents that were more serious than others. In particular, prosecutors were critical of the fact that incidents involving large numbers of images, a large age difference between parties and serious sexual content would all be treated the same under this legislation. Paul and Linda explicitly discussed the number and context of the images as aggravating factors:

> One of the problems I have with the law. [is that] it doesn't take into consideration the number of pictures. I mean it's one thing if a girl sends a boy her picture if she's in love, and he's got five of these pictures or ten of these pictures, when you're getting two, three hundred maybe that's not sexing anymore maybe that's something else (Paul, Connecticut Prosecutor)

> *I think the number of images is important I think the context of the image is important. I think there is a big difference between taking a naked photo of myself in front of the mirror and taking the picture of me performing oral sex on a boy.* That's two different things, I think a misdemeanour is good cause that keeps it in misdemeanour land but I think…as the number grows the penalties grows or the time period that's elapsed or where it went. Did it go to a bunch of kids at your school or did it get published on Facebook and go to the world (Linda Connecticut Prosecutor: emphasis added)

Moreover, Paul reported that the statute was problematic because it did not differentiate between incidents involving young people with significantly different ages:

> And it also doesn't take into consideration the difference between the ages of the senders and the recipients. It's one thing to have a fourteen year old to be sending a picture to her 15 year old boyfriend but if you have a thirteen year old sending pictures to a 17 year old and there's like three hundred of them, that's a little creepy (Paul, Connecticut Prosecutor).

Linda and Paul's comments illustrate support for an aggravating factors framework discussed by Weins and Hiestand (2009). These scholars noted that while a base level offence (like the newly implemented misdemeanour in Connecticut) is important, they argued:

> ...not all sexting should fall under a base-level offense. Scenarios easily come to mind where more severe consequences, such as felony delinquency are just and necessary for rehabilitation (Weins and Hiestand 2009, p. 49).

In line with Weins & Hiestand, Linda indicated that prosecutors needed avenues to pursue more serious cases:

> I think all of that needs to be addressed or [give us] some kind of parameters too of this particular crime…and at what point do we say, you know what no you're going to adult [court] because this is child pornography…you know [when there is an] age gap [or] the bigger the gap (Linda, Connecticut Prosecutor).

Weins and Hiestand's position is underpinned by the argument that sexting is highly varied in its manifestation and outcomes. They recommend that an aggravating factor framework include a base level offence and a subsection that provides a list of aggravating factors (factors which make a sexting incident more egregious) such as distributing it to a large number of people (five or more), absence of consent in the production, possessing of 10 or more images and creating or disseminating images for profit (Weins and Hiestand 2009, pp. 51–52). Paul's and Linda's insights affirm Weins and Hiestand's (2009) arguments and those of other legal scholars (Calvert 2009), that the nature of sexting is so varied, it is an oversimplification to criminalise the practice based on a definition of producing, possessing or distributing sexual images. Moreover, the varied nature of these practices makes it difficult to create what Calvert refers to as a 'one-size-fits-all statute', especially when each case can involve a different age gap between parties, range of dissemination, type of image and number of images (Calvert 2009, p. 61). Prosecutors reported the need for statutes to provide prosecutors with options for incidents involving aggravating factors.

While supporters of the Bill argued that this would be a panacea to the prosecution of young people with child pornography offences (Rebimbas 2010), prosecutors' experiences applying the statute revealed that, despite these reforms providing an alternative option to child pornography charges, having a base level offence did not allow them to adequately charge sexting incidents that involved more serious factors differently from others. In addition to these criticisms, reports on applying the statute indicated that there were additional issues with the statutory definitions, including the criminalisation of both the individual who produces the content and the person who

disseminates the content, both consensually and non-consensually. I refer to these as the implications of the new sexting statute, which are explored in the following section. In this section I also explore the construction of consensual and non-consensual sexting as mutual rather than unilateral acts.

Applying the paternalistic model: Criminalising victims of non-consensual sexting

As discussed in the previous section, the reported rationale for this offence was to protect young people from the 'dangers and consequences of inappropriate use of technology' (*An Act Concerning Sexting 2010* sHB5533). But interviews with prosecutors highlight that the criminalisation of both the young person who produces the image and the one who disseminates the image resulted in holding young women accountable for those who non-consensually sexted their images. The prosecutors both identified (to a certain extent) that this was a problematic aspect of the new statute yet also perpetuated this understanding in their discussions of the new statute.

Prosecutors reported that criminalising both the producer and disseminator was problematic because it meant that the producer consensually created an image is culpable for a misdemeanour. Linda demonstrated this issue in her discussion of a case where a 14-year-old sent an image to an 18-year-old,

> So your victim has committed a misdemeanour but you've committed a felony. Like we said it needs to be changed (Linda, Connecticut Prosecutor).

Despite identifying (in this example) that this was problematic, prosecutors were often ambivalent when identifying a victim, even when an image has been

disseminated without consent. This was evinced in their use of qualifying language when referring to victims of non-consensual sexting Linda stated:

> That they could come to me so the call will be made what should we do? And some of them are well how much is the parent screaming…or the alleged victim. And remember they are both victim and defendant…So you kind of need to…that victim/defendant needs to be either a real victim or a stop sending it because if you send it you're going to go into defendant land (Linda, Connecticut Prosecutor)

The words 'alleged victim' and 'real victim' firstly suggests that there are legitimate and illegitimate victims in relation to sexting. Criminologists have long discussed the problematic notion of real or ideal victims and how victimhood is constructed on the bases of gender, class and race (Christie 1987; Cossins 2003; Greer 2007; Stabile 2006) often to exclude certain types of individual from legitimate victim status. For example, Randall (2010, p.398) writes that the myth of the ideal victim 'undermine[s] the credibility of those women who are seen to deviate too far from stereotypical notions of "authentic" victims, and from what are assumed to be "reasonable" victim responses' (Randall 2010, p. 398). Additionally, the idea of a real sexual offence has long been critiqued by feminist scholars who argue that the idea of real rape discounts women's varied experiences of rape and falsely promotes stranger rape as the only legitimate kind of rape (Estrich 1987), in addition to validating victims who reinforce cultural values around sex, sexuality and femininity. The qualifying language used by prosecutors illustrates how this legislative context – with its conflation of victim and offender – reifies these critiqued notions of real victims and real sexual violence by setting a benchmark for victims that requires them to have no part in the production of the image. It also lessens the responsibility of the young men because it demonstrates the understanding that the first wrong is the young

woman's deviant behaviour, a concern that has been specifically raised by feminist scholars (Hasinoff 2014).

The structure of this Connecticut statute provides a platform for discussions around the person who creates the image; it labels that behaviour as the genesis of the problem and includes the victim's behaviour as part of that problem. For example, in a discussion of sexting victims, Linda clearly differentiates between victims and non-victims based on their involvement in the incident:

> That's tough, I mean victim/offender I mean I hate to say it, you have the rare ones where they blackmailed them into look let me take… send me these pictures or else I'm going to tell everyone you know that you did this that and the other. We definitely have some of those. But for the most part they're the victim/defendant they're the ones that first sent it out (Linda, Connecticut Prosecutor).

According to Linda, a person who is blackmailed into sending an image is deemed blameless or not culpable, but at the opposite end of the spectrum 'the victim/defendant' is the 'one[s] that first sent it out'.

This inability to disassociate the victim from the label of offender and vice versa, even when the act is non-consensual, suggests that dissemination of the images is a mutual rather than unilateral act. Bavelas and Coates (2001) argue that narratives of sexual violence, which create the sense of violence as a mutual (shared between two people) act rather than a unilateral (single person) act; alter the perception of these acts as aggressive and violent. Here, the victim–defendant dichotomy raised by these participants is reinforced by the new statute, which reproduces the notion that sexting is the offence and the problem is a mutual act rather than a unilateral one. This is not just in the sense that it carves sexting as a legal wrong, but also in

the sense that sexting is an offence that (within certain age boundaries) must involve two parties. Aside from Linda's distinction between incidents of blackmail, the sexting offence names the person in the image as complicit in the offence. The outcome of this is an erasure of non-consensual sexting as a specific offence as Coates and Wade argue:

> Language that mutualises violent behaviour implies that the victim is at least partly to blame and inevitably conceals the fact that the violent behaviour is unilateral and solely the responsibility of the offender (2004, p. 501).

This distinction between mutual and unilateral acts is not clear in the statute. Although it separates production from dissemination, it criminalises both of these actions identically, thereby implying that an individual who consensually sexts their image are as culpable as the person who disseminates it non-consensually. It reflects arguments from within the legal scholarship that characterise sexting as inherently harmful due to the potential for images to be distributed (Fichtenberg 2011; Leary 2010). These arguments challenge the assumption that a person who engages in consensual sexting should not hold the reasonable belief that a person would keep the image private. This context, while framed as a form of protection, reproduced the understanding (challenged by feminist scholars; Hasinoff 2013; Karaian 2012) that young women are inherently culpable for firstly producing these images, and secondly, for their distribution. That the non-consensual distribution of images was ultimately the responsibility of the person in the images was an understanding echoed by other participants:

> To me there has to be some personal responsibility for individuals. So if you're in a relationship with somebody…I *mean both parties have to take responsibility and if you don't want an image…getting out there then don't allow it*… and I understand that when they're younger it's harder because their minds aren't mature and know that that's really going to affect them even when they're older (Simon, Texas Defence: emphasis added)

Intertwined within these discussions about the responsibility of the young girls in these images were also discussions surrounding the new statutes as a deterrent for their behaviour. The following section, therefore, explores prosecutors' views of this statute as a deterrent.

Prosecutors were asked whether they thought creating a specific offence and continuing the criminalisation of sexting was appropriate. Their responses were complex and contradictory. Despite their criticism of the legislation and the conflation of the victim and offender, prosecutors viewed this statute form of positive and necessary deterrence. For example:

> I think you're gonna have to because as I said I think we're back to we need them to stop sending it. So you kind of need to…that victim/defendant needs to be either a real victim or a stop sending it because if you send it you're going to go into defendant land.
> (Linda, Connecticut Prosecutor)

> *The purpose of the law is to stop the behaviour you have to draw the line somewhere as soon as you send the stuff out, now you're crossing the line*…The rationale [behind the law] I kind of understood, you know we're getting more and more and kids doing this, so if we're not going to make an arrest and show them that they there's ramifications for what they do then we're just gonna have more and more of these to worry about (Adam, Connecticut Prosecutor: emphasis added)

These comments illustrate the perception of the law as a tool to eradicate sexting rather than as a way of dealing with the widespread non-consensual distribution of images. The assessment of law as a deterrent to the sending of images illustrates a pervasive 'moralizing dominant discourse' (Lee et al. 2013, p. 36) that labels sexting as both a risky and an inappropriate form of behaviour. This view is not without

precedence; Bailey and Hanna (2011, p. 441) similarly argue in favour of deterring consensual sexting:

> In their own long-term self-interest it would probably be prudent for teens to avoid capturing and sharing with their partners widely distributable digital memorializations of their sexual self-representations and sexual activities.

However there have been criticisms of this approach, for example Arcabascio (2009) argues that '…general deterrence may not be effective at curbing the behavior of teenagers' (Arcabascio 2009, p. 41). Indeed, despite their support of this legislation as a deterrent, Linda noted that this had little effect on young people's behaviour:

> The act was a actually passed in 2010. But even today that law's been on the books now for a few years even today I'm still today I'm still amazed at the kids attitudes towards the whole practice. It doesn't faze them in the least; nothing bad is ever gonna happen to them.

Calvert identifies motives to deter as synonymous with a paternalistic motive of stopping young girls creating these images and by extension harming themselves:

> This does not; of course mean that sexting causes these harms. Rather when taken to its logical extreme, it suggests that the law should intervene because the practice is an indicator of such harms. To allow it to exist and go unpunished is to ratify it, validate it and in doing so endorse a culture that exploits girls sexuality (2009, p. 25).

Although Calvert (2009) speaks exclusively about non-consensual sexting, the implicit link between the production of an image and the distribution of the image is reflected in the data above. Both prosecutors recognise the difference between non-consensual acts while simultaneously citing production of images as the genesis of the problem. As evident above, this sexting statute places the burden of responsibility on the producer of the image, which the Connecticut prosecutors opined was a proper function of the law: to dissuade image production through both

general and specific deterrence. Interviews with prosecutors on the implementation of this offence revealed that this paternalistic model both produces and erases culpability by criminalising both the young offenders and victims, creating a legal terrain whereby the victim of non-consensual sexting becomes a legal subject.

