NSW Council for Civil Liberties Inc.

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Submission to the Australian Law Reform Commission

Review of the National Classification Scheme

The New South Wales Council for Civil Liberties (CCL) is committed to protecting and promoting civil liberties and human rights in Australia.

CCL is a Non-Government Organisation (NGO) in Special Consultative Status with the Economic and Social Council of the United Nations, by resolution 2006/221 (21 July 2006).

CCL was established in 1963 and is one of Australia's leading human rights and civil liberties organisations. Our aim is to secure the equal rights of everyone in Australia and oppose any abuse or excessive power by the State against its people.

CCL thanks the ALRC for its permission to lodge a late submission on the National Classification Scheme.

CCL has not had the opportunity to make an extensive and detailed submission. We anticipate making a more extensive commentary in response to the Discussion Paper when that is released. In the meantime, we would welcome meeting with a member or members of the Review team, at which questions that you would like us to address may be put to us and discussed. Our subsequent submission would then concentrate on those issues.

Part 1: The Problems

A. The Internet—a new problem

It is a good general principle that a law which cannot be enforced is a bad law.

*Summary***.** The purposes of classification have been to determine under what circumstances material may be read, seen or heard, and to give advice as to who should be allowed to experience it. Where classification is refused, the effect is censorship.

The masses of material to be found on the Internet cannot be effectively regulated. The amount of material available is huge, beyond the capacity of any agency to vet. We note in this matter the assertion of Electronic Frontiers Australia in its submission to this Review, that there are one trillion web pages, and that more than 35 hours of video are uploaded to You Tube alone each minute.[1] This material is in effect published and distributed instantaneously. It is fluid—it can be modified in a moment or shifted from site to site; and there is no way of requiring producers outside of Australia to

[1] Electronic Frontiers Australia (2011), *Submission to the National Classification Scheme Review*, p. 4. As the *Issues Paper* notes, the Classification Board makes only about 1,700 decisions a year.

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provide a label of some kind which well tell consumers what the rating is. There is no equivalent of customs officials checking for acceptability, and given the impossibility of providing a value free definition of what is to be rejected, no prospect of an automatic, computer-run filtering system that would ban what it is desired to ban and leave what ought to be left.

a. Internet service providers (ISPs) could be required to prevent access to specified sites, in the hope of diminishing access. They would have a better chance of holding back the ocean's tides. Internet savvy people will find out how to access forbidden sites, tempted by the very fact that they are forbidden. They will publish the techniques on their blogs, and those with a desire to access them will do so. And curious people (such as the average teenager) will seek to find out what it is that is so awful that it has been banned.

Those who publish the material in the first place, finding that it has been banned or restricted, will readily place it on a different site. They will modify the content to avoid automatic rejection. Whatever the motivation they may have for producing it (prurient interest, participation in a ring of such providers, profit…) the publishers of such material do not lose their motivation as a result of an ineffective ban.

b Automatic filtering has been proposed. Necessarily, the design of such filters runs into traditional definition problems briefly discussed below. Sites that ought not to be excluded will be, to the detriment of those who would benefit by accessing them. Meanwhile, because sites are not excluded that clamorous minorities would like to see excluded, the clamour will continue.

An historical example illustrates the problem of mistaken exclusion. In the early days of widespread Internet access, New South Wales schools filtered sites which made reference to sex. In consequence, sites that used the words 'homosexual' or 'sexual orientation' were excluded. Gay and lesbian young people with problems arising from their sexual orientation, especially those in country towns who had no other source of advice and support, were prevented from gaining that support.[2]

Then there are the traditional examples of scientific discussion, medical information, political dispute,[3] education and works of art, all of which it is important not to exclude.

The publishers of these kinds of material will not be as enthusiastic as the purveyors of pornography about republishing to evade restrictions.

c. The current classification system requires that items are classified first, and then distribution is done appropriately to the level of classification. The mindset which led to this approach is ill-suited to the Internet. Items on the Internet are published and distributed simultaneously. By the time an

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[2] In the context of clamour about the possible harm done to young people by seeing material they supposedly are too young to see, it is to be remembered that young gay males living in the country are at high risk of suicide.

[3] Including submissions to this Review, perhaps.

item is refused classification, it will already by legally viewed or heard by many people, often a great many people. It is not possible to play the customs official with the Internet.

Similarly, the current system provides penalties for those who fail their legal obligations by distributing material that has been refused classification, for example. Such penalties will rarely be enforceable overseas.

d. It would be possible to limit attempts to control Internet content to material that is produced in Australia. But though there are fewer providers, there are still many sites, and those with an interest in evading regulation will readily find overseas sites on which to publish.

e. A law which cannot be enforced is a bad law. It leads to disrespect for laws in general, and to cynicism about those who attempt to police it. So too, a law which can only be enforced erratically. Such a law in addition leads to perceived and actual bias.

B. Definition—an old problem

a. Pornography

"I can't define 'pornography'," Justice Stewart once famously said, "but I know it when I see it."[4]

It is sometimes argued that all pornography should be banned. The problems of defining 'pornography' for this purpose are well known.[5] Here is a brief summary.

