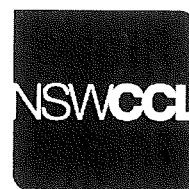


12 February 2010



New South Wales
Council for
Civil Liberties

Transparency Measures

Department of Broadband, Communications and the Digital Economy

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Submission: New South Wales Council for Civil Liberties

*Re: Measures to increase accountability and transparency for
Refused Classification material*

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New South Wales Council for Civil Liberties

The New South Wales Council for Civil Liberties (NSWCCL) is a non-government organisation (NGO) that dedicates itself to protecting and promoting civil liberties and human rights within Australia. NSWCCL was established in 1963 and is one of Australia's leading human rights and civil liberties organisations. The group is also in special consultative status with the Economic and Social Council of the United Nations since 21 July 2006. The aim of NSWCCL is to secure the equal rights of everyone in Australia and oppose any human rights abuses or the excessive use of power by the State against its people. NSWCCL hence attempts to influence public debate and government policy on various human rights issues by securing amendments to laws, or helping to change policies where civil liberties are not fully respected.

Introduction

The NSWCCL makes this submission in the circumstances of receiving Senator Stephen Conroy's consultation paper on mandatory internet service provider (ISP) filtering on 15 December 2009.

Upon being invited to make a submission, NSWCCL makes the following recommendations on increasing accountability and transparency for Refused Classification material.

Executive Summary: Recommendations

1. The classification process should remain as close as possible to the current system used to classify other materials
2. Classification should not be refused based on the presence of small amounts of material in the context of a larger work; the content should be classified having regard to the overall intent and effect of the work
3. The list of works refused classification should be transparent and publicly available
4. Classification decisions should be open to review, in order to ensure a standard of accountability.

Submission: Increasing Accountability and Transparency

1. The Classification Process

The process for classifying the internet should remain as close as possible to the current system employed for the classification of film, music, television, video games and other publications. That is, the Classification Board should make decisions based on the same, or a similar, National Classification Scheme in order to maintain consistency among all media.

Currently, all other material is subject to the *Classification (Publications, Films and Computer Games) Act 1995 (Cth)*, which gives power to the Classification Board to classify publications. The *National Classification Code (May 2005)* sets out the Advisory and Restricted Categories, and explains the use of the class 'Refused Classification' (RC).

There are also separate Guidelines for each type of media or publication, which describe the classification categories and indicate suitable audiences with regards to age and legal restrictions. Those classifying the internet should abide by a similar system whereby classifiable elements are set and adhered to, and these guidelines should be reviewed regularly to take into account changing moral societal standards. They should additionally be approved by those ministers responsible for censorship within the Commonwealth, State and Territory governments. Guidelines should also take into account the nature of the internet; by and large, people only assess material intentionally, and individuals can filter their own internet usage.

The Australian Communications and Media Authority (ACMA) currently monitors all online content and investigates consumer complaints, aiding in developing codes of practice for ISPs, and uncovering issues of internet safety relating to children.¹ NSWCCCL recommends that this system be reformed to ensure that ACMA cannot issue take down notices in respect of unclassified material, and that the appropriate course if ACMA considers material the subject of complaint to be unsuitable, for it to be referred to the Classification Board.

¹ Australian Communications and Media Authority (ACMA), 'Internet', 9 February 2010, http://www.acma.gov.au/WEB/LANDING/pc=INTERNET_MAIN.

2. Refused Classification

According to the National Classification Code, the category of RC is imposed upon various forms of publications where they

(a) describe, depict, express or otherwise deal with matters of sex, drug misuse or addiction, crime, cruelty, violence or revolting or abhorrent phenomena in such a way that they offend against the standards of morality, decency and propriety generally accepted by reasonable adults to the extent that they should not be classified; or

(b) describe or depict in a way that is likely to cause offence to a reasonable adult, a person who is, or appears to be, a child under 18 (whether the person is engaged in sexual activity or not); or

(c) promote, incite or instruct in matters of crime or violence.²

Where the classification of RC has been imposed, the material “cannot legally be shown, sold or hired in Australia.”³ However, The Code itself professes that “adults should be able to read, hear and see what they want”,⁴ and it is not actually illegal in most states and territories to merely possess RC material as long as they are intended for personal and private usage only. It follows that it should not be illegal to access RC publications on the internet. Further, the nature of the internet is that the user controls access, and so they can determine for themselves whether to access RC works.

Since refusing classification is such a serious matter, NSWCCCL submits that classification should not be refused to works which are of substantial and serious intent merely because of the presence of a relatively small amount of material. Rather, it is the overall intent and effect of the works that should be given primary consideration during classification. The place of publication is also a highly important factor when classifying content, as this speaks greatly to the intent of the work.