Distributing sexual images of minors cases

Participants discussed cases where young people had been charged with producing or distributing sexual images of minors. These accounts highlighted the impact of implementing an offence that criminalises both the production and distribution of images. While one Connecticut prosecutor specifically stated that his decision to initiate criminal proceedings was only for cases involving non-consensual sexting (Adam, Connecticut Prosecutor), other prosecutors' accounts revealed that they had charged a young girl who self-produced sexual images:

> I had one girl she was twelve years old and she took a picture of herself in the bathroom... typical bathroom picture in the mirror. And she sends it to her boyfriend and the first thing he does is send it to all of his friends and it goes all over the school. So she got charged under this statute and the boys got charged under the child pornography. And we let it come to the review board... (Paul, Connecticut Prosecutor).

This shared culpability between the person who consensually creates an image and someone who non-consensually distributes it was also exemplified in a case discussed by Linda:

> L: I'll be honest with you I am stunned [about sexting], I really am like the most recent one we have is a 15-year-old girl… the best way to put this [it was her] and her cat [in a sexual interaction]… [she] basically disseminated to several boys in the high school.
>
> LV: Did she choose to send?

> L: Oh yeah she sent them to several boys and of course parents got up in arms, but you've got to do something because one we needed it to stop because we didn't know how long she was going to keep going and enough parents saw this act because it was videotaped.

These cases not only involved young people close in age, but also incidents where there was a large age gap between the producer and the recipient. As detailed in Chapter Six, Adam prosecuted a case where a boyfriend (19) and girlfriend (15) exchanged pictures, in this incident the boyfriend demanded more pictures from his girlfriend, after she declined he threated to send them to her employer, she then told her mother, who contacted police. The police then arrested him for child pornography offences and her for sexting [distributing sexual images of minors] offences. I asked Adam how he proceeded in this case:

> A: Her case didn't furnish any business for the court the arrest was part of the process of punishment if you will. He's being prosecuted he's actually going to end up not having to register or pleading to an offence that would allow him to have to go to jail. He's going get one of the diversionary programs we have.

Prior to his discussion of this case, Adam claimed that the lack of consent was the only instance in which he would prosecute a sexting case. However, the case he relayed reflects an approach to prosecution that regardless of aggravating factors pursues this young girl's arrest under the sexting statute as 'part of the process of punishment'.

While the young girl was never punished under the statute, arrest without prosecution does not negate the importance of legal intervention; the arrest can act as a symbolic censure. This case highlights the outcomes of implementing the sexting-specific offence: that even when subject of the image is younger than the

recipient and coerced into producing the images, the law recognises them as both culpable for their behaviour. Adam's statement that they arrested both participants once again demonstrates the power of this law to create offences that are mutual rather than unilateral and to consider the genesis of the problem as the production of the image.

The interviews demonstrated that shared culpability was not solely a legal question, but rather a value-judgment held by prosecutors, as evidenced by the negative and judgmental attitudes that were articulated in the interviews towards young women who produce and distribute their images. For example, Paul recounted an interaction with a young victim of non-consensual sexting and implied the victim was to blame:

> And I asked the girl, twelve years old 'how much time went past between the time the boyfriend asked you to send the picture and the time you actually sent the picture'? And she thought about it and she said 'maybe a minute'. So she didn't think about it, as soon as he wanted it, went to the bathroom snapped a shot and that's the way it goes (Paul, Connecticut Prosecutor).

This attitude further illustrates the perception of non-consensual sexting as a unilateral act because it focuses on the young girls' decision to send the content as the core problem. Paul's focus on the young victim's decisions suggests that her produce the image is the key issue, rather than the boy's decision to distribute it. Paul's reference to the time lapse between the request for the image and the production of the image further highlights the issues with the preconception that young women in particular are thoughtless and flippant with their bodies. This is indicative of the discourse that characterises 'girls [as] the disempowered and duped victims of sexting' (Karaian 2012, p. 57) who are also described as 'disinhibited girls' (Hasinoff 2013, p. 452). The concern remains that because the Internet and mobile

phones permit instant communication that is removed from traditional social contexts and consequences, girls are more likely to make inappropriate decisions when communicating with these technologies (Cassell & Cramer 2008). Linda also recounted a similar exchange with a young woman who participated in the production of sexual images,

> We had a young man having sex with a young girl and another man videotaping it and putting it on Facebook. But it's just I mean, and you talk to the girl. I never thought he would post it. Well what did you think he was taking the pictures for? You had a videographer in the room where did you think that was going?

Similar to Paul's comments, Linda's narrative of this case included an addendum where she asked the girl why she participated in the production of the content. Linda's question 'Well what did you think he was taking the pictures for?' serves three purposes. First, it is a clear articulation of the neoliberal logic that women are sites of risk and therefore responsible for managing their own risks (Chan & Rigakos 2002; Hall 2004). Second, it paints her as foolish in lacking this understanding and third, it erases the young man's culpability and intention by normalising his actions as natural and to be expected, attitudes that echo those that pervade normative understandings towards sexual assault (Brownmiller 1975; Anderson & Doherty 2008). The focus on the consensual actions of these young women over the non-consensual actions of the young men is reflective of the problematic perception of men's sexuality as 'driven and uncontrollable' (MacLeod & Saraga 1987, p. 18). The actions of these young men are 'natural and expected', unlike the actions these young women who need to be interrogated for a justification for their behaviour. As specific legal subjects (Smart 1995), girls subjected to this line of questioning no longer have claims to victimhood that would at least symbolically place them in a different category. The demand for young women to provide an explanation for their

behaviour was highlighted when contrasted with Linda's representation of male offenders. When discussing the same case, Linda referred to her interview with the two boys, whom she noted 'burst into tears' when informed them their behaviour was unlawful, a sharp contrast to the interrogation of the young female victims.

Overall, the sexting statute provided prosecutors with options to avoid charging young people with child pornography offences. The implementation of this statute however, renders image producers criminally culpable and draws the focus from non-consensual image distribution and the harm of this caused to the victim, to a refocused view of this as a mutual offence.

Implications of a paternalistic model

There are two bases for criminalisation within the Connecticut statute (*Conn. Gen. Stat. Ann*. § 53a-196h). Firstly, as is the case with child pornography offences, the behaviour is harmful and criminalised because the minor is presumed to not be able to consent to their image being taken, even if they take the image themselves. Secondly, the rationale underpinning this approach is paternalistic in nature. Interviews with prosecutors revealed that in some cases this resulted in the criminalisation of victims' consensual sexting. Easily mobilised by creating mutual actions from unilateral actions, these outcomes reinforce findings from research that shows that paternalistic laws that are focused on regulating youth sexual activity have the effect of over-criminalising the behaviour and serve to legally and morally censure behaviour that is distasteful rather than harmful (Ellis & Kitzinger 2002). This has gendered implications for young women, particularly because empirical research demonstrates that young women's images are more likely to be exchanged

(NCTPTUP 2008; Ringrose et al. 2013; Walker, Sanci & Temple Smith 2013). While jurisdictions across the US have implemented this legislation, other jurisdictions, such as Victoria, have only recently codified sexting into law. In Victoria, recent reforms implement a different model from that used in Connecticut. Rather than focusing legislative intervention on both consensual and non-consensual sexting, Victoria's law reform criminalises non-consensual sexting, which is akin to a model informed by and attentive to the harm principle.

Harm Model: Criminalising non-consensual sexting in Victoria

In the following section I shift the focus from the legislative reforms in Connecticut to the recently implemented reforms in Victoria to discuss how sexting is conceptualised and realised as a legal wrong in this jurisdiction. In this section I firstly draw on the Victorian Parliamentary Inquiry into Sexting and examine how harm is used as a conceptualising factor into their recommendations. Secondly, I focus on parliamentary debates on the implementation of two new offences recommended by the Victorian Parliamentary Law Reform Committee (VPLRC 2013). Finally, I connect these new offences with legal practitioners' views on the nature of legislative reform, drawing particularly on observations from Connecticut prosecutors and their concerns about the limitations of creating a single base level sexting offence.

The Inquiry

In 2011, the Victorian Parliament Legislative Assembly of the 57th Parliament instructed the Law Reform Committee to conduct an inquiry (the Inquiry) into the

legal responses to sexting practices among young people. The Committee cited a series of media articles by Nicole Brady (2011a; 2011b, 2011c, 2011d) as catalysts for the Inquiry. The articles referenced in the Committee's report highlighted four incidents involving sexting: a case where a young (13-year-old) girl had been pressured by her boyfriend to create and send photographs; a case where two 17-year-olds had made a consensual sex tape and sent it to their friends; a case where a 16-year old girl sent naked images to her 19-year-old boyfriend and the case of a 'young' Victorian man who was prosecuted under child pornography laws and had to register as a sex offender after his friend sent him an image of an underage girl (Brady 2011a). In light of these reports, the Committee identified two major concerns: 'the possibility that child pornography offences can apply to young people who create, send, receive or possess sexting messages' (VPLRC 2013, p. 5), and the negative impact of non-consensual sexting on the individual in the original image.

The Committee specified three main areas of inquiry. Firstly, it sought to qualify and quantify, sexting[46], secondly, to investigate the educative campaigns focused on the social and legal ramifications of sexting, and thirdly, to understand the range of legal responses that could be applied to these practices (VPLRC 2013, p. ix). [47]

[46] Defining sexting as a broad range of behaviours including: '…the creating sharing, sending or posting of sexually explicit messages or images via the internet, mobile phones or other electronic devices by people, especially young people…' (VPLRC 2013, p. 19).

[47] The Inquiry issued the following terms of reference:

(1) The incidence, prevalence and nature of sexting in Victoria;

(2) the extent and effectiveness of existing awareness and education about the social and legal effect and ramifications of sexting;

(3) the appropriateness and adequacy of existing laws, especially criminal offences and the application of the Sex Offenders Register, that may apply to the practice of sexting, particularly with regard to the creation, possession and transmission of sexually suggestive or explicit messages and images in circumstances where a person:

(a) creates, or consents to the creation of, the message or image for his or her own private use and/or the use of one or more other specific persons; or

In May 2012, the Committee called for submissions and received 60 submissions from key stakeholders.[48] The Committee held six public hearings between September and December 2012, inviting stakeholders to speak directly to their submissions as well as answer questions. The Committee also consulted with 64 American and Canadian stakeholders in academia, the public sector, law enforcement and legal sectors. The outcome of the Inquiry was a Report that included 14 recommendations that supported a harm model approach to legal intervention (VPLRC, 2013 p. xxiii-xxiv). The two key legislative changes proposed by the Committee were *Recommendation 6*, that both the Commonwealth and Victorian child pornography offences be amended to include defences for images taken consensually between minors where the accused is not two years older than the person in the image, and *Recommendation 9*, that a summary offence be created specifically for sexting (VPLRC 2013, p. 152).

The Inquiry's recommendations highlighted three specific elements necessary for behaviour to constitute an offence: that the dissemination of an image be non-consensual, that images are threatened to be disseminated, and that images are used to humiliate or intimidate victims (VPLRC 2013, p. 151). These recommendations make a clear distinction between the law's role as an intervention for harmful acts rather than a blunt instrument meant to regulate nude or semi-nude images. These recommendations indicate a clear departure from the protectionist model exemplified in Connecticut, and constitute a harm model that is focused on

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> (b) creates, or consents to the creation of, the message or image and without their knowledge and/or their consent the message or image is disseminated more broadly than the person intended (VPLRC 2013, p. ix)

[48] In academia, centres against sexual assault, educational and parental groups, human rights, law, privacy, civil liberties, religious groups, police, health, youth welfare services and the community.

non-consensual sexting. The Committee's recommendations align with accounts from the legal practitioners in this thesis that non-consensual sexting was – irrespective of the legislative framework being applied – the key issue for law.

Conceptualising harm in the Inquiry

The harm created by non-consensual sexting formed the basis of the Committee's criticism of the current legislative provisions that could apply to consensual sexting, arguing that the current legislative landscape doesn't 'adequately recognise [the] real and significant harm…done to people of all ages when explicit images are distributed to third parties without consent' (VPLRC 2013, p. xxii). The Committee's intentions in creating a separate offence that captures non-consensual dissemination of images was two-fold: the new offence would be able to 'accommodate the range of harms that occur from sexting' while simultaneously 'prevent[ing] children and minors being inappropriately charged with child pornography offences' (VPLRC 2013, p.140).

The Committee also specifically mentioned how young people could be harmed by the broad distribution of images on the Internet, particularly on social networking sites. Rather than adopting traditional concerns that naked images of young people are in danger of being posted on paedophilic websites, the Committee specified that their concerns were with the publication of these images on social networking sites such as Facebook, Twitter and Tumblr, specifically due to the potential for the images to be viewed by a large number of users (VPLRC 2013, p. 191). The role of technology in this practice was characterised by the Committee, in the context of non-consensual distribution, as a mechanism that exacerbated harm to the victim

because technological outlets enabled the images to be disseminated to a wide audience in a manner that was long-lasting.