What is thought to be sexually explicit varies with culture and over time. Displaying ankles or a face, showing a woman breastfeeding, wearing a split or short skirt or tight trousers—these are generally accepted in modern Australia. (Not, of course, universally, and certainly not in the past.)

Not all sexually explicit material is pornography—medical textbooks, for example, are not.

Not all material which *can* produce arousal and may be retained by some people because it *does* cause them arousal is pornographic. Even a picture of a fully clothed young person sitting at a desk studying may arouse some paedophiles; a painting of the annunciation to the Virgin Mary similarly may attract men or women.

Not all material which is designed to produce arousal is pornographic. (It may be part of a work of art in which such arousal is questioned—parts of Hieronymus Bosch's *The Garden of Earthly Delights*, for example.)

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[4] *Jacobellis v. Ohio* 378 US 184 (1964)

[5] There is a useful summary online in the *Stanford Encyclopedia of Philosophy.* (http://plato.stanford.edu/entries/pornography-censorship). This section of our submission draws heavily from it.

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This example is typical of attempts to define a word that is strongly laden with value.[6]

b. Offense and offensiveness

It is sometimes argued that material that is offensive should be banned. But some people, notoriously, think that even the questioning of their beliefs is offensive. Catholic Christians sometimes find protestant denials of the virgin birth offensive; some Muslims find arguments that the Koran contains moral and factual mistakes offensive. Such issues, however, ought to be discussed.

Nor is it the case that material that a majority, even a substantial majority, of a society thinks is offensive may be banned on that ground. Such bans prevent the questioning of beliefs; but all beliefs should be open to question, since any belief may turn out to be mistaken, and harm may occur, or happiness be lost, because it continues to be believed.

c. Harm: real or imagined; severe or of lesser moment

As Mill argued, the principle of liberty, including that of freedom of speech, may be overridden in order to prevent harm. But while that is a necessary condition, it is not a sufficient one. The harm caused must be greater than the harm permitted by a ban. Moreover, the restriction of liberty is itself a harm; an infringement of a right and a cause of distress.

The distress caused by merely contemplating something horrible depicted in a film is not a harm that should lead to censorship. The movie Snowtown, for example, is terrible to sit through, with its (mostly true) story of how a youth became involved in serial torture and murder. It is justified by its attempt to explain how that happened; by its posing the question of what social conditions contributed.

Arguably, to be offended is not to be harmed at all. Taking offense is something that one does to oneself.

Some harms, however, are obviously sufficient to justify legal restrictions and punishments. Child abuse, sexual of physical, causes both immediate and long term suffering; and making child pornography with real abuse is appropriately punished. Obtaining such material encourages its making; so CCL policy supports the punishment of the wilful purchase of child abuse material. Similarly, abuse of adults without their consent is properly punishable.

Where such offences are committed in Australia, they can be punished in Australia.

But banning materials is only justified where the harm is clear. There are many claims made about the effects of viewing pornography on adults which depend on no more than guesses dressed up as common sense. Such guesses should not be used as justifications for legal bans.

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[6] Because nearly all moral principles are limited by other principles and so have exceptions, the definitions also have exceptions.

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Part 2: Principles

CCL has read submissions by the Queensland Council for Civil Liberties (QCCL) and by Professor George Williams to the inquiry by the Australian Senate's Standing Subcommittee on Legal and Constitutional Affairs into the Classification Scheme, and endorses those submissions. In particular, we agree with QCCL's views about the importance of the principle of liberty, especially its arguments about the freedom of speech. Only where serious harm is to be prevented is curbing liberty acceptable.

Nobody should be subjected to physical harm or enduring psychological harm; and material which is the result of such harm may be banned, and its production punished. But the causation involved should be clear.

Subject to that, adults should be able to read hear and see what they want. The mere fact that an item causes sexual arousal is not a reason for restricting them. Nor is the fact that some or even many people find it offensive.

It is vital that there continue to be an independent review of any classification. Such a review should be readily available. (It should not be made unaffordable, for example.)

High levels of classification, and refused classification grading, should be used with care, lest self-censorship stifle creativity, and, worse, debate.

An attempt to classify huge quantities of material would be extremely expensive; and that expense would have a high opportunity cost. The funding of health, education, road safety or police would be likely to be affected, with serious consequences. Classification activities should be limited to matters where the harm to be prevented is greatest. Because of the cost, the Board (or whatever replaces it) should concentrate on what causes the most harm.

Where it is feasible to classify material before it is viewed or heard, it is appropriate to do so to give people a guide as to whether they wish to see or hear it, or as to whether it is appropriate for their children. Governments should not misuse classification to focus on areas which clamorous minorities consider dangerous, but where there is no proof, or which in fact are not. The discussion about the Henson photographs is a case in point.

Consistency between different media is less important than the above principles. Nevertheless, if the present system is to be continued, CCL supports the provision of an R18+-rating for video games.

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