Specific examples of instances where classification decisions have not conformed to this principle are the books *Join the Caravan*,⁵ *Defence of the Muslim Lands*,⁶ and *The Peaceful Pill Handbook*.⁷

Defence of the Muslim Lands and *Join the Caravan*, both written by Sheikh Abdullah Azzam, were both banned for similar reasons. The Classification Review Board, coming to its decisions in July 2006, stated that both of these works were refused classification on the grounds that they “promote, incite, or instruct in matters of crime or violence”.⁸ In

² Commonwealth of Australia, *National Classification Code* (May 2005), 2.1, p. 2.

³ Australian Classification Board, ‘What We Do’, 2009, http://www.oflc.gov.au/www/cob/classification.nsf/Page/ClassificationinAustralia_Whatwedo_Whatwedo.

⁴ Commonwealth of Australia, *National Classification Code* (May 2005), 1 (a), p. 1.

⁵ Azzam, Sheikh Abdullah, *Join the Caravan* (2nd revised ed), 2001, Azzam Publications, London.

⁶ Azzam, Sheikh Abdullah, *Defence of the Muslim Lands* (2nd revised ed), 2002, Azzam Publications, London.

⁷ Nitschke, Philip and Stewart, Fiona, *The Peaceful Pill Handbook*, 2007, Exit International, Darwin.

⁸ Commonwealth of Australia, *National Classification Code* (May 2005), 2.1 (c).

particular, pages 64, 65 and 93 of the former book were credited with describing exactly how to carry out a terrorist attack,⁹ and pages 9, 18, 19, and 47 had the same effect in the latter.¹⁰ Such small percentages, and in work that is primarily used by academics studying the sources and causes of terrorism, should not have been capable of resulting in the banning of the entirety of both books; especially as the 'instructions' given merely reiterated the obvious, and easily obtainable, facts of Jihad.

The Peaceful Pill Handbook, a joint work between Dr Philip Nitschke and Dr Fiona Stewart, is another prime example of entire publications being suppressed due to the presence of small amounts of contentious and classifiable material. The book was refused classification in February 2007, the reasoning being that

1. ...it instructs in matters of crime relating to the manufacture of a prohibited drug (barbiturates)...
2. ...instructs in matters of crime relating to the possession of a prohibited drug (barbiturates) and importation of a prohibited substance and the importation of a border controlled drug...
3. ...instructs in matters of crimes under Coroners legislation in relation to reportable deaths.¹¹

Once again we see that the mere presence of a small selection of debatable material, here just in one chapter, is enough for the Classification Board; but small sections of chapters should not be sufficient to block an entire book.

Thus far, internet classification is indeed being refused due to the presence of single words or phrases rather than by the overall meaning and purpose. This was demonstrated through the leaked 'black list' of websites to be blocked by the government's internet censorship, which revealed that not only were child pornography and other such contentious sites banned; the filter also blocked "legitimate businesses...including two bus companies, online poker sites, multiple Wikipedia entries, Google and Yahoo group pages, a dental surgery and a tour operator."¹²

NSWCCL thus submits that incidental passages that are minor to the context of an entire work should not be treated as sufficient to constitute an RC rating. Each website therefore must be analysed as a whole, in order to maintain justice and fairness in classification, and increase accountability in the imposition of the RC rating.

⁹ Australian Government Classification Review Board, Decision on *Defence of the Muslim Lands*, 5 July 2006, p. 4.

¹⁰ Australian Government Classification Review Board, Decision on *Join the Caravan*, 3 July 2006, pp. 3-4.

¹¹ Australian Government Classification Review Board, Decision on *The Peaceful Pill Handbook*, 24 February 2007, p. 3.

¹² Darren Pauli, 'Australia's Web blacklist leaked', *Computerworld*, 19 March 2009, http://www.computerworld.com.au/article/296161/australia_web_blacklist_leaked/?fp=16&fpid=1.

3. Classification to be Transparent

NSWCCL objects to the process by which various pages are put on the secret 'black list'; it is imperative for classification decisions to reflect community standards, and therefore the outcomes and reasons should be made public.

A secret 'black list' without public accountability would be open to error, abuse, and political interference. The errors can be seen in the aforementioned accidental blocking of the above legitimate businesses and websites. Abuse and political interference would be inherent; the agendas of politicians would be prevalent in their decisions on various publications to be blocked, which is the reason for the first recommendation – a regulatory board not controlled by particular politicians and answerable to the people should be employed for the purpose of classifying the internet.

Within the United Kingdom, the IT industry is self-regulated by the Internet Watch Foundation (IWF). The IWF was established in 1996, and operates on a system of complaints, by blocking a blacklist of assessed URLs. The IWF works alongside the education sector, law enforcement agencies, government departments, the online industry, various international partners, several charities, and the public itself in order to specifically block "child sexual abuse content hosted anywhere in the world and criminally obscene and incitement to racial hatred content hosted in the UK."¹³

The UK IWF is a good example of employing a 'black list' system of refusing classification to various websites while still maintaining accountability and transparency. According to their website, the IWF makes available to the public their policies, minutes from board meetings, details of funders, accounts, minutiae of all trustees and senior staff, and, most importantly, the full details of all companies and websites that are blocked on their blacklist.¹⁴

Australian Democrats National President Julia Melland argued against the use of an internet blacklist within Australia; Melland stated that the issue was "not letting an unchecked, secretive list of websites be censored by the government. The proposed mandatory filter is a tool for tyranny, and we must not allow the technology to be put in place and be potentially misused by this or any other government."¹⁵ Her point is a strong one which agrees with NSWCCL's objection that a secret blacklist without public accountability would surely be open to error, abuse and political interference.

