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Standing Committee on Social Issues

Safety Net?

Inquiry into the Classification (Publications, Films and Computer Games) Enforcement Amendment Bill 2001

Final Report: On-line Matters

Ordered to be printed according to Resolution of the House dated 6 June 2002

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Terms of Reference

1. The Standing Committee on Social Issues is to inquire into and report upon the scope and operation of the *Classification (Publications, Films and Computer Games) Enforcement Amendment Bill 2001* with regard to:

   (a) whether the provisions of the Bill meet its stated policy objectives,

   (b) whether the provisions contained in Schedule 2 of the Bill provide an effective and enforceable regime for the regulation of on-line material,

   (c) the social and legal impact of the on-line regulation of offensive material, and its implications for fair reporting of news and current affairs and legitimate internet use, and

   (d) any related matter.

2. That the Committee provide a final report to the House by 7 June 2002.

These terms of reference were referred to the Committee by the Hon Bob Debus MP, Attorney-General, Minister for the Environment, Minister for Emergency Services, Minister Assisting the Premier on the Arts, on 5 December 2001.

Committee Membership

Jan Burnswoods MLC	Australian Labor Party	Chair
The Hon Doug Moppett MLC	National Party	Deputy Chair
The Hon Dr Arthur Chesterfield-Evans MLC	Australian Democrats	Member
The Hon Amanda Fazio MLC	Australian Labor Party	Member
The Hon Ian West MLC	Australian Labor Party	Member

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Chair's Foreword

I am pleased to present the Committee's final report on the *Classification (Publications, Films and Computer Games) Enforcement Amendment Act 2001*.

This report deals with the proposed model for regulating Internet content contained in Schedule 2 of the Act. The Committee issued an interim report in March 2002 which addressed Schedule 1.

At the centre of this inquiry has been the tension between the right of adults to see and hear what they want – a right that underpins democratic and cultural expression – and the need to ensure that vulnerable people, especially children, are protected from exposure to dangerous and exploitative material. While this tension has always been apparent in classification law, it poses new problems in the rapidly developing medium of the Internet.

The Committee heard that this balance had not been properly struck by the proposed model for regulation of Internet content. We heard that the negative impacts of the legislation were likely to be far greater than any benefits that would be realised. On this basis the Committee has recommended that the part of the Act regulating the Internet be repealed.

This does not mean that we believe there should be no regulation of Internet content. Criminal sanctions should apply to those who make abhorrent, exploitative or demeaning information available on-line or who attempt to use the Internet for predatory purposes. However, the proposed model would be likely to restrict law-abiding content providers while doing little to deter those with malicious motives.

We note that the Australian Broadcasting Authority already has a strong regulatory role in this area, with an effective complaints process, provision for take-down notices to remove offensive content and sponsorship of industry codes of conduct. It is also important to provide people, particularly parents, with the right information and tools to use the Internet knowledgably and safely. We have therefore made some recommendations to this end.

There has been a high level of public interest in this issue and I would like to thank all of those who made submissions and appeared as witnesses. I am also grateful to Committee Members for their interest and skill in dealing with the issues before this inquiry. Unfortunately, The Hon Doug Moppett MLC was unable to attend the meeting at which the Committee discussed the report's findings and recommendations.

Finally, I would like to thank the Committee secretariat for their assistance with the inquiry. We are particularly indebted to Vicki Buchbach, who was seconded to the Committee to assist with the inquiry and worked tirelessly to produce both reports.

I commend the report to the Government.

Jan Burnswoods, MLC
Chair

Executive Summary

This report considers the model for regulation of Internet content contained in Schedule 2 of the *Classification (Publications, Films and Computer Games) Enforcement Amendment Act 2001* (the Act).

Schedule 2 is intended to respond to community concerns about the availability of offensive and dangerous material on-line, and the potential risks to children who may access material unsuitable to minors over the Internet. Schedule 2 attempts to achieve this end by making it an offence either:

- to make material that would be classified X or refused classification available on the Internet, or
- to make material that would be classified R available without an approved age verification system in place.

The Committee considers it important to ensure that children are not harmed by exposure to unsuitable Internet content and are not the targets of paedophile activity.

In addition, extremely offensive material should not be available on the Internet and every effort should be made to remove violent or demeaning content and punish those who make it available.

The Committee also supports the at times competing principle that, in an open democracy, the right of adults to see, hear and read what they want is fundamental. This long-standing principle underlies the national classification scheme.

The Internet is an increasingly valuable tool for communication, research, artistic expression and business. The regulatory scheme proposed in Schedule 2 does not strike the right balance between the need to protect children and the right of adults to communicate freely. This is in part because the rapid changes in the way people communicate with new media are not being matched in pace by changes in legislative models attempting to regulate them.

In addition, there are significant concerns about the effectiveness and enforceability of the proposed scheme. It is more likely to deter use of the Internet by law-abiding content providers than by those with criminal intent.

Differing standards apply to the regulation of Internet content in other States and Territories and one of the original objectives of the proposed scheme, the establishment of uniform national enforcement legislation, has not occurred. Therefore the implementation of Schedule 2 will not result in uniformity.

Furthermore, the national co-operative scheme for regulation of Internet content is due to be reviewed in early 2003. It would seem unwise for Schedule 2 to commence operation without first considering the outcome of the review.

The Committee believes that more effective ways to achieve the objectives of Schedule 2 are through public education, including parental supervision, use of filtering software where appropriate, and encouraging compliance with industry codes of practice. The current systems in place, including the complaints system operated by the Australian Broadcasting Authority and the establishment of the NetAlert organisation, are important initiatives that could be further expanded.

These activities should be supported by rigorously enforced criminal law provisions with heavy penalties. The Committee does not believe that there should be no laws in place to regulate Internet content in NSW. Highly inappropriate, dangerous or offensive material such as child pornography, or material that promotes the activities of predatory paedophiles should not be made available over the Internet. Existing provisions in the *Crimes Act 1900* that prohibit such material should be reviewed to ensure that they provide an adequate basis for investigation and prosecution of people who make such information available on-line.

For these reasons the Committee recommends that Schedule 2 be repealed and that the Crimes Act be reviewed in order to determine the adequacy of the provisions for punishing those who make available particularly dangerous or offensive content.

Findings and Recommendations

Finding 1 *Page 18*

The Committee finds that:

- the proposed model for regulation of on-line content contained in Schedule 2 of the Act could have a significant effect on the legitimate use of the Internet and may affect the fair reporting of news and current affairs,
- the major negative social impact of the on-line regulatory regime established by the Act is that legitimate use of the Internet by residents of NSW may be deterred,
- the provisions contained in Schedule 2 may have the unintended consequence of criminalising a wide range of academic or other material which would be legal to publish off-line, and
- Schedule 2 is more likely to have an impact on non-commercial providers of Internet content than commercial providers. This may restrict the range of material that is available on the Internet.

Finding 2 *Page 32*

The Committee finds that:

- the on-line regulatory regime established by Schedule 2 of the Act will not meet the policy objectives of deterring the making available of objectionable matter and protecting minors from unsuitable material in any practicable sense, and
- the proposed regulatory model is neither effective in meeting the policy objectives of the Act nor enforceable without the allocation of an unrealistically high level of resources.

Finding 3 *Page 44*

The Committee finds that:

- a far better way of achieving the policy objectives of the Act would be to use a combination of

(a) provisions in the *Crimes Act 1900* for prosecuting suppliers of seriously offensive content,
(b) the complaints/take-down notices system established by the Commonwealth *Broadcasting Services Act 1992* for removing less serious content,
(c) the voluntary use of appropriate filters, and
(d) increased efforts to provide education and advice to the community and parents about the safe use of the Internet both for minors and adults.