The Committee recognised the gendered dimension of harm created by non-consensually distributing images (VPLRC 2013, p. 37) citing this aspect of 'problematic or harmful sexting' (sexting involving the non-consensual distribution of images) as disproportionately affecting girls and women. However, they also disconnected those harms from sexual harms by distinguishing non-consensual sexting from sexual violence; this distinction will be discussed below.

The report highlighted that tailoring a new offence to sexting presented the 'opportunity to disentangle sexting offences from sexual offences' (VPLRC 2013, p. 150). The disentanglement suggests the need to break free from the confines of sexual violence, in which sexting is entwined, yet -according to the Committee- wholly un-related, a distinction which has been the subject of some criticism. For example, Powell (2010a, p. 80) (speaking generally on this distinction) has argued this type of separation reflects the 'false distinction currently operating in law, policy and public debates between unauthorized sexual imagery as distinct from sexual violence', stating further:

> It might also be argued that the unauthorised taking and distribution of images of an otherwise consensual sexual encounter is similarly part of a continuum of gendered sexual violence and harassment targeting primarily women. The distribution is itself a direct violation of an individual's sexual autonomy with the effect of humiliating, intimidating or otherwise harassing the victim (Powell 2010a: 81).

The distinction between sexting and sexual violence is made clear by the Committee in the rationale for creating an offence outside the sphere of sexual violence. After

stating that sexting should be ‘disentangled’ from sexual violence, the qualification for this distinction is as follows:

> Nevertheless, a person who acts maliciously, or even carelessly, in sexting conduct, while not being exploitative, can still cause serious harm to the victim depicted in the image or footage. Given the harm that can result from non-consensual sexting, and general community recognition that this is not appropriate behaviour, it is strongly arguable that non-consensual sexting should be considered criminal behaviour (VPLRC 2013, p. 151).

The behaviour is differentiated from ‘sexual offending’. For example, the harmful behaviour according to this legislation is ‘malicious’ and ‘careless’ but not ‘exploitative’. Despite this clear distinction, cases recounted by participants in this study subvert the argument that this behaviour is not exploitative or that exploitation is not ‘sexual’. Howe (2004, p. 225) argues that ‘[s]exed violence… covers all forms of violence in which the gender or sexed status of the perpetrator or victim is relevant to the violence act’. This active disentangling of non-consensual sexting from sexual offences is problematic considering the complex intersection between shame and reputational damage that can accompany non-consensual sexting for young female victims. As discussed in Chapter Six, Texan defence lawyer Simon described a case where a young woman had a video of herself disseminated to both her school and wider community (*Texas Case* A) and was effectively ‘shamed out of the school’ and she and her parents had to move away from the area. Cases such as this suggest that the sexual nature of the images, and the implications for young women should not be excluded from a conceptualisation of sexual or gendered harm in non-consensual sexting.

The report bases this distinction on the intentions of the disseminator, noting that the while the disseminator may intend to be malicious, their intentions are not

exploitative and their behaviour is therefore not a sexual offence. However, naming an offence a sexual offence on the basis of the offender's intentions has been criticised by Johnson (2009) who argues that the victim's perception and the harm that occurred to the victim should be a key element for defining an offence as a sex offence. The subjective interpretation of an offence through the male offender's perspective is fundamental in feminist criticisms of the law's inability to differentiate harmful from non-harmful actions (Mackinnon 1987).

The distinction between these acts and sexual violence is perhaps unsurprising. As discussed in Chapter Three naming behaviour as sexual violence by distinguishing consent from non-consent has been challenging. Feminist scholars have long grappled with this issue, particularly within the second wave where feminists worked to 'conceptually transfor[m] rape from "normal" heterosex into an act of violence', (Smart 1995, p. 111) and on the continuum of normal sexual interaction. There is a precedence of resistance to labelling – symbolically or otherwise – behaviour involving sex as a sexual offence, particularly when this behaviour can be 'explained away' or 'contextualised' within notions of hetero-normativity. Extending this concept non-consensual sexting offers a useful method for examining what meanings are attached to these images in the Committee's recommendations (VPLRC 2013) and from the perspective of the participants. In the Committee's proposed reform, images of women are the legal subject and the non-consensual distribution of these images is harmful. While the report does contextualise harms in terms of gender, it also de-contextualises these offences from sex.

Despite addressing family and intimate violence in the report (VPLRC 2013, p. 24), receiving submissions from Women's Health and Community Legal Centres on about the importance of educating police on a family violence framework when investigating sexting and employing a family violence framework to regulate non-consensual sexting, the recommendations made by the Victorian Parliamentary Law Reform Committee (VPLRC 2013) did not define non-consensual sexting as family or intimate partner violence. This is a critical absence, particularly considering both state and federal commitments to addressing family or intimate partner violence. In 2009, the Australian Government launched their *National Plan to Reduce Violence Against Women* (2010–2022), with the specific aim to make 'real and sustained reduction in the levels of violence against women' (DSS 2014, foreword). Supported in part by a range of law reforms on family violence in Victoria, this included repealing the *Crimes (Family Violence) Act 1987* (Vic) and inclusion of the *Family Violence Protection Act 2008* (Vic) in 2009. While these reforms addressed a wide range of issues, a key to the discussion was the inclusion of a 'more comprehensive definition of family violence, which better recognizes economic and emotional abuse as well as other types of threatening and controlling behaviour' (Department of Justice 2014, para. 3) and improvement of grounds for intervention orders established in *Crimes (Family Violence) Act 1987* (Vic) that favoured displays of violence or aggression and the likelihood of the offender repeating their actions (Murray & Powell 2009). The implications of defining non-consensual sexting as family violence will be returned to later in this chapter.

Since the report was release the recommendations moved quickly into the development of draft legislation and we move now to examine the parliamentary

debates on this law reform. Before examining these debates, I first outline the structure of these two new offences recently implemented in Victoria.

New Victorian statutes and Parliamentary Debates

The new statutes implemented in Victoria encompass both the distribution of an intimate image and the threat to distribute an image. A person commits the offence of distributing intimate images if '[A] intentionally distributes an intimate image of another person [B] to a person other than [B]; and the distribution of the image is contrary to community standards of acceptable conduct' (*Summary Offences Act 1996* (Vic) s. 41DA(1ab)). Secondly, someone commits the offences of threatening to distribute images if:

> (1)
>
> (a) A makes a threat to another person (B) to distribute an intimate image of B or of another person (C); and
>
> (b) the distribution of the image would be contrary to community standards of acceptable conduct; and
>
> (c) A intends that B will believe, or believes that B will probably believe, that A will carry out the threat.
>
> (2) A person who commits an offence against subsection (1) is liable to level 8 imprisonment (1 year maximum).
>
> (3) For the purposes of this section, a threat may be made by any conduct and may be explicit or implicit (Summary Offences Act 1996 (Vic) s. 41DB).

This section examines the support for the bill within parliamentary debates on the *Crimes Amendment (Sexual Offences and Other Matters) Bill 2014*. Two main reasons for supporting the bill emerged from this debate: firstly, that this reform was necessary because it reflected the shifting technological and social mores, and secondly, that there is an imperative to label non-consensual sexting as inappropriate and offensive.

The bill implemented the recommendations from the Parliamentary Inquiry and was received positively in Parliament. In particular, it was viewed as an example of the government being reflexive to shifts in technology and sexual practices. For example, Martin Pakula (Member for Lyndhurst) described the bill as 'modernising' (Commonwealth of Australia 2014, p. 3393). Similarly, Don Nardella (Member for Melton) argued that the bill was important because the government is 'trying to keep up with the technology and the societal changes that are occurring in our community' Technology and the technological context in which sexting is situated was viewed as a key reason to pass a bill that reflected these new realities.

The second reason for supporting the bill that emerged from the debates was the importance of labelling non-consensual sexting as offensive and against community standards of behaviour. Steve Herbert (Member for Eltham) noted that this behaviour was inherently illegal due to the breach of consent:

> The act of sending images of a person around the world against their will by individuals who maliciously impact upon that person's sense of self really should be illegal. This bill makes it illegal. It should not happen, and we need to do something about it (Commonwealth of Australia 2014, p. 3405).

Clem Newton-Brown (Member for Prahan) noted that this bill is important because it recognises the harm of non-consensual sexting and sends a 'strong message to the community that if you are the recipient of an intimate image, it is not okay to share that image without consent' (Commonwealth of Australia 2014, pp. 3395-3396). Moreover, the nature of the bill was seen as a way of balancing the competing principles of protection of young people's self-expression while attending to harmful behaviour:

> The bill goes to address the issues we identified during our inquiry. It also grapples — as we attempted to do as best we could — with this issue of getting the balance right and understanding that the genie is out of the bottle in terms of how humanity is communicating, while recognising that we want to do our best to have some protections around young people so that their digital footprint is protected as much as possible (Jane Garrett Member for Brunswick, Commonwealth of Australia 2014, p. 3408).

Additionally, the words of Garret indicate that protecting both young people and adults from non-consensual dissemination of images was a key rationale underpinning support for these new statutes.

Implications for this new statute: Lessons from Victorian and Connecticut legal practitioners

This statute demonstrates an attention to many of the concerns that have emerged around sexting, but also affirms the findings from this study that non-consensual sexting has been the clear focus of legal intervention. Legal practitioners from both countries provided criticisms for the implementation of a base level offence, and these insights will be discussed in the following section.

The views of Victorian legal practitioners who participated in this study were in line with the recommendations made by the Victorian Parliamentary Law Reform Committee. Victorian defence lawyers consistently indicated that the law had an important role to play in distinguishing between consensual and non-consensual sexting and were in favour of criminalising conduct where images had been distributed without consent. For example, John noted:

> There should be the creation of a separate offence that applies, but not with the label of child pornography. That… only applies where [producing or distributing images] is not consensual and where the age gap is… significant.

> Because there is always a situation between a 17-year-old and 10-year-old and it might be legitimate to say that this is child pornography. But when you have a 15-year-old and a 15-year-old. I don't think there are any circumstances where you should call that child pornography. But I think you could probably create an offence if it is without consent (John, Victoria Defence).

For these participants, there was consensus on how the law should be re-framed to better respond to these practices. They supported the creation of a new offence that would apply to the non-consensual distribution of images with additional defences afforded to the charge of child pornography. John's comments highlight the importance in identifying appropriate incidents for legal intervention and the acknowledging that there is a hierarchy of harmful behaviour that can be defined as non-consensual sexting. However, some participants qualified their support of sexting statutes because they were concerned that criminalising non-consensual sexting was legitimising legislative intervention, which could lead to over-criminalisation of young people.

While this model differs greatly from the paternalistic model implemented in Connecticut, the experiences of the Connecticut prosecutors have important implications for monitoring the implementation of the Victorian law. In particular, Connecticut prosecutors' insights into the problems with the creation of a base level offence that does not distinguish between more and less serious incidents of sexting. These criticisms (as outlined earlier) illustrate the difficulties faced by prosecutors when the complexities of sexting are not included in the statute. Underpinning these criticisms is the fundamental understanding that has pervaded legal practitioners' accounts of sexting cases in Chapter Six – that sexting is a varied practice with

many dimensions. The number of images, the age difference between the participants and the breadth of distribution are all factors that legal practitioners noted in their discussion of these cases. The insights from prosecutors who are active in implementing a base level offence (despite its different conceptualisation of sexting as a criminal offence) suggest that, while represented as a panacea to the problems raised by prosecuting non-consensual sexting as child pornography, base level offences cannot necessarily attend to the complexities inherent within sexting practices. This is encapsulated by Duncan's (2010, pp. 689–699) argument that the:

> …complexity of this problem makes it easy for legislators to draft laws that fail to effectively address the many dimensions of this problem. Because self-produced child pornography (read sexting) can involve very different contexts, any legal solution should recognize the uniqueness of each situation by utilizing a base-level offense with enhanced punishment for more egregious behavior to provide a flexible response.

The varied nature of sexting and its implications for base level offences are of critical importance to this research. From the discussions with legal practitioners, the Victorian Parliamentary Law Reform Committee (VPLRC 2013) report and the work of other scholars, non-consensual sexting incidents occur as mechanisms of intimate partner violence. As such, the criticisms from Connecticut prosecutors and others (Crofts & Lee 2013; Duncan 2001) of the ability of one base level offence to capture the varied nature of these practices leads us to considerations of the range of legislative frameworks that can, and are being, applied to youth sexting. This extends beyond these new offences in Victoria and moves towards contextualising these practices rather than defining them as genderless and only characterised by the technologies of their manifestation. The following section extends this discussion and examines the use of family violence legislation to respond to non-consensual sexting.