United States Secretary of State Hillary Clinton also recently made a declaration on the matter; in her speech 'Remarks on Internet Freedom' made on 21 January 2010, Clinton argued against censorship of the internet. Although the main focus of her speech was to propound the point that 'censorship should not be in any way accepted', she also briefly

¹³ Internet Watch Foundation, 'About the Internet Watch Foundation (IWF)', 2 February 2010, <http://www.iwf.org.uk/public/page.103.htm>.

¹⁴ Internet Watch Foundation, 'IWF Accountability', 2 February 2010, <http://www.iwf.org.uk/public/page.103.htm>.

¹⁵ Darren Pauli, 'EFA claims 100 signatures an hour in filter petition', *Computerworld*, 19 January 2010, http://www.computerworld.com.au/article/332977/efa_claims_100_signatures_an_hour_filter_petition/?pp=.

admitted that 'all societies recognise that free expression has its limits.'¹⁶ Australia's Senator Stephen Conroy latched onto this minor point in his advocacy of refusing classification to a long list of URLs, missing perhaps the entire point of Clinton's speech; that it is not for the government to simply black out a whole array of what they deem to be potentially harmful websites, especially where the process would be inaccurate and not open to the public.

As such, NSWCCCL recommends that in order to remain transparent and accountable, a blacklist must be both publicly known and available for viewing by all members of society. If it is not made public, the result will be a two-tier system where few are in a privileged position to know what is on the list. Such an outcome is unacceptable in a democracy, and it is unacceptable that people are not even allowed to know the list of what they are not allowed to know.

4. Classification to be Open to Review

NSWCCCL also submits that classification decisions should be open to both the judicial review and merits review processes. These processes will ensure that public standards are always reflected in decisions that are made, and that these decisions are not politically motivated.

Within Australia, the classification decisions for all other publications and materials can, under the *Classification (Publications, Films and Computer Games) Act 1995 (Cth)*, be appealed to the Classification Review Board. This mechanism ensures that any decision made can be reviewed if there is a general consensus that the decision did not reflect societal standards. It has been pointed out that such reviews are absolutely necessary because "The Classification Board itself is not representative of the wider community...the Classification Board is far more conservative than the Australian public."¹⁷

The aforementioned IWF system within the UK allows for an appeal process for the webhosts themselves who become blacklisted. This system is constantly under inspection by "independent auditors such as forensic, academic and law enforcement professionals",¹⁸ which ensures that it remains impartial and reflective of the standards of the community. Such a system is imperative should the government choose to censor the internet via a filtering of websites that have been refused classification.

¹⁶ Hillary Rodham Clinton, 'Remarks on Internet Freedom', *US Department of State*, 21 January 2010, <http://www.state.gov/secretary/rm/2010/01/135519.htm>.

¹⁷ Von Brasch, Arved, 'Internet filtering debate: history and where to go in the future', *Civil Liberties Australia*, 29 January 2010, <http://www.cla.asn.au/0805/index.php/articles/2010/internet-filtering-debate-history-lbr-gand-where-to-go-in-the-future>.

¹⁸ Internet Watch Foundation, 'IWF Accountability', 2 February 2010, <http://www.iwf.org.uk/public/page.103.htm>.

Conclusion

NSWCCL submits that the classification of the internet should remain as close as possible to the process that is currently employed for the classification of all other materials.


Content should also be assessed by its wider context rather than by individual words or minor passages within the entire works.

Classification should reflect community standards, and as such the blacklist should be viewable by the public.

The rating of RC should be determined in a way that is transparent and open to judicial and merits review.

Since this submission is only able to deal with measures to increase accountability and transparency for RC material, NSWCCL is unable to address all relevant civil liberties matters in relation to mandatory ISP filtering. The crucial issue is whether the RC classification is appropriate as a basis for internet filtering. Google Australia's position on the subject, as stated by head of policy Larla Flynn on 11 February 2010, is that "The scope of RC is simply too broad and can raise genuine questions about restrictions on access to information. RC includes the grey realms of material instructing in any crime from graffiti to politically controversial crimes such as euthanasia, and exposing these topics to public debate is vital for democracy."¹⁹ NSWCCL agrees wholeheartedly with this position.

Yours Sincerely,



Stephen Blanks

Secretary, New South Wales Council for Civil Liberties

¹⁹ Moses, Asher, 'Google baulks at Conroy's call to censor YouTube', *Sydney Morning Herald Online*, 11 February 2010, <http://www.smh.com.au/technology/technology-news/google-baulks-at-conroys-call-to-censor-youtube-20100211-ntm0.html>.