Recommendation 1 *Page 18*

The Committee recommends that the Attorney-General ask the Office of Film and Literature Classification to assist the enforcement of the national on-line regulatory scheme by:

- providing the public with detailed information (including examples) about interpretation of the National Classification Code as it applies to on-line material, and
- offering a timely, low-cost, voluntary classification of on-line material service for non-commercial on-line content providers to use prior to uploading.

Recommendation 2 *Page 32*

The Committee recommends that Schedule 2 of the *Classification (Publications, Films and Computer Games) Enforcement Amendment Act 2001* be repealed.

Recommendation 3 *Page 34*

The Committee recommends that:

- for the time being, Internet content should be regulated using the relevant provisions of the *Crimes Act 1900*, and
- the Attorney-General should review the existing provisions of the *Crimes Act 1900* relating to on-line content with a view to determining whether these provisions provide a sufficient basis for prosecution of people who publish highly dangerous or offensive material on-line.

Recommendation 4 *Page 44*

The Committee recommends that, in order to increase community awareness of the safe use of the Internet, the Attorney-General should approach his Federal counterpart and the Federal Minister for Communications, Information Technology and the Arts, recommending that NetAlert Limited be provided with additional funding to undertake its vital community educational role.

Recommendation 5 *Page 46*

The Committee recommends that:

- the Attorney-General, through the Standing Committee of Attorneys-General, investigate the constitutionality of the national classification scheme and take any remedial action required,
- the Attorney-General consider either establishing a licensing scheme, similar to that which operates in the ACT to allow controlled premises to sell X-rated material in NSW or taking more enforcement action against breaches of the legislation, and
- the Attorney-General write to the Minister for Communications, Information Technology and the Arts suggesting that the review of the operation of the on-line regulatory scheme consider:
  (a) including a weighted list of objectives of the scheme, and
  (b) developing effective and enforceable nationally uniform enforcement provisions for implementation by States and Territories.

Glossary

ABA	Australian Broadcasting Authority
The Act	*Classification (Publications, Films and Computer Games) Enforcement Amendment Act 2001*
BSA	Commonwealth *Broadcasting Services Act 1992*. On-line regulation is included in Schedule 5 of the Act.
Chat room	Internet discussion groups that people can enter and leave at any point in time. Some have restricted membership but others are public. Visitors often adopt pseudonyms.
Classification Act	NSW *Classification (Publication, Films and Computer Games) Enforcement Act 1995*.
EFA	Electronic Frontiers Australia.
Filter	A software product designed to block access to inappropriate material. Filters can operate in a variety of ways including by allowing access to known appropriate content (white lists), blocking access to known inappropriate content (black lists) or by assessing material and blocking it if it does not meet criteria.
ICH	Internet Content Host defined in Schedule 5 of the BSA as a person who hosts Internet content in Australia, or who proposes to host Internet content in Australia
IIA	Internet Industry Association
Internet Content	Defined in Schedule 5 of the BSA as information that is kept on a data storage device and is accessed, or available for access, using an Internet carriage service but does not include ordinary electronic mail or information that is transmitted in the form of a broadcasting service.
ISP	Internet Service Provider - defined in section 8 of the BSA as a person who supplies or proposes to supply an Internet carriage service to the public
Objectionable matter	Under the Act, on-line material uploaded in NSW which is, or would be, classified X or RC or an advertisement for material which is or would be so classified.
National Classification Code	Code for classification of films, publications and computer games scheduled to the *Classification (Publications, Films and Computer Games) Act 1995*. **Classification categories for films are**: G – General PG – Parental Guidance recommended M – Mature: 15+ MA – Mature Accompanied: 15+ R – Restricted 18+ X – 18+ only RC – Refused Classification – does not meet the requirements for these categories **Classification categories for computer games are:** G – General G8+ – recommended for 8+ M – Mature – recommended for 15+ MA15+ Restricted to 15+ RC – Refused Classification – does not meet the requirements for these categories.
NetAlert Limited	Commonwealth-funded community education body with responsibility for educating community and industry about the Internet.
OFLC	Office of Film and Literature Classification.

PIN	Personal Identification Number.
Potential Prohibited Content	Under Schedule 5 of the BSA, Internet content which has a high likelihood of being Prohibited content (see below) but has not yet been classified.
Prohibited content	Under Schedule 5 of the BSA, Internet content hosted in Australia that is classified X or RC or is classified R but not protected by a restricted access system. For Internet content hosted outside of Australia, material that is or would be classified X or RC.
SCAG	Standing Committee of Attorneys-General.
URL	Universal Resource Locator – an address for an Internet site.

Chapter 1 Background to the Inquiry

Establishment of the Inquiry

1.1 On 4 December 2001 the Legislative Council agreed to pass the *Classification (Publications, Films and Computer Games) Enforcement Amendment Bill 2001* (the Bill). On 5 December 2001 the Hon Bob Debus MP referred the following terms of reference to the Standing Committee on Social Issues:

> 1. The Standing Committee on Social Issues is to inquire into and report upon the scope and operation of the Bill with regard to:
>
> (a) whether the provisions of the Bill meet its stated policy objectives,
>
> (b) whether the provisions contained in Schedule 2 of the Bill provide an effective and enforceable regime for the regulation of on-line material,
>
> (c) the social and legal impact of the on-line regulation of offensive material, and its implications for fair reporting of news and current affairs and legitimate Internet use, and
>
> (d) any related matter.
>
> 2. That the Committee provide a final report to the House by 7 June 2002.[1]

The Classification Amendment Act

1.2 The *Classification (Publications, Films and Computer Games) Enforcement Amendment Act 2001* No 95, (the Act) contains amendments to the NSW *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (the Principal Act).[2]

1.3 The Act consists of two parts. Schedule 1 contains a number of amendments to the Principal Act aimed at streamlining administration of the national classification scheme. For instance it contains provisions relating to exemptions from classification requirements for certain films and provides for a penalty notice system to be used instead of court prosecution for some offences. These provisions were intended to be implemented in all States, Territories and the Commonwealth on 22 March 2002.

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1 Referred by the Hon Bob Debus MP, Attorney-General, Minister for the Environment, Minister for Emergency Services, and Minister Assisting the Premier on the Arts on 5 December 2001.

2 Although the Committee's terms of reference and the title of this inquiry refer to the "*Classification (Publications, Films and Computer Games Enforcement) Amendment Bill 2001*", the Bill became an Act on receipt of the Governor's assent on 11 December 2001 and it is referred to as an Act throughout this report. However the Act was not proclaimed at that time and so did not commence until Schedule 1 was proclaimed in March 2002 as described below. Schedule 2 has not yet commenced.

1.4 Schedule 2 contains provisions relating to the regulation of on-line material. Schedule 2 adds five new sections after section 45 of the Principal Act to regulate the supply of on-line material which is objectionable or unsuitable for minors.

Conduct of the Inquiry

1.5 The terms of reference were advertised in metropolitan and major regional newspapers inviting submissions from members of the public. In response, the Committee received 37 submissions from individuals and organisations representing a diverse range of views on the issue. A list of submissions is included at Appendix 1.

1.6 The Committee held two full days of public hearings on 5 and 6 March 2002 at Parliament House in Sydney. A further short hearing was held on 11 April 2002. A full list of witnesses is included at Appendix 2.

1.7 The complete transcripts of these hearings are available via the Parliament website at www.parliament.nsw.gov.au or by contacting the Committee secretariat.

Interim Report: Off-line Matters

1.8 On 14 March 2002, the Committee tabled an interim report which recommended that Schedule 1 commence on 22 March 2002 and that minor amendments should be made to the Act at some later date before regulations relating to the penalty notice scheme are made.