Intimate partner violence framework: Contextualising non-consensual sexting as violence against women

As discussed in the preceding sections, while base level offences in Victoria and Connecticut have criminalised sexting (based on either a need to deter young people from the practice or to criminalise non-consensual and harmful behaviour), one of the consistent issues arising from these reforms is that broad definitions of sexting do not account for the varied nature of the practices and the contexts in which sexting incidents occur. Indeed, as discussed in Chapter Six participants in the study recognised intimate partner violence as a context in which non-consensual sexting occurs without explicitly naming this behaviour as intimate partner violence. This is clearly an important aspect of sexting that is not explicitly named in the legislative reforms discussed in this chapter. The following section addresses the application of family violence legislation in Victoria that specifically contextualises non-consensual sexting as intimate partner or family violence. This section draws on the interview with one Victorian Community Lawyer who works with women seeking intervention orders against former partners who have released or threatened to release intimate photographs as well as evidence from the Parliamentary Inquiry. It highlights the importance of shifting focus away from discussions of criminalisation and offenders (which has dominated discussions around sexting and the law) and towards regulation and discussions of victims.

The Parliamentary Inquiry recommendations focused primarily on educating young people on cyber safety (VPLRC 2013, p. 60) and amending child pornography and sex offender registration acts (VPLRC 2013, pp. 146, 161) rather than family violence. Yet as Community lawyer Kathryn indicated sexting and family violence can occur together. In her work, Kathryn was using civil measures such as

intervention orders to assist her clients to stop their partners or former partners from distributing nude or sexual images or as a response to threats to distribute images. Kathryn's interview indicated that, while legislative reform has focused on non-consensual sexting, these civil mechanisms have been used by young women in Victoria.

Kathryn's comments significantly differ from most participants, mainly because her discussion places the behaviour of the disseminator at the forefront, contextualising it within the relationship and naming the use of the images as an instrument for abuse:

> But statistics show that it's mainly women who leave relationships not men in heterosexual relationships. And that's what I see constantly anyway that's what the legal service sees. And what we've noticed is that when the women are indicating that they want to leave the relationship or have left the relationship, then whatever it is that they have engaged in or created has been used as a way to either reconcile or not leave the relationship. Or unfortunately in a small number of cases, I think it might have been two cases the younger women have felt that they needed to resume a sexual relationship. So it's a way for them to get them to have sex. By having this threat held over them (Kathryn, Victoria Community Lawyer).

Her experiences also challenge the dominant discourse of adolescent stupidity and foolishness, recognising that both young and older women experience non-consensual sexting intimate partner violence and challenge the views of Connecticut prosecutors Paul, Linda and Adam, who argued that non-consensual sexting is implicitly instigated by young women.

Family violence frameworks in Victoria have undergone significant changes since the 1970s as a result of feminist advocacy and campaigning (Murray & Powell 2009). In Victoria, family violence is defined in many ways. These include the policy definition:

> Family and domestic violence is any violent, threatening, coercive and controlling behaviour that occurs in current or past family, domestic or intimate relationships. This includes not only physical injury, but direct or indirect threats, sexual assault, emotional and psychological torment, economic control, property damage, social isolation and behaviour which causes a person to live in fear (DHS 2011, para. 2).

And the criminal definition, which includes behaviour that is:

> Physically or sexually abusive, emotionally or psychologically abusive, economically abusive, threatening, coercive or in any other way controls or dominates a family member to feel fear for the safety or wellbeing of that family member or another person, or behaviour by a person that cause a child to hear or witness or otherwise be exposed to the effects of family violence (*Family Violence Protection Act 2008* (Vic) s.1(a-b)).

The behaviour Kathryn described fit within these definitions. For example:

> But essentially it means that if he does publish the photos in some way there is just immense humiliation and trauma that's just been continued to be perpetrated in these relationships of family violence already (Kathryn, Victoria, Community Lawyer)

While the discrepancy between the range of behaviours included in the Victorian policy compared with those in the criminal statute has been criticised (Murray & Powell 2009), the legislation explicitly refers to harassment or behaving in an offensive manner which was often evidence in the cases of non-consensual sexting described by participants. The use of an image as a form of threat or coercion is never explicitly defined as family violence in public documents, but it fits within some the broad categories of sexual, emotional and verbal abuse (ABS 2009). Controlling, coercive or threatening behaviour or behaviour intended to degrade or demean was inherent in many of the cases described in all four jurisdictions. For example, cases discussed by Damien, Kathryn, Adriana and Luther (see Chapter Six) all featured ex-partners using private sexual images in order to humiliate the victim. However none

of these participants discussed these practices as constituting a form of intimate partner violence. Importantly, as noted above- the cases varied- in some instances they could potentially fit within an intimate partner violence definition given that they were part of *ongoing* forms of coercive and threatening behaviours. For example Kathryn discussed cases that could be referred to as instrumental violent behaviour, which is coercive or threatening behaviour to gain benefits or resources (Johnson 2006; Stark 2010):

> And what we've noticed is that when the women are indicating that they want to leave the relationship or have left the relationship, then whatever it is that they have engaged in or created has been used as a way to either reconcile or not leave the relationship. Or unfortunately in a small number of cases, I think it might have been two cases the younger women have felt that they needed to resume a sexual relationship. So it's a way for them to get them to have sex. By having this threat held over them. And as far as I'm concerned that's having sex without consent (Kathryn, Victoria Community Lawyer).

However, some behaviour falls into the category of single violent acts that are not used to control a partner or former partner (Braaf & Meyering 2013; Hamberger 2005). Whereas, in other cases such as Damien's (Victoria Case A) where he shared in an image in the context of his relationship break down, there was no indication or evidence that this was anything other than a single act of violence that was not indicative of his past behaviour towards his former partner.

Intervention orders and non-consensual distribution of images

Recognising non-consensual sexting as intimate partner violence is not only a conceptual issue it is a process issue- as family violence intervention orders[49] can be applied for where family members or intimate partners are experiencing violence or

[49] As opposed to a Stalking Intervention Order

threatened violence from other family members or intimate partners under *Family Violence Protection Act 2008* (Vic). While not physically harmful, the act of threatening to distribute or distributing a sexually explicit image of a current or former partner without their consent can be identified as an act of violence and there are specifications within the act to recognise this, as Kathryn explained:

> Now there is an order you can ask for as part of your applications that the other party be prohibited from putting anything electronically about you, so not allowed to email anything about you, not allowed to put anything up on Facebook about you. You can ask for that order. In one way if we ask for that order, then we'll get it and if he continues to do it he's breaching that order (Kathryn, Victoria Community Lawyer).

However, an important point where non-consensual cases of sexting can begin to be differentiated in relation to whether they may constitute IPV is the repetition of the behaviour: an intervention order is only available if there is the expectation that the behaviour will be repeated.[50]

While there is the potential for the family violence framework to absorb non-consensual sexting within intimate relationships, it is important to note that legal intervention is not always in the best interest of the victim (Murray & Powell 2009; Stubbs 1995). Kathryn explained that seeking an intervention order on behalf of victims of family violence where sexual images had been (or threatened to be), exposed had some negative implications for victims:

> So in order to get one of these applications…you've gotta go to the court and get it written out and stuff and almost all of them have said to me, I don't want to tell the court that I've made this video. *Understandably, because if they say it and they say he's threatening to release it they have to put it down in writing and there is a possibility then that their family members will see it, you know*

[50] *Family Violence Protection Act (2008)* s. 74(1): The court may make a final order if the court is satisfied, on the balance of probabilities, that the respondent has committed family violence against the affected family member and is likely to do so again.

> *we're talking about civil proceedings here, so it's all open.* So there's a possibility in questioning her that the magistrate will refer to that as well, because the magistrate has to refer to all evidence. So I often get this disclosed to me outside what's written on the application (Kathryn, Victoria Community Lawyer: emphasis added).

For clients, the fear of exposing these images to the courts and their families made seeking an intervention order unappealing and, critically, intervention orders do not guarantee the behaviour or threatened action will cease. This was reflected in Kathryn's explanation that many offenders whose former or current partners had worked with her to attempt to obtain an intervention order used this weakness in the IVO system to ensure an IVO application was not pursued:

> And some of them have said to me, 'he said he's going to release this video if I go ahead with this intervention order'. Which you know puts them in this sort of crazy position. But I still want them to go ahead with the intervention order to protect them (Kathryn, Victoria Community Lawyer).

Furthermore, Kathryn noted that clients were conflicted about implementing the intervention order if the terms were breached due to an aversion to further exposing themselves to police:

> Having said that though, our clients have to go to police and say this order is here and he's not able to publish anything electronic about me and there's nude photos of me on Facebook. That whole thing of having to go in and having to speak to the police who will easily find that evidence and charge him with breaching and…it puts our clients in a difficult position and it's a position that [they] don't want to be in. And they've said to me, quite clearly I'm not going to do anything about it. I'm not going to give him the attention and I don't want the cops to know. I really don't want my folks to know (Kathryn, Community Lawyer)

These comments highlight the difficulty of pursuing an intervention order for the victim and parallel research findings regarding the vulnerability of family violence victims when they seek protective measures such as intervention order (cf.

Parkinson, Cashmore & Single 2011). They also indicate how dynamic the use of sexual images can be as a form of threat and as a form of relationship abuse, as well as how palpable the threat of exposure is. Kathryn's accounts of her clients' situations illustrate that the threat of exposure can leave victims constrained in their choices to pursue legal redress or even measures that aim to protect them from further exposure.

Kathryn argued that young women's reticence to disclose these incidents was one of the reasons why the use of sexual images as a threat was not addressed as a form of family violence. As mentioned above, these facts are often disclosed outside a formal intervention order application and are not formally recorded in court as part of the violence. Victims' reticence at disclosing intimate partner violence is not uncommon and can occur for a number of reasons. While there is limited research on the nature of dating violence in Australia (Sety 2012, p. 1), some of the main studies have found that young people are reticent to disclose violence or seek help (National Crime Prevention Study 2001), and these barriers to seeking help include shame and reticence at being perceived as a victim (Chung 2007). These findings are affirmed in the broader scholarship on intimate partner violence and help-seeking. Victim's experiences of shame in reporting intimate partner violence have been identified in the literature. Ragusa (2012, p. 689) highlights that while there has been a shift in service delivery for victim/survivors of intimate partner violence help-seeking behaviour, intimate partner violence remains socially stigmatised and this stigma needs to be addressed to better understand why victims seek or access support or why they decide not to.

Kathryn's account of her clients' reticence to seek help further illustrates how shame is an inherent dimension of non-consensual sexting, particularly non-consensual sexting as intimate partner violence. This concern leads to an interrogation of the concept of reputation and the threat of reputational damage to young people, which is a crucial part of much of the feminist scholarship on young people's practices in negotiating sexting (Ringrose 2013; Salter, Crofts & Lee 2013). As discussed in Chapter Six, the notion of reputation or loss of reputation after a girl has her images disseminated and shared is entrenched. The power and ties of a woman's reputation to her sexual image has practical implications as evidenced above. Here, concern about exposure affected clients greatly, and this was not just a fear of exposure in court, but also a fear of exposure to family members.

Obfuscating non-consensual sexting as gendered violence: Narratives of men's anger

In Chapter Six, while participants recognised that non-consensual sexting occurs often in the context of a relationship breakdown yet only Kathryn referred to this as a form of domestic or family violence. On the contrary, in their narratives of sexting scenarios, the anger of young men was never addressed or discussed as a key issue for the law or as a factor that would place sexting into a family violence framework. This could be due – in part – to the fact that these were singular incidents rather than a pattern of behaviours. However, the lack of recognition for either gendered or intimate partner violence was particularly noteworthy because participants identified male anger toward women who terminated relationships as a catalyst for disseminating images of former partners. For the most part, anger was not explicitly discussed with reference to a legislative framework. For example,

Adriana (Victoria Defence) characterised this as the typical non-consensual sexting scenario, but makes no reference to intimate partner violence:

> But when we do see them we see a boy and girl taking photos of themselves having sex or someone takes a photograph of a girlfriends breasts or something then they send it onto someone else. Either with the permission of the girlfriend or maybe they have a fight they break up and there is some vindictive or inappropriate or nasty sending of this sort of photography to someone else.

Damien and his father explicitly described Damien as angry when he sent the images:

> They'd broken up at some stage and she called him and said that she's met some handsome fellow on the boat and they'd had this massive affair and whether it did or didn't happen is irrelevant and she was provoking him and in a fit of anger… [He sent it] (Damien's father).
>
> We haven't spoken for three or four months and I'm doing great and now you're provoking me and that's when I got angry and sent the images and it's just crazy that this one little ten minutes of anger is 15 years of life. (Damien, Victorian Offender).

Here, the anger is referenced but it is qualified through the girlfriend's provocation (admissions she was seeing someone else), thus becoming the reason for Damien's actions. Salter, Crofts and Lee (2013, p. 311) characterise these scenarios as 'boys [perceiving] injuries to masculine pride in the aftermath of a relationship breakdown' and labelling the distribution of intimate images as a manifestation of 'generalized aggression' towards women. So, while this scenario was identified as sexting, young men's aggression (enacted by disseminating images) is largely obfuscated in these narratives.