1.9 On 20 March 2002, the Governor proclaimed that Schedule 1 would commence on 22 March 2002.[3]

Report structure

1.10 This Final Report deals with the implications of the proposed scheme for regulation of on-line content in Schedule 2 of the Act. There are seven further chapters:

- Chapter 2 outlines the legislative background to classification of publications, films and computer games in NSW and briefly describes the policy objectives of the Act,
- Chapter 3 addresses the need for the Act,
- Chapter 4 examines the social impacts of the Act and potential consequences of the Act's implementation,
- Chapter 5 discusses legal concerns with the Act in its current form,
- Chapter 6 examines whether or not the Act establishes an effective and enforceable regime for the regulation of on-line content in NSW,
- Chapter 7 discusses other possible options for regulating on-line content in NSW, and
- Chapter 8 briefly canvasses other issues that were raised with the Committee during the Inquiry.

[3] Government Gazette No 65, 22 March 2002, p 1717

Chapter 2 Legislative Background

The national classification scheme

2.1 Since 1984 there has been a national co-operative scheme for the classification of films and publications established by Commonwealth legislation. In 1994, separate classification guidelines for computer games were added to the scheme.[4] Under reforms to the scheme in 1996, most classification decisions are made by the Classification Board according to the National Classification Code. Complementary State and Territory legislation contains enforcement provisions for the scheme. The measures in the national scheme and changes to it are agreed by the Commonwealth, State and Territory Attorneys-General meeting as Censorship Ministers and are implemented in appropriate legislation.[5]

2.2 The principles underpinning the co-operative scheme are stated in the National Classification Code for Films, Publications and Computer Games as:

(a) adults should be able to read, hear and see what they want;

(b) minors should be protected from material likely to harm or disturb them;

(c) everyone should be protected from exposure to unsolicited material that they find offensive;

(d) the need to take account of community concerns about

(i) depictions that condone or incite violence, particularly sexual violence, and

(ii) the portrayal of persons in a demeaning manner.[6]

The *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (NSW)

2.3 The object of the *Classification (Publications, Films and Computer Games) Enforcement Act 1995 (NSW)* is to provide for the enforcement of classification decisions made under the Commonwealth Act through penalty provisions and by prohibiting the publishing (including the sale, exhibition, distribution and demonstration) of certain publications, films and computer games.[7]

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4 See Glossary for a guide to the classifications for films and computer games. Appendix 4 contains the entire National Classification Code. It is important to note that there is no R category for computer games. Games that do not fit the criteria for MA15+ are Refused Classification (RC).

5 A very good description of the history of classification of publications, films and computer games is contained in Gareth Griffith, *Censorship in Australia: Regulating the Internet and other recent developments*, Briefing Paper 4/02, NSW Parliamentary Research Service, February 2002.

6 Section 5 National Classification Code, Scheduled to Commonwealth *Classification (Publications and Computer Games) Act 1995*

7 s3 *Classification (Publications, Films and Computer Games) Enforcement Act 1995*, No 63

The Commonwealth on-line regulatory scheme

2.4 National regulation of Internet content began in Australia on 1 January 2000 when amendments to the Commonwealth *Broadcasting Services Act 1992* (the BSA) commenced. These amendments inserted a new Schedule 5 on Internet content into the BSA and added the following objects to the Act:

> (k) to provide a means for addressing complaints about certain Internet content; and
>
> (l) to restrict access to certain Internet content that is likely to cause offence to a reasonable adult; and
>
> (m) to protect children from exposure to Internet content that is unsuitable for children.[8]

2.5 Section 4 of the new schedule of the BSA also explains on-line regulatory policy, stating that the Parliament intends that Internet content hosted in Australia and carriage services supplied to end-users in Australia be regulated in a manner that:

> (a) enables public interest considerations to be addressed in a way that does not impose unnecessary financial and administrative burdens on Internet content hosts and Internet service providers; and
>
> (b) will readily accommodate technological change; and
>
> (c) encourages:
>
> (i) the development of Internet technologies and their application; and
>
> (ii) the provision of services made practicable by those technologies to the Australian community; and
>
> (iii) the supply of Internet carriage services at performance standards that reasonably meet the social, industrial and commercial needs of the Australian community.[9]

2.6 Schedule 5 establishes a co-regulatory scheme for Internet content which involves the Australian Broadcasting Authority (ABA), the Classification Board, Internet Service Providers (ISPs), Internet Content Hosts (ICHs) and the public.

2.7 The Schedule establishes a mechanism for the public to complain to the ABA regarding Internet content. The ABA is then able to refer content to the Classification Board which classifies Internet content according to the requirements for films and computer games. If content hosted in Australia is found to be "prohibited content" (that is, content either classified RC or X by the Classification Board, or classified R and not subject to a restricted access system) the ABA can require Internet Content Hosts to remove it. If material is hosted overseas and the material would be refused classification in Australia, the ABA refers the matter to international law enforcement or community hotlines and advises local filter manufacturers to add the address to a list of banned sites.

2.8 ISPs are also obliged to abide by appropriate codes of conduct such as offering approved filters to subscribers and regularly updating lists of sites containing prohibited content in

8 s3(1) Schedule 5 BSA

9 s(3) Schedule 5 BSA

accordance with notifications from the ABA. NetAlert Limited, a government appointed community advisory body, advises ICHs and ISPs about their obligations under the codes of practice and educates the community about safe use of the Internet.[10]

2.9 The BSA provides that a review of the operation of Schedule 5 must be undertaken before 1 January 2003 with a particular requirement to investigate the development of Internet filtering technologies and whether they are sufficiently developed to prevent users from accessing R-rated material hosted outside Australia that is not subject to a restricted access system. If this review finds that filtering technologies are sufficiently developed, the Act provides that amendments should be brought before the Parliament to extend the scope of "prohibited content" to include R-rated material hosted outside Australia that is not subject to a restricted access system.[11]

The NSW Amendment Bill

2.10 As with films, publications, and computer games, complementary enforcement legislation for Internet content was originally envisaged for State and Territory legislation. In 1999 Censorship Ministers agreed to model national provisions for on-line content regulation which was designed to complement the Commonwealth BSA and Classification Act. These provisions are the basis for Schedule 2 of the *Classification (Publications, Films and Computer Games) Enforcement Amendment Act 2001 (NSW)* (the Act).

2.11 Western Australia, the Northern Territory and Victoria had already introduced legislation to prosecute those providing inappropriate Internet content. In 2001, the South Australian government introduced a Bill based on the national model provisions. A parliamentary inquiry recommended that the Bill be passed with minor amendments, but Parliament was prorogued prior to the passage of the legislation. The Bill has not yet been reintroduced.[12]

The policy objectives of Schedule 2

2.12 The terms of reference for this inquiry ask the Committee to inquire into whether the Act meets its stated policy objectives. According to the Minister's second reading speech, these are:

- to deter the making of "objectionable matter" available on the Internet; and
- to protect children from "matter unsuitable for minors".[13]

10 Evidence Tayt, 11 April 2002

11 s 95 Schedule 5 BSA

12 Parliament of South Australia, *Report of the Select Committee on the Classification (Publications, Films and Computer Games) (Miscellaneous) Amendment Bill (No 2) 2001*, October 2001

13 NSWPD 4/12/01, p 19371

The provisions of Schedule 2

2.13 The provisions of Schedule 2 are in Appendix 3. The Schedule adds a new Part 5A to the Act. In summary, the provisions create two offences:

- making available or supplying matter unsuitable for minors on an on-line service (with a defence that at the time of making this available there was an approved restricted access scheme in place),[14] and
- making available or supplying "objectionable matter" on an on-line service.[15]

2.14 "Matter unsuitable for minors" is defined as matter which is or would be classified R if it is a film, or RC if it is a computer game. The definition of "matter unsuitable for minors" also includes an advertisement for either of these things consisting of or containing moving images even if the advertisement itself would not be classified R or RC. "Objectionable matter" is defined as matter which would be classified RC or X in accordance with the National Classification Code.

2.15 Ordinary email and real time chat which is not recorded are excluded from the definition of on-line content.

Other relevant legislation

2.16 There are at least two other potential avenues for addressing objectionable Internet content. Under Sections 578B and 578C of the NSW *Crimes Act 1900* (the Crimes Act), possession and publication of child pornography are offences with significant penalties. Publication can include display on the Internet. Publication of indecent articles is also an offence although "indecent article" is not defined.

2.17 Crimes related to the misuse of email are covered by section 85ZE of the Commonwealth *Crimes Act 1914* which prohibits the intentional use of a carriage service with the result that another person is menaced or harassed in such a way as would be regarded by reasonable persons as being, in all the circumstances, offensive.

14 s 45D

15 s 45C

Chapter 3 Need for the Act

This Chapter briefly discusses the scale of the problem which is being addressed by the proposed on-line regulatory model.

Level of concern about unsuitable material

3.1 In Chapters 4 and 5, the Committee examines the social and legal impact of the Act on individuals and businesses. In Chapter 6, the effectiveness of the provisions in achieving the policy objectives of the Act are evaluated.

3.2 As a preliminary step in addressing these considerations, it is important to assess the size of the problem the Act is designed to address. In order to achieve this, the Committee sought evidence of the amount of community concern arising from objectionable material and material unsuitable for minors.

3.3 According to the Australian Library and Information Association, which is a professional association for librarians, there are not many reports of concerns about exposure to pornography from members of the public accessing the Internet from public or school libraries.[16]

3.4 In relation to material that would be unsuitable for minors, the Australian Broadcasting Authority advised that of the total number of complaints to their Internet content complaints regime, only 3 per cent of prohibited material would be rated R if it was classified.[17]

3.5 The Committee notes that according to the reports of the operation of the co-regulatory scheme for Internet content regulation, the number of complaints is relatively small and not consistently increasing as public knowledge about the complaints mechanism increases. For the six months to 30 June 2001, the ABA's hotline received 215 complaints compared to 290 for the previous six months and 201 for the first six months of the scheme's operation. Of the 185 complaints investigated, only 16 items were hosted in Australia and half of these were found not to be prohibited content.[18]

3.6 These statistics suggest that there is not a high level of community concern about the amount of objectionable material or material unsuitable for minors that is currently available on the Internet. In particular there is very little concern about material that would potentially be rated R being available on the Internet. On this basis it does not seem likely that the proposed scheme would lead to the identification of vast amounts of inappropriate Internet content being made available from NSW.

3.7 Mr Phillip Argy of the Australian Computer Society argued that the scale of unintended receipt of objectionable matter is quite low:

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16 Evidence Nicholson, 6 March 2002

17 Evidence Wright and Shipard, 6 March 2002

18 Minister for Communications, Information Technology and the Arts, *Six-month Report on Co-Regulatory Scheme for Internet Content Regulation: January to June 2001*, pp 10-11

> [T]his kind of material does not arrive unbidden at your computer screen. You have to go and seek it out. You have to call it. You have to click on a link to it. You have to get it. It is not even like television. When you turn on the TV what is there is there. But with your computer and a web browser you only get things when you click on a link to go visit them. So in fact web browsing is precisely like going to the shop. … The Internet is not a broadcast regime where the receiver is a passive receiver. It is very different from television. It is the complete opposite of television. You do not simply turn it on and material is available as you put it. You actually have to find it and seek it out and effectively download it by clicking on a link.[19]

3.8 This view is consistent with European research on Internet use which recommends balancing the risks of Internet use with the tremendous benefits of the emerging communications medium:

> Contrary to popular perceptions, Internet users are not bombarded with pornographic images the moment they log on to the Internet. Instead pornography on the Internet has to be actively searched for in most instances, and in many cases paid for. In this sense, the Internet may be viewed as a less invasive medium than television, for example as pornography will seldom just appear on one's screen. Moreover, it represents only a tiny proportion of material that may be accessed through the Net. The moral panic about cyberporn has distracted attention away from the rich informational resources the Internet has to offer in our homes with the touch of a few buttons.[20]

3.9 The Committee acknowledges the importance of the principle that minors should be protected from unsuitable material. However there seem to be more compelling risks to the safety of minors through such means as email or chat room discussions that would not be addressed by the Act.

3.10 For instance, recent research in New Zealand indicates that a significant minority of girls aged between 11 and 19 years using the Internet who participated in a survey have physically met people only known to them from on-line discussions. Sixty per cent of those surveyed had undertaken potentially unsafe behaviour such as providing personal information or photographs of themselves to strangers.[21]

Conclusion

3.11 The Committee notes that the Act does not address more direct forms of communication such as email, which may provide greater opportunities for exploitation of minors by predatory adults than publication on the Internet.

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19 Evidence Argy, 5 March 2002

20 Yaman Akdeniz, *Sex on the Net: the Dilemma of Policing Cyberspace*, South Street Press, Reading 1999, p 64

21 The Internet Safety Group, *Girls on the Net: the Survey of Adolescent Girls' Use of the Internet in New Zealand*, February 2001, p 5

3.12 In view of the very small number of complaints recorded about material that originates in Australia, particularly complaints that relate to R-rated material, there is a need to be realistic about the possible level of harm to children that is likely to result if Schedule 2 of the Act does not commence.

3.13 Education of children and young adults about safe forms of electronic communication is important in order to empower them to deal with emerging risks in a rapidly changing communications environment.

Chapter 4 Social and key legal impacts

The terms of reference for this inquiry ask the Committee to assess the social and legal impact of the on-line regulation of offensive material, and its implications for fair reporting of news and current affairs and legitimate Internet use.[22]

This Chapter discusses the negative social impacts of on-line content regulation by investigating the potential effects of the Act on legitimate Internet use and on business, including the reporting of news and current affairs. It also addresses some of the key legal concerns with the Act in its current form.

It is important to note that the NSW Act was not designed to operate in isolation but rather to complement legislation from the Commonwealth and other States and Territories. Many submissions and witnesses did not address the impacts of the NSW Act in isolation and raised general philosophical points about on-line content regulation. For this reason much of the following discussion relates to the national on-line regulatory regime as a whole rather than simply to the provisions of the Act.

Social impacts of on-line content regulation

4.1 The major negative social impacts that have been raised with the Committee are that the legislation will unfairly constrain legitimate discussion of adult topics by adults and hamper academic debate. The Committee heard that there was a high level of concern because on-line material that would be classified R would need to be protected by restricted access systems if it were made available in NSW. (The effectiveness of restricted access systems will be discussed in Chapter 6.) The Committee was told that a consequence of the regulatory scheme would be that people could be excessively concerned about the effect of content regulation and limit their use of the medium. This would have the effect of creating a culture of paranoia and self-censorship.

4.2 The Committee has also heard that the impacts on business are potentially severe, especially for news and current affairs organisations which present often confronting material in the public interest. Some submissions suggested that information technology businesses would be discouraged by the Act from basing themselves in NSW.

Legitimate Internet use

4.3 This inquiry's terms of reference refer to "legitimate Internet use". Establishing what this means requires a consideration of both people's right to communicate freely and their responsibility to make public communications which do not conflict with the principles of the National Classification Code. As noted in Chapter 2, these principles are that adults should be able to see what they choose to but minors should be protected from unsuitable material and all people should be protected from offensive material.