Both in the media and within a significant proportion of the research scholarship sexting and intimate partner violence are perceived as gendered violence but as

qualitatively distinct (Carty 2010, Jolicoeur and Zedlewski 2010; Sweeny 2011). In the re-telling of Alpert's case, there are instances where there is specific discursive erasure of men's anger and men's violence. For example, Potter describes Alpert's case as such:

> In 2008, just twenty days after his eighteenth birthday, Phillip Alpert distributed nude photos of his 16-year-old ex-girlfriend following a heated argument without considering the legal consequences, Alpert logged onto her e-mail account and sent to her friends and family nude photos his ex-girlfriend had previously taken of herself for him (2011, p. 419).

This re-telling of men's anger also appears in Walters' account:

> Late one night after having a fight with his girlfriend, Phillip Alpert – who had just turned eighteen – *made an irrational decision with far-reaching consequences and like most teenagers those consequences never entered his mind*…After an argument, in an ill-conceived effort to gain his ex-girlfriend's attention, Alpert woke up in the middle of the night, signed into her email account with the password she had given him and with one click he emailed the nude photographs to everyone in her contacts list (2010, p. 102: emphasis added).

Neither of these accounts mentions that the argument was about her leaving the relationship; instead, Alpert's behaviour is reframed to accommodate his actions. The gendered and abusive nature of his action is erased by suggesting that his decision was 'irrational', 'ill-conceived' and thoughtless ("without considering the consequences") and in some way facilitated and enabled by technology ("with one click"). While this is not a comprehensive review of representations of this case, it suggests there may be some parallels between the dominant narratives of sexting-related offences (or non-consensual sexting) and the historically dominant gendered narratives in intimate partner violence most evident in the area of homicide where men have been less culpable for fatal acts of violence due to provocation and the hot-blooded, uncontrollable nature of men's rage (Howe 2012, p. 95; Maher et al.

2005; Tyson 2012). Arguably this discursive erasure of men's anger or men's violence is being replayed in narratives around non-consensual sexting, where the distribution of an image is explained as a reactive mis-step that occurs in the context of anger or rejection-based jealousy *enabled by* new technologies that make it possible.

This narrative has long been a controversial issue for feminist engagement with the use of provocation law, and the narratives around men's anger reproduced in court demonstrating how legal practitioners, supported by the law of provocation, use men's anger as an excuse for their violence against women, these contextual factors of intimate partner violence, gendered violence or men's violence have yet to supplant the framing of non-consensual sexting as a practice of technological dimensions. Kathryn affirms that non-consensual sexting and family violence are linked and that using family violence frameworks to assist victims are important albeit fraught solutions to this problem.

Despite Kathryn's professional experience and recognition that disseminating intimate images has become a technique of family violence (Powell & Henry 2014), responding to non-consensual production and distribution of images with family violence frameworks has yet to be extensively considered. One reason for this could be that the inclusion of behaviours that are not physically violent as forms of intimate partner or family violence still remain contested (Murray & Powell 2009), particularly because young people do not readily identify non-violent behaviours as intimate partner violence (National Crime Prevention Study 2001). Australia has yet to implement legislation that reflects the links between gendered violence and the use

of non-consensual sexting against young women and girls (Powell 2010) and the absence of this contextualisation was evident in the Victorian Parliamentary Law Reform Committee's (VPLRC' 2013) report.

Kathryn's account further connects to Calvert's (2009) concerns addressed at the beginning of this chapter that there is an issue with creating a 'one fits all offence' to criminalise sexting. The added dimension here, the use of civil mechanisms by victims, illustrates the need for the scope of discourse surrounding sexting and the law to be broadened to include discussions around these mechanisms that don't necessarily criminalise but instead are accessed by victims as a way of protecting themselves. This facet of the discussion is important. As demonstrated in the previous chapter and at the beginning of this chapter, the predominant issue with sexting and the law has been how to or not to define this behaviour as a legal wrong. This inevitably focuses on offenders and those disseminating images rather than on victims who, as Kathryn indicates, are currently using the legal system to manage and protect themselves from non-consensual sexting.

Conclusion

The law reforms in Victoria illustrate a change that has addressed many of the concerns in scholarship surrounding the criminalisation of consensual sexual activity between young people. It seems a more nuanced approach than that adopted in Connecticut where 'moralising dominant discourses' (Lee et al. 2013, p. 36) prevail. The interviews revealed some of the problems raised by creating legislation that criminalises both consensual and non-consensual sexting without attending to the issue of harm, including placing responsibility on the victim for the abuse of their

consent and misuse of their personal images. In Victoria the new law focuses attention on harmful and malicious behaviour, including breach of consent, rather than on authorised sexting. Experience from Connecticut prosecutors indicates that simply criminalising either the production or distribution of the image, without considering the age gap between two parties, the breadth of the distribution and how this affects the victim may be limiting in providing a proper charge or punishment for an offender. While Victorian law reform suggests that the law's role should be a response to the harm created by non-consensually distributing images, it also sought to 'disentangle' this offence from the realm of a sex offence. The rationale for this is to remove the potential for sex offender registration, but the consequence may be that the offence itself remains outside the broader remit of gendered violence, which has significant consequences for broader social change to prevent such practices.

Sexting offences in the US and recommendations in Victoria illustrated a clear need to distance and distinguish young people who distribute sexual images from those who are 'sex offenders', particularly child pornographers. However, in doing so, active removal of non-consensual image dissemination from the realm of a sex offence was instrumental in erasing some of the key elements of what makes this issue a problem; to remove sexting from the realm of 'sexual offences' is to deny the gendered nature of the images and their broad dissemination. This aligns with discourses of a gender-neutral adolescent foolishness that dictates the understanding of this offence. Furthermore, Kathryn's experience as a community lawyer indicated the ubiquity of sexting as a tool for men's violence and the relationship breakdown as the critical aspect of the problem. That this remains largely un-interrogated raises questions about discourses of adolescent sexuality

and the ability of those discourses to obfuscate intimate partner violence. While the contextualisation of the harm of non-consensual sexting as intimate partner or family violence was included in the Victorian Parliamentary Law Reform Committee report (VPLRC 2013), not seeing it listed as part of their recommendations suggests the need to further contextualise the harm of this practice and interrogate the gendered nature of distributing images without consent and how the law can respond.

Chapter Nine: Conclusion

This thesis began with the description of two cases *Miller* and *Alpert*. These cases painted a fractured and unclear picture of the nature of prosecuting sexting because they featured consensual and non-consensual sexting, minors and young adults, self-produced images and images of former partners, and resulted in girls and young men being either prosecuted or threatened with prosecution for charges under child pornography law. For criminologists, these cases raise questions about the key issues at play in relation to youth sexting and the law, particularly in relation to the intersection between youth sexual agency, the law and technology. Within the media and scholarly literature these cases, both in the US and beyond, raised concerns and questions regarding legislative overreach that were difficult to answer given the limited detail regarding prosecutions. Prompted by the questions raised by these cases (and others reported in Victoria) this research examined, in detail, youth sexting prosecutions, and in so doing has developed a solid evidence base from which to consider the broader issues in relation to youth non-consensual sexting, technology, gender and the role and impact of law.

To draw together the theoretical and empirical contributions of this research, the discussion below is organised around the three research questions that guided this inquiry. These research questions were addressed by conducting a qualitative research project involving semi-structured interviews with legal practitioners, offenders and offenders' family members in Victoria, Florida, Connecticut and Texas. While the accounts of the participants in this study do not paint a complete picture of the nature of the criminalisation and regulation of youth sexting, their discussions offer detailed insights into the operation of the law, which is a critical step towards

developing an informed approach to law reform. This thesis adds new voices to the research field, enabling a shift away from the dominant analysis of how the law can potentially be applied to how it has been applied.

Prosecuting non-consensual sexting against women and girls

The first research question pertained to the prevalence and details of prosecuted cases. As discussed at the beginning of this thesis, it was noted that there was much speculation on the potential for many cases to be prosecuted, but limited evidence this was occurring. It was also noted that conceptually youth sexting and the law raised concerns around legal intervention into youth sexual expression (Karaian 2012). The accounts from legal practitioners and offenders illustrate that the concern regarding the number of cases appears, generally, unsupported and that prosecuted cases to date have been less about technology and sexual agency and more focused on non-consensual acts facilitated by new technologies as a way of shaming, harming or seeking revenge upon young women.

Two key findings contributed important insights into the broader research literature. First, most participants reported that prosecutions of sexting incidents were rare. The exceptions were the Connecticut prosecutors who reported an increased number of cases after the implementation of their sexting statutes. The cases discussed in detail by participants primarily involved incidents where an adult male (best described as a young adult, being generally under the age of 20 years) non-consensually distributed images of (mostly) female minors or young adult women (aged 19-22). Second, the images were often being disseminated to harm or humiliate the victims, often in the context of a relationship breakdown. The analysis

of the cases reported by all participants demonstrated the paradigmatic sexting case being pursued to prosecution involved a young man sending nude pictures of an ex-girlfriend in the aftermath of a relationship breakdown with the intent to harm or humiliate her.

These findings contribute new knowledge to the existing research and scholarship as well as informing the direction of future research. Through building a small sample of detailed case studies of prosecuted sexting cases. Legal practitioners' accounts indicate that the law is capturing (regardless of the type of legislation) behaviours that are non-consensual and gendered- featuring young men as offenders and young women as victims most often. This finding suggests that one of the concerns raised in the sexting-related scholarship -that young people who are engaging in consensual sexting could be potentially prosecuted for exploring their sexuality (Angelides 2013; Karaian 2012)- is largely unfounded or, at least, displaced. This is not to discount the need for discussions around youth sexuality, agency and the law, which form a crucial part of the ongoing discussion around sexting and the law, but it points more critically to the importance of attending to gender and non-consensual sexting more specifically.

The shift towards examining these actions as a form of gendered and intimate partner violence, particularly when these behaviours are placed in the context of pre-existing dynamics that surround young women's sexuality is an important direction for future analysis. The findings from this research indicate that shame and reputation need to be applied and discussed as part of these offences to better understand the types of offences being committed. It also indicates the need for

further consideration of how victims respond to non-consensual sexting, including their engagement with the law and the interconnections between the historical challenges in responding to intimate partner and sexual violence and the challenges responding to non-consensual sexting. This is evidenced by discussions in Chapter Eight where victim blaming was at times evident, echoing past critiques of legal responses to sexual violence that responsibilise victims. In addition this study highlights the critical importance of including and examining narratives of adolescent stupidity that have emerged as a way of explaining non-consensual sexting (as evidenced in some of the legal commentary on the *Alpert* case) that provide a gendered scapegoat for young men.

The law's role in relation to violence against women, particularly violence that is facilitated by technology, is thus a critical area of research to which these findings add further dimensions. As the scope, persistence and variation of violence against women takes on new technological dimensions feminist criminologists and legal scholars seek to understand how this violence is both conceptualised by law (Citron 2009; Citron & Franks 2014), but also how the law is being applied to these incidents. In collecting data on this specific type of gendered violence, non-consensual sexting, this thesis illustrates the different ways in which this behaviour has been defined as unlawful and the need for the law to recognised the deeply gendered nature of these incidents. This is crucial given that despite the growing scholarship around the use of information and communication technology as part of intimate partner violence (Powell 2010; Powell & Murray 2014) research indicates that young people tend not to recognise violent behaviours in dating relationships as domestic violence or intimate partner violence (Chung 2005). As such, contributing

to the understanding of non-consensual sexting as mechanism of youth intimate partner violence aids what Mueller et al. (2013, p. 436) argue is an 'opportunity to interrupt a destructive pattern or behaviour in its incipience'. Moreover, this thesis also contributes to the ongoing feminist criminological project that seeks to consistently revise and reconstruct our definitions of sexual and intimate partner violence against girls and women, considering the implication of these new technological dimensions of this form of violence.

The application of child pornography law in sexting cases

The second research question focused how legal practitioners negotiated child pornography laws when applied youth sexting cases, from the perspectives of defence lawyers in Victoria, prosecutors in Connecticut and offenders in Victoria. Data from these three groups provided unique insights into the prosecution of these cases. Ultimately discussions from the legal practitioners regarding the application of child pornography laws to youth sexting cases affirm the broader legal discourse on the problematic nature of prosecuting these incidents as child pornography offences (cf. Calvert 2009; Crofts & Lee 2013). Despite the fact that the offenders in their accounts were young adult men rather than minors, legal practitioners were uniform in their view that the automatic requirement that these young men register as sex offenders revealed the need to review the absence of discretion in relation to the sex offender register. As is discussed in more detail below, these findings offered important considerations in relation to the role of prosecutorial discretion in these child pornography cases involving sexting, the pervasive assumptions underpinning child pornography and sex offender registration law and the impact of registration on

the individuals convicted of child pornography offences after non-consensually sexting.