4.4 Many submissions argued that the Act would have a "chilling effect on freedom of speech" by limiting what adults could discuss.[23] The Committee notes that unlike a number of

22 Term of reference 1 (c)

other countries, Australia does not have a legislatively based right to freedom of speech. However, as pointed out by the Australian Publishers Association and the Australian Society of Authors in a joint submission, Australia is a signatory to the United Nations Declaration of Universal Human Rights. Article 19 of the Declaration allows all people the right to freedom of opinion and expression through any media regardless of frontiers. The submission from these two organisations considered that the Act would be an assault on citizens' civil liberties.[24]

4.5 A further consideration is the notion of "electronic equivalence" which means that what is legal to publish in an off-line medium should also be legal to publish on-line. According to the second reading speech for this Act, this is an underlying principle of the national on-line regulatory model:

> The Bill is based on the principle that any matter that is illegal or controlled off-line should also be illegal or controlled on-line.[25]

4.6 The Committee heard that individuals were particularly concerned that the principle of electronic equivalence was not being met because R-rated Internet content was not easily accessible to adults. Typical of these concerns were those expressed by Mr Phillip Argy of the Australian Computer Society in relation to the social impacts of the Act:

> This criminally prohibits the making available of matter that would be classified as objectionable or unsuitable for minors if the Federal regime classified it, and there is basically no exception. There is no exception for being an adult or knowingly supplying it to adults. The Bill simply does not envisage that scenario. You just simply cannot make it available at all. I frankly do not understand how you can do that. That is literally saying to all Australians of adult age "This material is not to be made available in NSW, in case children get to see it." With respect, that is just not the right approach in our humble submission.[26]

Should adults have access to R and X-rated material on-line?

4.7 A small number of submissions stated that Internet pornography threatened families and children and recommended extending the scope of the Act to limit access to on-line and other material which would be classified as MA15+.[27] While noting that this could be unduly restrictive, the Committee considers that this suggestion would be an issue for the revision of the National Classification Code for Films, Publications and Computer Games as a whole rather than something that this inquiry can resolve.

4.8 On the other hand, a number of witnesses have told the Committee that X-rated material should be available to adults on-line. Representatives of Sharon Austen Limited who legally

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23 For example, Submission No 1, Ms Reba Kearns, Submission No 4, Mr James Howison, Submission No 7, Mr Chris Jensen

24 Submission No 23, Australian Publishers Association and the Australian Society of Authors

25 NSWPD LA 7/11/01, p 18251

26 Evidence Argy, 5 March 2002

27 Submission No 33, The Hon Rev Fred Nile MLC, Submission No 25, Mrs P Wagstaff, Submission No 30, F C Crook

market X-rated products both on and off-line from the Australian Capital Territory stated that they would like to operate from NSW.[28] Furthermore, they argued that the Act was not consistent with the Commonwealth legislation in banning access to X-rated material. The Internet Society of Australia also contended that only material that is refused classification (RC) off-line should be prohibited for supply to adults on-line.[29] The Committee notes that while possession of X-rated material is not a crime in NSW, sale and publication of such material is. As "making available or supplying" on-line material is more analogous to publication than to possession, the Committee considers that "electronic equivalence" would not justify changing the on-line regulatory model to enable adults to make available X-rated material on-line.

Risk to adult debate about important issues

4.9 The Committee has heard that a major consequence of the Act is that restricting R-rated Internet content in NSW risks the ability of adults to discuss serious adult matters particularly as they relate to politics, relationships and medical procedures. This is because R-rated material does not just include sexually explicit or violent material but also the discussion of "adult themes".[30] A representative of Electronic Frontiers Australia stated in evidence:

> There is a vast amount of material that this Bill can catch. We are especially concerned about what is, in effect, a complete ban on information that would be classified "R". We really have a concern that many people think that the "R" classification is given purely because material contains gratuitous violence or sexual activity. If you actually look at the classification board decisions you will find that in fact, yes, certainly that kind of material is included in "R", but it covers also a very broad range of other material that is unsuitable for minors. Basically it falls down to anything that the Classification Board considers requires an adult perspective. So, it can cover information that is dealing with psychological sorts of issues, things that just generally could disturb minors; it is not always material that necessarily harms, except to the extent that it harms in terms of disturbing them. Again, we are not saying that this information should be available to children. What we are saying is that the proposed legislation is catching a very broad range of material other than just violence and sexual material.[31]

4.10 Dr Peter Chen from Melbourne University stated in his submission that the Act could have negative effects on serious academic discussion:

> [T]he medium of the Internet was originally, and remains heavily, a medium used by academics, researchers, and commentators for the collaboration and sharing of intellectual capital and criticism. While many of these areas would have little to do with information that may be classified X or R under the OFLC guidelines, some important areas in health sciences, psychology, the humanities, and cultural studies do touch on matters of criminal activity, anti-social behaviour, "deviant" sexuality,

28 Evidence Graham, 5 March 2002, Evidence Ellis, 11 April 2002

29 Submission No 22, Internet Society of Australia

30 see Appendix 4

31 Evidence Graham, 5 March 2002

> and erotica. These are legitimate areas of inquiry and the Parliament should be highly cautious about any activity that impinges on these basic level intellectual activities.[32]

Self-censorship

4.11 The Committee was told that the proposed scheme may lead to uncertainty among the public and the non-commercial users of the classification code, resulting in self-censorship. The Arts Law Centre of Australia provided details of individuals who were not continuing with Internet content provision because of concerns about the enforcement of on-line content classification, for instance, one multimedia artist now hosting her material off-shore. The risks for the artistic community extended to galleries not wanting to proceed with exhibitions if they considered they might receive an R rating. The Arts Law Centre of Australia identified a lack of willingness of the arts community to become embroiled in legal matters, with the effect of avoiding any controversial action at all.[33]

4.12 Watch on Censorship stated in evidence that the Act would not lead to the catching of criminals but it would create a level of insecurity in the law-abiding population with the undesirable result of extreme self-censorship:

> For a person who you have to presume is law-abiding, who is being told that this legislation has been passed, that person is going to have to think conservatively and err on the safe side because the downside is that they have committed a criminal act—not that it is a civil wrong that might be picked up; they are actually committing a criminal act when they do it. To me, that has the potential to create a culture within New South Wales of extreme self-censorship. The more you publicise this legislation, and the more sensitive individuals get to what they might be criminally liable for, I think that tends to self-censorship, so people will be frightened or deterred from communicating that sort of stuff on the Internet. I think that is the message you send to people.[34]

4.13 A freelance journalist expressed concern in a submission that she would be unable to sell work to be published on overseas websites if it dealt with adult themes in an informative way because she was not equipped to defend charges.[35] A representative of John Fairfax Holdings argued that tighter restrictions on on-line material than off-line will limit the diversity of voices presenting views to the public. This would have the effect of restricting discussion of important issues by the community.[36]

Concerns about Classification Guidelines

4.14 A number of submissions and witnesses commented that the guidelines for the National Classification Code are subjective and not always interpreted unanimously by the

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32 Submission No 8, Dr Peter Chen

33 Evidence Beal, 6 March 2002

34 Evidence Shannon, 5 March 2002

35 Submission No 18, Ms Yolanda Corduff

36 Evidence Polden, 5 March 2002

Classification Board. Many submissions commented that there was no way that Internet content providers could be expected to understand and predict into what category their content would be classified, particularly as many would be non-commercial operators without access to legal advice on a daily basis.[37]

4.15 As noted by the Arts Law Centre of Australia, the definition of 'community standards', the Classification Board's purported yardstick for deciding whether material falls into particular categories, can change over time. Even the classification of particular items can change: the film *ET* received a PG rating rather than its original G rating when it was reclassified on re-release in 2002. Other films change on appeal to the Classification Review Board, which for instance recently altered the classification of the film *Romance*.[38]

4.16 A number of submissions raised the concern that the use of film guidelines is not suitable for the Internet because very many individuals are Internet publishers whereas, in most other media, publishers are a small number of larger organisations such as film distribution companies or newspaper proprietors. One commented that while the classification rating scheme depends on a model where consumers purchase from publishers with no sale or resale by consumers, peer to peer file swapping (without necessarily involving payments) is an important part of Internet communications. This submission suggested that there should be a mechanism for accurate "Do it Yourself" rating of material.[39]

4.17 Mr Des Clark, Director of the OFLC, acknowledged that fees for classification are significant although he told the Committee that the Office does offer exemptions from fees for categories such as student film makers.[40] However the costs in time and money of classification of material are likely to be sufficiently high to deter people seeking legal certainty. As the witness from Electronic Frontiers Australia told the Committee:

> Commercial organisations, such as ninemsn and so forth will, of course, be able to afford lawyers to advise them on how the lawyer thinks the OFLC might classify something. Those organisations could even afford to pay the OFLC $700 to classify a single web page. It is not really going to affect commercial organisations. Certainly they could comply. They will not want to have to pay to get things classified, but they are running commercial businesses and are in a better position to pay for classification to make sure they are not breaking the law. Ordinary individuals and non-profit groups just cannot afford to do that. They are basically [going to] be intimidated by law that says that if they take a substantial risk that the material could be R-rated they will end up in court.[41]

37 For example, Submission No 8, Dr Peter Chen

38 Evidence Beal, 6 March 2002. The Committee also notes recent media reports that the Review Board altered the classification of the film *Baise Moi* from R to RC.

39 Submission No 24, Brendan Scott

40 Evidence Clark, 5 March 2002

41 Evidence Graham, 5 March 2002

4.18 Some submissions suggested that the provisions of Schedule 2 of the Act not commence until the Office of Film and Literature Classification established an inexpensive voluntary classification service for on-line material.[42]

Impact on business

4.19 A number of submissions have claimed that a major impact of the Act will be to discourage on-line businesses from establishing themselves in NSW.[43] One witness suggested that because of the legal vagueness about the coverage of the Act the IT industry would avoid establishing businesses in NSW.[44] A further concern was that local sites such as ninemsn.com.au might be unwilling to act as portals and host chat rooms if they could be held liable for the content of these discussions. This could lead to a lack of sites available to discuss matters of local interest.

4.20 A recent academic survey of adult industry participants indicated that industry members operating websites were more likely to move operations to overseas servers than to undertake actions to make them compliant with the Australian on-line regulatory model.[45]

4.21 The Australian Society of Authors and Australian Publishers Association stated that restricted access systems would deter customers from entering sites. This could have significant impacts on any e-commerce sites.[46]

4.22 Electronic Frontiers Australia have also identified a serious risk to business in that, if material is protected by a restricted access system, it will not be included in search engine results and potential customers would not learn about sites except through advertising or links on other sites containing R-rated material.[47]

Advertisements for material unsuitable for minors

4.23 Some witnesses noted that the Act is broader in scope than the Commonwealth legislation for on-line content because it includes advertisements for RC- or X-rated material in the definition of material that is objectionable and advertisements for R-rated material in the definition of material unsuitable for minors irrespective of the content of the advertisements themselves.[48]

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42 Submission No 8, Dr Peter Chen, Submission No 31, Electronic Frontiers Australia. Submission No 21, from the Australian Computer Society, suggested maintaining an on-line register of classified material so people can see what material is classified and in which category.

43 Submission No 22, Internet Society of Australia

44 Evidence Coroneos, 6 March 2002

45 Dr Peter Chen, *Adult Industry Censorship Survey 2002*, Centre for Public Policy, University of Melbourne, 2002, p 3

46 Submission No 23, Australian Society of Authors and Australian Publishers Association

47 Electronic Frontiers Australia, *Submission on Draft Model State/Territory Legislation On-line Content Regulation*, 1999, p 22

48 For example, Evidence Simes, 5 March 2002

4.24 Although the definition of advertisement in the Act itself is quite broad (consistent with section 5 of the Commonwealth Classification Act) and can include any medium, this is moderated in the definition of on-line material unsuitable for minors which provides that an advertisement for R-rated material would consist of:

> an advertisement for any such film consisting of or containing an extract or sample from the film comprising moving images.[49]

4.25 As noted by a witness from the ABA, the Commonwealth BSA definition of "prohibited content" only includes advertisements if they would be classified prohibited content themselves.[50]

4.26 The Committee notes this inconsistency between the two Acts. There appear to be stronger penalties for NSW content providers than for other jurisdictions and content providers could be prosecuted for supplying material which would not be subject to take-down provisions under the Commonwealth complaints scheme.

4.27 This is also inconsistent with other media. Witnesses pointed out that newspapers are able to carry advertisements for R-rated movies and in video libraries there are no restrictions on minors inspecting the cases for R-rated videos.[51]

4.28 Electronic Frontiers Australia contended that "advertisement" is defined too broadly in the Act and could include references to websites, even the URLs, and quotations from books. The Committee notes that this is only the case for X and RC advertisements as advertisements for R-rated material would only meet the definition of Internet content not suitable for minors if they consist of extracts of a film comprising moving images.[52]

4.29 The Committee notes the possible consequence that websites in NSW could inadvertently contain objectionable material simply by carrying a link to a site anywhere in the world which contained material considered objectionable in NSW. Managers of websites based in NSW would be limited in relation to the type of advertising for Internet services or sites they would be able to carry on their sites as there would be a risk that overseas advertising could be for material considered objectionable here. This may place an exceptionally high burden on business.

4.30 The Australian Visual Software Distributors Association of Australian expressed concern about the impact on video retail sites in NSW if clips for R-rated movies were not allowed on NSW sites as customers would be able to go to overseas sites for the same material from which they might choose to purchase products.[53] This could severely limit the ability of locally based sites to operate profitably.

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49 s45A

50 Evidence Shipard, 6 March 2002

51 Evidence Simes, 5 March 2002, Evidence Haines, 11 April 2002

52 Electronic Frontiers Australia, *Submission on Draft Model State/Territory Legislation On-line Content Regulation*, 1999, p 8, s5A

53 Evidence Simes, 5 March 2002

Impact on reporting of news

4.31 The Committee heard from John Fairfax Holdings Limited and the Society of Authors and the Australian Publishers Association that much material currently freely available in newspapers would not be accessible on-line because it could be R-rated. For example, Mr Mark Polden from John Fairfax Holdings suggested that the Fairfax f2 website could not have reported on-line the details of the recent controversy about the performance of the Governor-General in his former role as Archbishop of Brisbane.[54]

4.32 Mr Polden stated that one consequence of this lack of electronic equivalence would be felt more acutely by residents of regional and remote areas as:

> City people can go and buy this in the newspaper but if you are relying on the Internet out in the country you may have a real problem in getting access to news and current affairs.[55]

4.33 Mr Polden also recommended that there be an explicit exemption from the requirements of the Act for media organisations similar to that currently operating for broadcast media.

4.34 The Committee considers that in its current form, Schedule 2 may present difficulty for newspapers in making available on-line material that is freely available off-line. However it is also likely that large media organisations with access to in-house legal advice would be well equipped to determine what is suitable in the two media.

4.35 Non-commercial sites discussing news or current affairs such as student newspapers, might have more difficulty and could inadvertently make available on-line material which would be considered objectionable or unsuitable for minors. This is a serious issue given that one of the great strengths of the Internet is the potential for non-commercial operators to present discussion and opinion on current affairs.

Conclusion

4.36 On balance, the Committee considers that the proposed model for regulation of Internet content in Schedule 2 of the Act may restrict legitimate Internet use by adults as the model does not reflect the full range of ways that people are currently using the rapidly changing medium.

4.37 The range of possible negative impacts of the scheme, including the potential for self-censorship and restriction of fair reporting of news and current affairs, suggest that alternative ways to achieve the objectives of the scheme should be considered.

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54 Submission No 23 Australian Society of Authors and the Australian Publishers Association, Evidence Polden, 5 March 2002.

55 Evidence Polden 5 March 2002

Finding 1

The Committee finds that:

- the proposed model for regulation of on-line content contained in Schedule 2 of the Act could have a significant effect on the legitimate use of the Internet and may affect the fair reporting of news and current affairs,
- the major negative social impact of the on-line regulatory regime established by the Act is that legitimate use of the Internet by residents of NSW may be deterred,
- the provisions contained in Schedule 2 may have the unintended consequence of criminalising a wide range of academic or other material which would be legal to publish off-line, and
- Schedule 2 is more likely to have an impact on non-commercial providers of Internet content than commercial providers. This may restrict the range of material that is available on the Internet.