Discussions with Victorian defence lawyers indicated that their ability to mitigate on behalf of clients was hindered by both statutory and procedural issues. Including, the lack of age based defences, access to the Criminal Justice Diversion Program and the mandatory nature of the sex offender register. While issues with the age based defences for the production of child pornography have been amended after the implementation of new exceptions to the production, procurement and possession of child pornography (which make specific exceptions for minors producing, distributing and disseminating sexted images of other minors (*Crimes Act 1958* (Vic) s. 70AAA)), Victorian defence lawyers discussion of the access to the CJDP and mandatory registration raises questions about the conceptual underpinnings of child pornography in addition to a lack of transparency in prosecutorial decision making.

Findings indicated no Victorian participant had their cases dealt with by way of diversion. That the CJDP had not been accessed in cases discussed by Victorian defence lawyers raises questions about use of prosecutorial discretion in these cases, particularly considering the lack of transparency in prosecutorial decision making in relation to diversion. As such, these accounts further prompt the need for focused research on prosecutorial decision making in relation to diversion as well as highlighting the inherent problems with having diversion in the sole control of the prosecution.

The limited legal avenues for defence lawyers to negotiate on behalf of their clients highlights two key assumptions underpinning child pornography legislation: the

perceived sex offender and child sexual innocence. The inability to access the CJDP and mandatory sex offender registration illustrate the pervasive and imagined child pornography user as a predatory older paedophile who is a risk to both children and the community. Despite limited empirical research on whether child pornography use is indicative of, or leads to, contact offending (Seigfried et al. 2008; Taylor & Quayle 2003), this assumption is pervasive within the legal discourse (Taylor & Quayle 2003) and evidenced in discussions with defence lawyers. Moreover, the second assumption brought to the fore in the discussions with defence lawyers pertained to youth sexuality. The lack of defences for the production of child pornography (at the time of interview) and the criminalisation of all sexual images of children as child pornography illustrates the gap in the legal imagination as to alternative interpretations of child nudity. In the accounts from legal practitioners, their inability to have the age of their clients and the consent to the images included in a defence reaffirms the gap in the legal imagination that occurs against a backdrop of cultural anxiety about the youth sexuality and the visual depiction of young people engaging in that sexuality. Defence lawyers' insights into the difficulty in negotiating for diversion in these cases indicates that these assumptions need to be tested, in further research, against prosecutorial decision making in child pornography cases, specifically cases involving 'non-traditional' child pornography.

In the absence of data from Victorian prosecutors, questions of prosecutorial decision-making in relation to youth sexting incidents charged as child pornography offences were addressed through the insights of Connecticut and Texan prosecutors. Discussions with these US prosecutors demonstrated that they were using their discretion to avoid charging young people with child pornography

offences. These discussions contradict concerns emerging from within the literature, particularly in the aftermath of *Miller*, that prosecutors are specifically using their discretion to pursue consensual sexting cases. Rather, prosecutors were using their discretion to pursue lesser charges, such as breach of the peace, in an effort to avoid charging young people with felonies or they were using mechanisms such as grand juries as forms of third party oversight to ensure that charging young people with felonies was appropriate. These insights affirm the importance of closely examining the role of prosecutorial discretion in relation to youth sexting cases to further reveal the reasons behind these decisions.

Key findings surroundings the negotiation of child pornography law in relation to youth sexting incidents also emerged in discussions with two Victorian offenders. Interviews with two young men who had been convicted and put on the Victorian sex offender register highlighted some consequences of sex offender registration that have been identified by Tewksbury & Lees (2007, p. 387). These consequences including limited employment opportunities (in one case career goals had to be changed to satisfy the requirements of the register), limited contact with family members (the offenders had to limit their contact with younger family members due to the requirements of registration) and emotional stress. While other researchers have identified these consequences (Hudson 2005; Tewkesbury & Lees 2007) in relation to adult males who have committed offences involving more 'traditional' child pornography, these findings highlighted that these difficulties were often amplified by their relative youth and bring to the fore concerns regarding the administration of the register in addition to the non-discretionary nature of both registration itself and the length of time an individual is placed on the register

Moreover, findings indicated that there were issues with the administration of the register, specifically with respect to police communicating the requirements, and their ability to informally manage any breach of these conditions. Both young men did not report being risk assessed by police, either informally or formally. This is a problematic outcome of a mandatory post-sentencing scheme with no formal risk assessments, and as such, the administration of the register and young adults on it need to be explored in further detail. This is particularly concerning considering that the latest reforms to the Sex Offenders Register (*Crimes Amendment (Sexual Offences and Other Matters) Bill 2014*) in Victoria are looking to become more stringent and focused on collecting more data, despite findings from the Victorian Law Reform Commission that registration should be applied on a case-by-case basis. The difficulties for both of these participants to adhere to the requirements of the register, to the point of being sanctioned for these breaches, indicates that a broader inquiry about the effects of registration on the young adults who have not been assessed for risk and the ability for police to communicate how a registrant should manage the register is needed. Moreover, this affirms the work of others who have found that the increasing number of people on the register coupled with the lack of resources make it a difficult system for police to manage (Powell et al. 2014).

Discussions with the two Victorian offenders extended upon discussions with Victorian defence lawyers. Their experiences on the register illustrated how an entrenched understanding of sex offenders as paedophilic contact offenders manifests in sex offender registration and the perception of those registered as risky subjects. To date no research has examined this specific population of offenders on the sex offender register and the need to further examine the limits of the sex

offender register and how it can operate more effectively and (potentially) fairly is a clear recommendation from this research. This research illustrates that the experience of young adults as registrants needs more critical inquiry, particularly if (as it seems it will) the Victorian sex offenders register remains mandatory. This subsection of the registered population highlight some of the key issues coalesced around the lack of risk assessments and the interpretation of these young men as risky subjects. This is of crucial importance as the legal landscape of sex offender registration in Australia is currently undergoing significant changes. Western Australia has adopted a community notification model of registration (Community Protection [Offender Reporting] Act 2012 (WA)), and after the well-publicised murder of Daniel Morcombe, community notification will be debated in the Northern Territory Parliament in 2015 (Purtill & Dorsett 2014). The current landscape appears to be drawing upon the risk averse understanding of these offences and there needs to be critical engagement with how these models of monitoring are being applied and managed because the numbers on the sex offender register are growing every year and police have criticised the available resources (Powell et al. 2014).

These findings further illustrate the importance for criminological research to draw upon the insights of legal practitioners and offenders, those involved in implementing the law and those impacted by those implementations to better understand the law's operation and its conceptual underpinnings.

Alternative legislation: The benefits of harm models and exploring non-consensual sexting as intimate partner violence

Given the concerns surrounding child pornography legislation being applied to sexting cases, the third research questions focused on examining some of the

alternative legislation that has been implemented to criminalise or regulate youth sexting. Three forms of legislation distribution of child pornography by minors in Connecticut (Conn. Gen. Stat. Ann. § 53a-196h), distribution of and threats to distribute intimate images in Victoria (*Summary Offences* Act *1996* (Vic) s. 41DA(1a-b)) and Victorian family violence legislation were specifically examined in this study to consider how sexting is criminalised and the assumptions underpinning this construction, specifically with respect to the differentiation of consensual from non-consensual sexting. Principle motivations underpinning this range of legislation include the need to protect young people (as exemplified in the Connecticut statute), the response to harm (as exemplified in the Victorian statute) or conversely to subsume sexting under the definition of intimate and family violence and respond by protecting victims from further harassment. These three different constructions of sexting, as a practice that should be deterred, as non-consensual behaviour and as intimate partner violence, raised key practical and theoretical implications.

In Connecticut, while prosecutors reported that this new offence allowed them flexibility, they were also critical of the fact that it did not take into account the aggravating factors in each case. While new legislation that criminalises sexting as a lower level offence has been characterised as a panacea to the problem of over-criminalising sexting and criminalising sexting as a child pornography offence, findings illustrated that having one base level offence that a broad statutory definition of sexting did not reflect the variety of incidents being charged. The findings indicated that the variable nature of sexting and the broad range of behaviours that can be encompassed within these definitions cannot be encapsulated by one base level offence. This resonates with the consistent finding throughout this study that

different sexting behaviours raise different legal issues and need to be contextualised. These findings further illustrate the need to shift beyond conceptualising sexting as a technological practice, once used without consent, and a re-focus on the context in which it is used to better understand these incidents as unlawful.

It was also clear that the application of this paternalistic legislation highlighted how law can continue to reproduce moralising discourses that blame victims and prefigure young girls as responsible for the harms that befall them if their images are shared without their consent, a critique of specific areas of law for many decades (cf. Naffine 1994). Additionally, despite identifying some of the practical limitations of this statute, Connecticut prosecutors supported its use as a deterrent for consensual and non-consensual sexting. Using law to deter young people from sexting to promote abstinence implies that consensual sexting is the primary issue. But the analysis from this research study indicates that the crucial issue for law is non-consensual sexting and a distinction between these two practices is paramount.

This alerts us to a long-standing issue with legislation that conflates consensual and non-consensual sexual activity. It suggests that non-consensual sexting is provoked and permitted by young girls who either take or distribute their intimate images by mutualising non-consensual acts. This conflation raises serious concerns and needs to be historically contextualised because it reflects the key concerns of early feminist scholars who have critiqued the characterisation of rape as rough sex as an attitude existing against the background of pervasive myths about rape that position women as provoking their attacks (Brownmiller 1975; Burt 1980). The implications of this

conflation were visible in some of the sexting cases discussed by Connecticut prosecutors that indicated that young women had been charged (not prosecuted) after producing and sending their images.

Conversely, the Victorian reforms introduced in 2014 employ a harm model, which conceptualises sexting as a problem of abuse of consent and responds to victim harm while allowing for lenient sentences for youths under the age of 18 years. Despite the positive aspects of this legislation, specifically its focus on non-consensual sexting, insights from Connecticut prosecutors suggest that creating a base level sexting offence that does not differentiate between the more or less serious sexting incidents is problematic. This illustrates the potential difficulties with this new model in Victoria and points to the need to monitor the application of these new laws to investigate whether the issues identified by prosecutors in Connecticut are replicated in Victoria.

This research culminated with a discussion of the use of civil mechanisms, like intervention orders, by victims of non-consensual sexting. This discussion illustrated that non-consensual sexting was already being managed as a form of intimate partner violence. Despite the use of intervention orders to protect these young women, the access to this mechanism was complicated by victims' concerns about having the sexted images shown in court or having their families find out that they were involved in this kind of activity. This illustrated the use of an alternative legislative framework that responds to sexting in a conceptually different way than criminalisation. It also reframed the discussion around sexting and the law focused on the criminalisation and the appropriate punishment and sanction for the accused

and shifted the focus onto victims, their needs and the way in which young women are using the law to protect themselves to prevent the further dissemination of their images. Investigations into the use of family violence applications and intervention orders by young women to protect themselves, and the additional findings that young women disclosed the use of intimate images by former partners outside the formal family violence applications, points to the need to consider more criminological inquiry into the legislative mechanisms open to victims who are seeking to end non-consensual sexting or prevent non-consensual sexting.

Criminalisation and regulation: The need for a varied legislative landscape

The findings from this research identify that non-consensual sexting is not one single offence. This parallels arguments elsewhere that a variety of legislation must be applied to these practices rather than a simple offence (Calvert 2009; Duncan 2010). The findings in this thesis indicate that sexting is a varied practice with multiple dimensions, many of which may not be considered unlawful and/or may not be considered to be serious offences if the community deems them to be unlawful. Base level offences are challenging as they don't differentiate between more serious incidents of sexting, particularly when there was an age difference between parties, multiple images or a broad dissemination of images. Additionally the use of civil mechanisms by victims indicates that the legal and criminological discourse on non-consensual sexting and the law should expand beyond a discussion of criminalisation and the understanding of offending behaviour to include victimisation and the mechanisms available for victims to redress non-consensual sexting. Specifically, considering the legal and criminological discourse over youth sexting

has been dominated by discussions around criminalisation and how to conceptualise these practices as offences and whether or not young and young adult offenders should be criminalised. Additionally, the need for re-focusing discussions of the operation of law and victim protection needs to be prioritised considering the difficulties faced by victims and the dearth of legal and civil protections available to victims of technology facilitated violence who have had their images shared without their consent (Web Index 2014).

Conclusion

This study provided important and unique insights into the operation of the law in four jurisdictions across Australia and the US; however this is, of course, only a partial picture of the legal process. In addition to greater transparency of prosecuted cases and transparency regarding prosecutorial decision, the police remain key gatekeepers in the criminal justice process and future research on sexting and the law will better understand the complexity of what is happening in the community and the adequacy and appropriateness of the legal response through careful and close examination of police and prosecutorial practices.

This research highlights that monitoring the implementation of new and existing legislation in place to criminalise either youth or adult sexting across Australia and the US is essential. Discussions with Connecticut prosecutors provided key insights into the operation of these laws and their implications for young people engaging in sexting, but the same needs to be done for Victoria. In Victoria, this legislation has been supported by both the legal practitioners in this study and politicians, but the implementation of this legislation will still need to be monitored to examine the range

of non-consensual sexting incidents it is being applied to. This is especially important given the criticisms that emerged from Connecticut prosecutors that a base level offence is limiting and does not reflect the complexity of cases they are managing.

On a conceptual level this research highlights that it is critical to frame sexting as a form of gendered violence and, in some cases, as a form of intimate partner violence, and to ensure that this encapsulates the experiences of young people in sexual or dating relationships. Scholars have found that young people, particularly young women find it difficult to name violent behaviours as intimate partner violence, (Chung 2005, p. 453) and not doing so ensures that this violence remains hidden and unaddressed. The extent to which all cases fit within the context of intimate partner violence requires close consideration and examination, but critically it is not an either/or determination- we need to enable more nuance and attention to the context of violence and the harm that it generates. Additionally, it is important to include the insights from legal practitioners to examine how and whether these behaviours can be subsumed under a legal definition of family violence and violence against women and to further understand the ongoing difficulties faced by victims of non-consensual sexting who seek redress through the civil and criminal law.

While sexting has emerged as a 'new' technological practice that draws from historically consistent concerns about youth sexuality and technology and risk, the technology itself remains the secondary aspect of non-consensual sexting and the law. What resonates within this investigation is the ever present issues that have driven feminist criminologists, how to name and respond to sexual violence against women via the law, particularly how to properly recognise and respond to both

offending and victimisation without obfuscating narratives of young men's diminished culpability. These are serious offences that have significant impacts on the young women who are victimised. As such it is critical to discuss and respond to these incidents within a sexual and gendered violence framework, particularly one that makes the clear distinction between consent and non-consent, in order to avoid renewed technologically deterministic discussions and instead further deepen discourse of violence against women and girls. This research therefore, contributes to a more informed discussion of how to develop better responses to these practices by drawing upon the professional insights of those tasked with implementing the law and those who are affected by it.

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Children, Youth and Families Act 2005 (Vic)

Classification Enforcement Act 1995 (Vic)

Community Protection (Offender Reporting) Act 2012 (WA)

Criminal Code Act 1995 (Cwlth)

Conn. General Statutes §§ 53a-35a, 53a-41

Connecticut General Statutes § 53a-70, 53a-71, & 53a-73

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Connecticut Penal Code 53a-196h

Crimes Act 1958 (Vic)

Crimes Act 1914 (Cwth)

Crimes (Family Violence) Act 1987 (Vic)

Criminal Procedure Act 2009 (Vic)

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Police Offences [Child Pornography] Act 1977 (Vic)

Road Safety (General) Regulations 2009 (Vic)

Sentencing Act 1991 (Vic)

Serious Sex Offenders Monitoring Act 2004 (Vic)

Serious Sex Offenders (Detention & Supervision) Act 2004 (Vic)

Sex Offenders Registration Act 2004 (Vic)

Summary Offences Act 1996 (Vic)

Texas Penal Code § 43

U.S.C. §1983

U.S. Const. am. 1.

Working With Children Act 2005 (Vic)

Appendix A

Class 1 Offences

These offences can only be committed against children to be considered registrable Class 1 Offences.

Crimes Act 1958 (Vic) and Crimes Act 1914 (Cth)

s 38 Rape; s 44 Incest, s 45(1) sexual penetration of a 16-or 17-year old; s 51(1) Sexual penetration of a person with a cognitive impairement by a person who provides medical or therapeutic services; s 51(2) Sexual penetration of a person with a cognitive impairement by providers of special programs; s 38A Compelling sexual penetration; s 47A Persistent sexual abuse of a child under the age of 16; s 49 Facilitating sexual offences against children; s 60AC Aggravated sexual servitude against a person under the age of 18; s 50BA Sexual intercourse with a child under the age of 16 outside Australia; s 50BB Inducing a child under the age of 16 to engage in sexual intercourse with a third party outside Australia in the presence of the defendant; s 50DA Benefitting from an office involving child sex tourism; s 50DB Encouraging an offence involving child sex tourism.

***Criminal Code Act 1995* (Cth)**

S 270.6; Causing a child to enter or remain in sexual servitude

Class 2 Offences

Except in the case of bestiality these offences need to be committed against a child to be considered a Class 2 Registrable Offence.

Crimes Act 1958 **(Vic)**

s 39 Indecent assault; s 40(1) Assault with intent to rape; s 47(1) Indecent act with a child under the age of 16; s 49(1) Indecent act with a 16- or 17-year-old child; s 51(2) Indecent act with a person with a cognitive impairment by providers of medical or therapeutic services; s 52(2) Indecent act with a person with a cognitive impairment by providers of special programs; s 53 Administration of a drug to a person with the intention of engaging in sexual penetration or an indecent act with that person (or facilitating another person to do so); s 54 Owner, occupier or manager of premises inducing or knowingly allowing a child under the age of 17 to enter or remain on the premises for the purpose of taking part in an unlawful act of sexual penetration; s 55 Taking a child away or detaining a child against their will with the intention of getting married to that child or taking part in an act of sexual penetration with that child, or with the intention that the child should marry or take part in an act of sexual penetration with another person; s 56 Abducting a child from their lawful carer with the intention that the child should take part in an act of sexual penetration outside marriage; s 57 Procuring a child to take part in an act of sexual penetration by threats, intimidation or any fraudulent means; s 58 Procuring a person under 16 years old to take part in an act of sexual penetration or an indecent act; s 59 Bestiality: offences involving sexual penetration of or by an animal; s 60AE Aggravated deceptive recruiting for commercial sexual services, where the offence is aggravated because it was committed against someone under the age of 18; s 60B(2) Loitering near a school, kindergarten or childcare centre without reasonable excuse after having been found guilty of an offence of a sexual nature; s 68(1) Production of child pornography; s 69 Inviting, procuring, causing or offering a minor to be in any way concerned in the making of child pornography; s 70(1) Knowingly

possessing child pornography; s 70AC Inviting, procuring, causing or offering a minor to be in any way concerned in a sexual performance involving payment of the minor or any other person; s 76 Burglary where the offender entered the building as a trespasser with the intent to commit a sexual or indecent assault on a child; s 77 Aggravated burglary where the offender entered the building as a trespasser with the intent to commit a sexual or indecent assault on a child

Sex Work Act 1994 **(Vic**)

s 5(1) Causing or inducing a child to take part in an act of sex work, whether as the sex worker or client; s 6(1) Receiving payment knowing that it or any part of it has been derived, directly or indirectly, from sexual services provided by a child; s 7(1) Entering into or offering to enter into an agreement under which a child is to provide sexual services; s 11(1) Owner, occupier or manager of premises allowing a child to remain on the premises for the purpose of taking part in an act of sex work, whether as the sex worker or client.

Classification (Publications, Films and Computer Games) (Enforcement) Act 1995 **(Vic)**

s 57A Knowingly using an online information service to publish or transmit child pornography

Crimes Act 1914 **(Cth**)

s 50BC Sexual conduct involving a person under the age of 16 outside Australia; s 50BD Inducing a child under the age of 16 to be involved in sexual conduct with a third party outside Australia.

Criminal Code Act 1995 **(Cth)**

s 270.7 Deceptive recruiting for sexual services; s 271.4 Trafficking children into or out of Australia; s 271.7 Domestic trafficking in children; s 474.19(1) Using a carriage service to access, transmit or solicit child pornography; s 474. 20(1) Possessing, controlling, producing, supplying or obtaining child pornography material with the intent to commit an offence under s 474.19; s 474.22(1) Using a carriage service to access, transmit or solicit child abuse material; s 474.23(1) Possessing, controlling, producing, supplying or obtaining child abuse material with the intent to commit an offence under s 474.22; s 474.26 Using a carriage service to procure a person under 16 years of age with the intention of engaging in sexual activity; s 474.27 Using a carriage service to groom persons under 16 years of age.

***Customs Act 1901* (Cth)**

s 233BAB Intentional importation of child pornography or child abuse material

Class 3 Offences

These offences can be committed against adults rather than children

Crimes Act 1958 (Vic)

s 38 Rape; s 44 Incest; s 51(1) Sexual penetration of a person with a cognitive impairment by a provider of medical or therapeutic services; s 52(1) Sexual penetration of a person with a cognitive impairment by a person who provides special programs; s 38A Compelling another person to take part in an act of sexual penetration

Class 4 Offences

To be considered a Class 4 registrable offence, these offences are committed against adults

Crimes Act 1958 (Vic)

s 39 Indecent Assault; s 40(1) Assault with intent to rape; s 51(2) Indecent act with a person with a cognitive impairment by providers of medical or therapeutic services; s 52(2) Indecent act with a person with a cognitive impairment by providers of special programs; s 53 Administration of a drug to a person with the intention of engaging in sexual penetration or an indecent act with that person (or facilitating another person to do so); s 55 Taking a person away or detaining a person against their will with the intention of getting married to that person or taking part in an act of sexual penetration with that person, or with the intention that the person should marry or take part in an act of sexual penetration with another person; s 57 Procuring a person to take part in an act of sexual penetration by threats, intimidation or any fraudulent means; s 60AB Sexual servitude: causing another person to provide sexual services by use of force, threat, unlawful detention, fraud, misrepresentation or enforcing an excessive debt; s 60AD Deceptive recruiting for commercial sexual services; s 76 Burglary where the offender entered the building as a trespasser with the intent to commit a sexual or indecent assault; s 77 Aggravated burglary where the offender entered the building as a trespasser with the intent to commit a sexual or indecent assault.

Appendix B

Interview Schedule A

Focus on three areas:

Background on your practice

Overview of the cases you have dealt with:

Victims, offenders, details, contexts, aggravating and mitigating factors

Your views on the law's role in the practice of sexting

Background

How many years have you worked in your profession?

How many at this office?

Do you specialise in any area?

Overview of Cases

1. How many sexting cases have you participated in?
    a. What years
2. Does your (office) get many inquiries about cases like this?
3. Details about the case
    a. Age of the offender/victim
    b. Relationship between offender & victim
    c. Context – how was the pornographic image created and distributed
    d. Did the victim consent to the photo being taken at any point?
    e. Did the offender/victim know that they were creating illegal material
    f. Was it distributed to one person, more than one person
4. What makes a strong/weak sexting case
    a. What are the factors that get it to court in the first place?
    b. Technological aspect influential?
5. Outcome of cases?
    a. Sentencing outcome
    b. From your perspective, was the offender victim affected if so how?
        i. Affected during the court case?
        ii. Impacts on offender/victim after court case?
6. Are these the kinds of cases you want to deal with?

Law's Role

1. What are your thoughts on the use of child pornography law as a response to youth sexting, do you think it is an appropriate response?
    a. Use of CP law
    b. Use of sex offenders registries appropriate/inappropriate? Expand.

    c. Does the law have any role?
2. Are there any driving factors behind the law being applied in this way?
    a. Paedophilia, online child pornography.
3. How much of a role do you think that new technologies play in these cases?
4. Argument that ‘sexting ‘ is modern day courtship, outside the criminal sphere, do you agree?
5. As a professional in this area do you foresee any wider impacts of the law being applied in this way?
    a. Impacts for law
    b. Impacts for young people

Appendix C

MONASH University

Monash University Human Research Ethics Committee (MUHREC)
Research Office

Human Ethics Certificate of Approval
(Interviews with judges and lawyers in Australia and the USA)

Date:	**5 July 2012**
Project Number:	**CF12/1508 – 2012000806**
Project Title:	**Adolescents, the New Child Pornographers? An analysis of the Australian and American prosecutions of adolescents under child pronography laws for 'sexting'**
Chief Investigator:	**Dr Marie Segrave**
Approved:	**From: 5 July 2012** **To: 5 July 2017**

Terms of approval

1. The Chief investigator is responsible for ensuring that permission letters are obtained, if relevant, and a copy forwarded to MUHREC before any data collection can occur at the specified organisation. **Failure to provide permission letters to MUHREC before data collection commences is in breach of the National Statement on Ethical Conduct in Human Research and the Australian Code for the Responsible Conduct of Research**.
2. Approval is only valid whilst you hold a position at Monash University.
3. It is the responsibility of the Chief Investigator to ensure that all investigators are aware of the terms of approval and to ensure the project is conducted as approved by MUHREC.
4. You should notify MUHREC immediately of any serious or unexpected adverse effects on participants or unforeseen events affecting the ethical acceptability of the project.
5. The Explanatory Statement must be on Monash University letterhead and the Monash University complaints clause must contain your project number.
6. **Amendments to the approved project (including changes in personnel):** Requires the submission of a Request for Amendment form to MUHREC and must not begin without written approval from MUHREC. Substantial variations may require a new application.
7. **Future correspondence:** Please quote the project number and project title above in any further correspondence.
8. **Annual reports:** Continued approval of this project is dependent on the submission of an Annual Report. This is determined by the date of your letter of approval.
9. **Final report:** A Final Report should be provided at the conclusion of the project. MUHREC should be notified if the project is discontinued before the expected date of completion.
10. **Monitoring:** Projects may be subject to an audit or any other form of monitoring by MUHREC at any time.
11. **Retention and storage of data:** The Chief Investigator is responsible for the storage and retention of original data pertaining to a project for a minimum period of five years.