4.38 As a result of this finding, the Committee makes the following recommendation about assisting the public to understand how material should be classified. As the definition of "prohibited content" in the Commonwealth BSA also relies on the Classification Code, this recommendation remains relevant for appreciating what material would be subject to take-down notices even if Schedule 2 does not commence.

Recommendation 1

The Committee recommends that the Attorney-General ask the Office of Film and Literature Classification to assist the enforcement of the national on-line regulatory scheme by:

- providing the public with detailed information (including examples) about interpretation of the National Classification Code as it applies to on-line material, and
- offering a timely, low-cost, voluntary classification of on-line material service for non-commercial on-line content providers to use prior to uploading.

Chapter 5 Other legal impacts

In this Chapter the Committee addresses the remaining legal impacts of the on-line regulatory regime established by Schedule 2 of the Act.

5.1 Many submissions and witnesses raised concerns about the legal impacts of the Act. These include concerns about:

- inconsistencies between the Act and respective Commonwealth, State and Territory legislation and the operation of the national classification scheme,
- the application of the National Classification Code guidelines for film to Internet content,
- the definition of particular terms, including "making available or supplying" and "Internet content",
- the adequacy of defence provisions, and
- the difficulty of establishing the location of an offence.

Lack of consistency with the Commonwealth model of on-line regulation

5.2 Several witnesses and submissions to the inquiry commented that the Act's provisions were not consistent with the regime established for on-line material in Schedule 5 of the Commonwealth *Broadcasting Services Act 1992* (the BSA) and the National Classification Code.[56] Mr Phillip Argy of the Australian Computer Society expressed these concerns in evidence:

> [T]he intent of the Standing Committee of Attorneys-General was that the States would have complementary legislation. That was only to fill in the blanks, if you like, where Federal law could not properly go. That is why I say if that is what was intended this Bill spectacularly failed to achieve that objective because it is not tracking the Federal legislation and does not operate in the same way. If this were simply a State version of the Federal regime, our position would be identical to what it was with the Federal regime. This is quite different.[57]

5.3 In particular, a number of witnesses and submissions were concerned that the Act appears to reverse the normal onus of proof for classification offences because it does not require material to have been classified before an offence may have occurred. This is because the Act defines "objectionable content" or "content unsuitable for minors" in terms which do not require it to have been already classified as R, X or RC, but rather as potentially meeting those categories if it were to be classified. The offences of supplying or making available content which is either objectionable or unsuitable for minors consist, in part, of

56 For example, Evidence Argy, 5 March 2002, Evidence Patten 11 April 2002

57 Evidence Argy, 5 March 2002

being reckless as to whether the material would meet these criteria, not merely of knowledge that it is so classified.[58]

5.4 By contrast, under the scheme for regulating Internet Service Providers and Internet Content Hosts established by the BSA, the Australian Broadcasting Authority (ABA) is able to issue interim take-down notices to "potential prohibited content" that is, material which has not yet been classified but there is a substantial likelihood that it would be prohibited content if classified.[59] Final take-down notices are not issued until after classification as "prohibited content". The Arts Law Centre of Australia argued that the NSW Act is not consistent with the Commonwealth Act because it does not establish a similar scheme of take-down notices.[60]

Lack of consistency with other States and Territories

5.5 Schedule 2 of the Act contains provisions based on national model provisions for Internet content regulation which were approved by the Standing Committee of Attorneys-General in 1999.

5.6 As noted in Chapter 2, Western Australia, the Northern Territory and Victoria have independently enacted legislation to regulate Internet content. These pieces of legislation differ from the model national provisions. For example, they all include offences of making material unsuitable for a minor available to a minor rather than simply making it available without a restricted access system in place.[61] South Australia and the Australian Capital Territory introduced Bills based on the same model as the NSW Act, however they have not been implemented.[62] As noted by the witness from Electronic Frontiers Australia:

> The basis of this Bill comes from model legislation that was written in August 1999. It is 2½ years down the track and there is no real evidence that most governments intend to enact it.[63]

5.7 If Schedule 2 was commenced it would not lead to nationally uniform legislation for regulating Internet content. There are other inconsistencies in the application of the national classification scheme, such as the availability of X-rated films in the Australian Capital Territory. While lack of consistency with other States and Territories is in itself not a compelling reason for not commencing Schedule 2, the fact that it would not contribute to a national scheme reduces the strength of the case.

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58 For example, Submission No 31, Electronic Frontier Australian, s45A-45D

59 s11 Schedule 5 BSA

60 Evidence Beal, 6 March 2002. The Arts Law Centre was particularly concerned that s61A of Schedule 1 of the Act provided that penalty notices could be issued for some as yet unstated offences which could include the supply of unclassified on-line content. For this reason, the Interim Report of this inquiry recommended that s61 be amended to preclude the issuing of penalty notices for unclassified material.

61 Gareth Griffith, "Censorship in Australia: Regulating the Internet and other recent developments", Briefing Paper 4/02, NSW Parliamentary Research Service, February 2002, pp 32-33

62 Evidence Nicholson, 6 March 2002

63 Evidence Graham, 5 March 2002

Definition of certain terms

5.8 The Committee heard that the Act could contribute to legal uncertainty about its application because of vagueness in the definitions of "Internet content" and "making available or supplying".

5.9 The Act relies on the definition of "Internet content" in the BSA which it quotes in s45A as:

> Information that is kept on any article or material (for example, a disk) from which information is capable of being reproduced, with or without the aid of any other article or device and that is accessed or available for access, using an Internet carriage service (as defined in that Act) but so as not to include ordinary electronic mail or information that is transmitted in the form of a broadcasting service.

5.10 The Internet Society of Australia expressed concern that mailing lists may fall outside the definition of ordinary electronic email and recommended that all interpersonal communication be excluded from the definition of on-line material.[64]

5.11 It is also not clear whether real time chat rooms would be included in the definition of Internet content. The content of these conversations can be ephemeral and similar to email except that it is stored for varying lengths of time and is accessible to others. Many chat rooms are not monitored and it has been suggested that they frequently contain objectionable material or material unsuitable for minors. Because the term "making available or supplying" has not been defined, there is the potential consequence that the portals hosting chat rooms could be held responsible for making available or supplying objectionable material or material unsuitable for minors. A witness from John Fairfax Holdings identified a risk that sites would not want to act as portals if they could be prosecuted for the content in stored chat sessions as they would be making this content available.[65] Mr Peter Coroneos of the Internet Industry Association stated in evidence that portal sites would not be willing to monitor the content that they are hosting although they would assist in the apprehension of perpetrators if they were identified by other means. He suggested that there should be exemptions from the application of the legislation for mere providers of a portal where there was no control over the content.[66]

5.12 The Arts Law Centre of Australia was concerned that the definition of "making available" could include NSW-based people who cache a website which contains objectionable matter from an overseas source which is then used by others as, technically, they made it available to others.[67]

5.13 A witness from the Australian Computer Association commented:

> To give you an example, to take an extreme, if this legislation were to be passed and any of my clients ask me to vet material they propose to make available on-

64 Submission No 22, Internet Society of Australia

65 Evidence Polden, 5 March 2002

66 Evidence Coroneos, 6 March 2002

67 Submission No 35, Arts Law Centre of Australia

> line they would be committing a criminal offence because for me to be able to view it and advise on it I would have to look at it, and they cannot make it available to me. To me that demonstrates that it has gone too far: it is not achieving its objective.[68]

5.14 The Hon Peter Breen MLC noted in his submission that uncertainty in the definition of "making available" could also be contributing to excessive filtering of information:

> Most people's "gateway" to the Internet is through "search engines", such as Google and Yahoo!. However, these services could be liable under the new offences in the Act, because they are "knowingly…making available" objectionable matter or matter unsuitable for minors. Therefore it is possible that these services will filter the Internet as a matter of course, making this their default standard configuration.[69]