[redacted]

Professor Ben Canny
Chair, MUHREC

cc: Ms Laura Vitis

Postal – Monash University, Vic 3800, Australia
Building 3E, Room 111, Clayton Campus, Wellington Road, Clayton
[redacted]
www.monash.edu/research/ethics/human/index/html
ABN 12 377 614 012 CRICOS Provider #00008C

Laura Vitis <laura.vitis@monash.edu>

MUHREC Amendment CF12/1508 - 2012000806: Adolescents, the New Child Pornographers? An analysis of the Australian and American prosecutions of adolescents under child pronography laws for 'sexting'

2 messages

MRO Human Ethics Team <muhrec@monash.edu> 6 November 2012 at 16:05
To: Marie Segrave <marie.segrave@monash.edu>, Laura Vitis <laura.vitis@monash.edu>

PLEASE NOTE: To ensure speedy turnaround time, this correspondence is being sent by email only. MUHREC will endeavour to copy all investigators on correspondence relating to this project, but it is the responsibility of the first-named investigator to ensure that their co-investigators are aware of the content of the correspondence.

Dear Researchers

Thank you for submitting a Request for Amendment to the above named project.

This is to advise that the following amendment has been approved and the project can proceed according to your approval given on 5 July 2012:
Change to procedures:
Change to participants recruited: addition of group - adult offenders
Participants will be invited to participate in this project by their legal counsel. On behalf of the researcher, their lawyers will contact them and inform them of the details of the project and enquire whether they would like to participate.

Thank you for keeping the Committee informed.

Professor Ben Canny
Chair, MUHREC

Human Ethics
Monash Research Office

Our aim is exceptional service

Monash University
Level 1, Building 3e, Clayton Campus
Wellington Rd
Clayton VIC 3800, Australia

Telephone: +61 3 9905 5490
Email: muhrec@monash.edu
Website: http://www.monash.edu.au/researchoffice/human
ABN 12 377 614 012 CRICOS Provider No 00008C

Appendix D

Explanatory Statement

Adolescents, the New Child Pornographers? An analysis of the Australian and American prosecutions of adolescents under child pornography laws for 'sexting'.

My name is Laura Vitis and I am conducting a research project towards a PhD at Monash University, with Dr Marie Segrave a Senior Lecturer in the Department of Criminology. You are invited to take part in this study. Please read this Explanatory Statement in full before making a decision.

You have been selected for this study due to your involvement in a case where a young person aged 15-21 have been prosecuted for child pornography offences after participating in sexting. I obtained your details via public websites.

The aim of this study is to investigate the role of law in the prosecution of those aged 15-21 for child pornography offences in cases that relate to practices involving 'sexting' in the United States and Australia. In conducting interviews with legal actors it seeks to better understand how the role of law is shaped with respect to new technological issues and changing definitions of child pornography.

The benefits from this research include the opportunity to share your own experiences, opinions and understandings of the law's role as a response to this particular practice of adolescent 'sexting' and adolescent sexuality.

This interview will take approximately one hour and it is not expected that your involvement will cause inconvenience and/or discomfort to you

This study is voluntary and you are under no obligation to consent to participation. However, if you do consent to participate, you may withdraw during the interview or at any stage after the interview. To withdraw your consent after the interview has finished; please contact me directly (contact details below).

All of the information you provide in your interview will be collated with other interviews. For the purpose of anonymity a pseudonym will be used to de-identify your contribution to this project. Any publications that use information provided by you will not use your name or other identifiable information.

Data collected will be stored in accordance with Monash University regulations, kept on University premises, in a locked filing cabinet for 5 years. A report of the study may be submitted for publication, but individual participants will not be identifiable in such a report.

If you would like to be informed of the aggregate research finding, please contact Laura Vitis on 0418566074 or email laura.vitis@monash.edu

Thank you,

Laura Vitis

If you would like to contact the researchers about any aspect of this study, please contact the Chief Investigator:	**If you have a complaint concerning the manner in which this research is being conducted, please contact:**
Marie Segrave Tel: 990 52107 Email: marie.segrave@monash.edu 7th Floor Building 11 (Menzies), Clayton Campus Monash University, Australia.	Executive Officer Monash University Human Research Ethics Committee (MUHREC) Building 3e Room 111 Research Office Monash University VIC 3800Tel: +61 3 9905 2052 Fax: +61 3 9905 3831 Email: muhrec@monash.edu

Appendix E

Consent Form

Title: Adolescents, the New Child Pornographers? An analysis of the Australian and American prosecutions of adolescents under child pornography laws for 'sexting' (At the time of interview)

NOTE: This consent form will remain with the Monash University researcher for their records

I agree to take part in the Monash University research project specified above. I have had the project explained to me, and I have read the Explanatory Statement, which I keep for my records. I understand that agreeing to take part means that:

I agree to be interviewed by the researcher	☐ **Yes**	☐ **No**
I agree to allow the interview to be audio-taped and/or video-taped	☐ **Yes**	☐ **No**
I agree to make myself available for a further interview if required	☐ **Yes**	☐ **No**
I understand that my participation is voluntary, that I can choose not to participate in part or all of the project, and that I can withdraw at any stage of the project without being penalised or disadvantaged in any way	☐ **Yes**	☐ **No**
I understand that any data that the researcher extracts from the interview for use in reports or published findings will not, under any circumstances, contain names or identifying characteristics.	☐ **Yes**	☐ **No**
I understand that any information I provide is confidential, and that no information that could lead to the identification of any individual will be disclosed in any reports on the project, or to any other party.	☐ **Yes**	☐ **No**
I understand that data from the interview will be kept in a secure storage and accessible to the research team. I also understand that the data will be destroyed after a 5 year period unless I consent to it being used in future research.	☐ **Yes**	☐ **No**

Participant's name

Signature

Date

Appendix F

Case	Description
Victoria Case A	In this case Victorian offender Damien revealed that when he was nineteen he was found guilty of three separate child pornography related offences for distributing images of his girlfriend without her consent. The charges included: inviting a minor under the age of 18 years to be concerned in the making of child pornography (*Crimes Act, 1958* s.68*),* knowingly using an online information service to transmit objectionable material depicting a minor in an indecent sexual manner or context (*Classification Enforcement Act, 1995* s.57A*)* and knowingly using an online information service to publish objectionable material depicting a minor in an indecent sexual manner or context (*Classification Enforcement Act, 1995* s.57A*)*., Damien and his former girlfriend Sally were both seventeen they created a consensual video recording of their sexual activity. Two years after making this tape they ended their relationship. Damien then informed Sally that he wanted to sever contact because he found it difficult to hear about her moving on with her life. Three months afterwards, Sally called him and an argument ensued. She informed Damien that she had moved on and was engaging in a sexual relationship with someone else. Following this exchange Damien created screen captures of Sally from the video. He then sent those images to two or three of their mutual friends via MSN messenger. These friends deleted the photos, informed Linda of what had happened, then contacted Damien and told him to delete the photos, which he did. Linda's family then contacted Damien's parents and attempted to resolve the matter informally and ensure the photos were deleted. However, they still contacted police about the incident. As a result police gained a search warrant and confiscated Damien's computer and camera and took him to the station for questioning. While police did not find any photographs on either device, during his interview Damien admitted to sending the images, not understanding that this was a child pornography offence. After admitting to distributing the photographs he was charged and appeared at the Magistrates' Court in 2008. The charge was proven and he received a no recorded conviction and a fine of $2000. As a result of the mandatory registration for convictions of a child pornography offence, Damien is now on the sex offender's register for fifteen years.
Victoria Case B	In this case Victorian offender Nathan revealed that when he was 19 years old, he was found guilty of producing and distributing child pornography after recording oral sex between an adult (his friend) and a minor (a girl they knew) on his mobile phone. In 2011, Nathan was driving with three male friends and they picked up a 15-year-old female acquaintance who Nathan believed was 16 years old at the time. While in the car, the girl performed oral sex on one of the 18-year-old boys and Nathan took a photo of her engaged in this act on his phone. Nathan alleged that afterwards his friend who had been driving the car took Nathan's phone while Nathan was in the bathroom and sent the photo from to another friend without Nathan's permission. The photo was then distributed among their mutual friends and eventually to students at the school the girl attended (and the boys had graduated from). The school contacted the police and Nathan admitted to his involvement in producing the photo. As a result, Nathan was convicted of the production and distribution of child pornography (*Crimes Act 1958* (Vic) *s.68*) and knowingly using an online information service to transmit objectionable material depicting a person who is a minor under the age of 18 years in an indecent sexual manner or context (*Classification Enforcement Act 1995* (Vic) *s.57A*). The case was subsequently heard in the Magistrates' Court where Nathan received a *no recorded conviction* and a good behaviour bond. Nathan was automatically put on the Victorian sex offender register as a sex offender for eight years
Florida Case A	In 2008, Florida Judge Luther presided over this case where the young man was charged and found guilty of the production and distribution of child pornography (*Florida Statutes* 847.0135, 847.0138; 827.071). During their relationship the defendant (18) and his girlfriend (15) had taken photographs of themselves engaging in sexual acts. When the defendant turned nineteen his girlfriend ended their relationship. After which the defendant sourced fifteen to twenty-five sexual photos they had taken consensually and sent them to her teachers, parents, grandparents and friends. Following this dissemination he was charged and convicted with producing and distributing child pornography. In sentencing this case, Luther noted that while the young man was eligible for a custodial sentence he avoided this as a sentence. However, due to Florida's mandatory sex offender register, the young man had to register sex offender for 25 years

Texas Case A	In this case a young man in his senior year in high school received an unsolicited video clip from a female freshman. This video was a recording of her simulating masturbation. The young man's girlfriend, an eighteen-year-old senior at the same high school also viewed the video. Afterwards, this young woman showed the video to her friends at school. She continued to re-produce and distribute the video by burning it onto CDs and selling it at the school. Additionally, she emailed it en masse to her entire district. This young woman instigated was indicted for possession or promotion of child pornography (*Texas Penal Code* S.43.26). Simon (Texas Defence) had left the State's Attorney office before her case had finished and recalled that her lawyer had tried to negotiate the charge down to a misdemeanor.
Texas Case B	A sixteen-year-old girl sent naked pictures and videos of herself masturbating to her sixteen-year-old boyfriend. The photos and the videos were unsolicited and the young man who kept them in his possession did not distribute them. The images came to the attention of the local school resource officer[51] who confiscated the images from the boy's phone. The photos were then brought to the attention of the County Attorney who wanted to prosecute for possession of child pornography. The County Attorney then changed the charge to possession of obscene material (*Texas Penal Code* 43.23). This case was argued for a year then the charge was dropped.
Connecticut Case A	This case involved an 18-year-old male, George, having sexual intercourse with a minor, Katie, while his friend, Bill, recorded the interaction (Linda could not confirm whether Katie was aware that this recording was taking place). Afterwards, Bill uploaded the content to Facebook. George and Bill were both charged with distributing child pornography.
Connecticut Case B	In this case a young woman sent videos of herself engaging in sexual acts with an animal to a number of young men in her high school, Linda (Connecticut Prosecutor) revealed that while she had the opportunity to charge both the young woman who sent the images and the young men who received them, she was able to exercise her discretion to avoid prosecution of both under child pornography statutes, even though these were applicable
Connecticut Case C	A nineteen-year-old male was dating a thirteen-year-old girl and recorded her engaging in sexual acts, which Linda described as "numerous vile things" on numerous occasions. The young girl would not admit to a sexual relationship with her boyfriend, however, there was evidence of sexual activity within the photographs. Linda decided not to pursue her case under the sexting statute, her boyfriend, however, was convicted of possession of child pornography and sex with a minor. He received a one-year mandatory minimum sentence and ten years on the Sex Offender's Register.
Connecticut Case D	In this case two ten and eleven-year-olds and two thirteen and fourteen-year-olds were sending pictures of their genitals to one another. After the police investigated this case it was revealed that a nineteen-year-old male who was the cousin of one of the boys involved was telling the young boy to engage in this behaviour and send him the images. The nineteen-year-old man was arrested for possession of child pornography.

[51] Local law enforcement officers dedicated to providing security in schools