5.15 The Committee notes that the definitions in the BSA and the NSW Act do not cover all the possible ways in which the Internet is used and considers that this is a consequence of the rapidly changing nature of the medium. It notes, in particular, points raised by the Internet Industry Association and the Australian Visual Software Distributors Association that the Act is unclear about the definition of peer to peer file sharing arrangements and business to business communications which rely on virtual networks rather than email. For instance the Australian Visual Software Distributors Association represents companies who manage their business to business sales (which could include R-rated material) through restricted websites requiring a PIN and have not received advice that this would meet ABA criteria for a restricted access system.[70]

Adequacy of defence provisions

5.16 The Committee has heard concerns that the defence provisions available in the Act are inadequate. For instance, Electronic Frontiers Australia stated, in a submission in response to the national model provisions, that it is unclear whether the defence that there was a restricted access system depends on whether the system was operating at the time content was uploaded or when it was accessed by someone else. The EFA suggested that this has the potential to reverse the normal onus of proof in an unacceptable manner because content providers may not have control over whether a restricted access system was functional.[71] The Committee notes that the South Australian parliamentary inquiry into a similar Bill recommended amending this provision so that it was clear that the content provider was not responsible for ensuring the restricted access system was functional at all times.

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68 Evidence Argy, 5 March 2002

69 Submission No 27, the Hon Peter Breen MLC

70 Evidence Simes, 5 March 2002

71 Electronic Frontiers Australia Submission Draft Model State/Territory Legislation On-line Content Regulation, downloaded from *http://www.efa.org.au/Publish.agres9909.htm*

5.17 The Arts Law Centre of Australia suggested that if Schedule 2 were to be implemented, an additional defence relating to articles of genuine artistic merit should be established.[72]

Difficulty of establishing location of an offence

5.18 A further area of uncertainty created by the Act is the location of an offence. The Committee notes that the Internet is a medium that crosses State and national borders. Material published from one place is available around the world.

5.19 Many submissions and witnesses noted that there would be a great deal of difficulty in defining the limits of territory covered by the Act. As one submission noted:

> One of the Bill's chief failings is that it completely fails to address issues of jurisdiction or define the location of an offence. Considerations that are absolutely vital in Internet law. If somebody located in NSW accesses material stored on a Victorian server and sends to another person in Queensland... in which state does the offence take place?[73]

5.20 The South Australian parliamentary inquiry considered that, if someone uploaded objectionable on-line content from South Australia, an offence would be committed no matter where the content was hosted.[74]

5.21 However, some submissions have suggested that it is potentially the case that if material is available to be seen from NSW, an offence would have been committed under the Act. According to a witness from the Internet Industry Association:

> Typically, as I see it, if a person posts material to a chat site accessible from New South Wales to another person on the chat site in another country. If it is objectionable material, the first person has committed an offence under New South Wales law, notwithstanding that neither party is in New South Wales. The question is are you serious about that and how are you going to enforce it? Are you going to try to extradite that person? The next time they visit Australia for a holiday are you going to arrest them at the airport? That is a real question. I am not trying to trivialise this, except to say there was an important decision in the Yahoo! case in France that you are possibly aware of, involving Yahoo! making available access to Nazi memorabilia, which is a very sensitive area, particularly in France. They sought to impose those restrictions; the court sought to exercise its jurisdiction over Yahoo! America.[75]

5.22 As pointed out by Mr Mark Polden of John Fairfax Holdings, of particular relevance to this question is a recent defamation case *Gutnick v Dow Jones* which stated that publication happened wherever material was available:

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72 Evidence Beal, 6 March 2002

73 Submission No 16, Mr Geoffrey Brent

74 Parliament of South Australia, *Report of the Select Committee on the Classification (Publications, Films and Computer Games) (Miscellaneous) Amendment Bill (No 2) 2001*, October 2001, pp 12-13

75 Evidence Coroneos, 6 March 2002

> You have big problems there with the way it is presently drafted because it does not nominate the jurisdiction in which the publication is said to occur. At the moment the law under *Gutnick v Dow Jones*, which is going on appeal to the High Court shortly,…says that publication happens where somebody reads it. So, if you are trying to control what people read and see in New South Wales, you will end up with a situation, is one going to seek to give New South Wales law an extraterritorial effect and prosecute people who actually reside in, say, Queensland? Alternatively, are you going to be able to prevent people who have their web server or are supplying content in New South Wales from publishing it everywhere else but not in New South Wales? The New South Wales Parliament might legitimately say, "Our primary and really only concern is for the children of New South Wales", but in practical terms that is a real problem.[76]

5.23 The Committee considers that this is a complex legal area and has the potential to sow confusion among providers of on-line material.

Conclusion

5.24 There is a range of considerations that do not support the implementation of the proposed scheme. The Act as drafted will not contribute to a nationally consistent scheme of regulation of Internet content. Uncertainty about the application of the Act to particular material could result from definitions which do not consider ways in which the medium is currently used. The coverage of the Act is likely to be broader than was originally intended and does not recognise the particular circumstances of the way people use the emerging medium of the Internet.

[76] Evidence Polden, 5 March 2002

Chapter 6 Effectiveness of Schedule 2

In this Chapter the Committee addresses two aspects of the terms of reference in relation to the provisions in Schedule 2 of the Act:

- whether the Act provides an effective and enforceable regime for the regulation of on-line material and
- whether the Act meets its stated policy objectives.[77]

Enforcement regime

Level of resources required for effective enforcement

6.1 The Committee was told by a number of witnesses that the Act would be very difficult to enforce in any meaningful sense, because it would be impossible to prevent the making available of objectionable material on-line. A witness from Sharon Austen Limited queried whether enforcement activity could effectively prevent the uploading of objectionable content:

> If the police do not have the inclination to prosecute someone in George Street, how on earth are they going to prosecute someone who is a web master in their bedroom, uploading material. I have been trying to think in my mind the process of how does a policeman stop someone uploading explicit material onto a site that is posted in Denmark. I cannot even work it out.[78]

6.2 One witness suggested that devoting a significant level of resources to an enforcement effort was not the best use of public funding:

> I think that there is a need for a very large enforcement classification mechanism. If this legislation is to be given real bite and teeth and actually operate, one has to ask the question, who is going to make these determinations? Is the OFLC[79] adequately funded? Is it going to need more funding? Is there going to be a New South Wales body? Are the police going to be resourced up? How is it going to work in practice? Is that a good expenditure of public moneys when there may be other ways of approaching this problem. Our sense of it would be that you could be throwing good money after bad and really not achieving very much at all in practical terms. That is certainly our sense of it.[80]

6.3 On the other hand, there is a risk that any enforcement scheme could collapse because of particularly zealous users of a complaint system. Mr Polden from John Fairfax Holdings raised the example of Mr McWhirter, the original "officious bystander" who sought mandatory enforcement of television classification guidelines in the United Kingdom. Mr

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77 terms of reference 1(b), 1(a)

78 Evidence Patten, 6 March 2002

79 Office of Film and Literature Classification

80 Evidence Polden, 5 March 2002

Polden suggested that if legislation was not designed to operate against all objectionable content then perhaps it should be redesigned.[81]

6.4 According to a witness from the Australian Broadcasting Authority (ABA), the complaints hotline/take-down notice scheme can be considered effective because it was not intended to prevent the making available of all objectionable content:

> There is a line of argument that the scheme is ineffectual if you understand its purpose to be to block, for example, all pornography on the Internet. However, as a policy implementer that is not what I understand the scheme to be doing. As far as I understand it, the scheme is to provide people with a place to complain if they come across material that they think goes beyond current community standards and they want action taken. The ABA offers other complaints systems, for example for television, where the first port of call is the industry....Given the fact that we have drawn the conclusion that people would appear to complain to us when they come across material they are not expecting to find, and also our understanding that adult web sites are largely commercial in nature and, therefore, want to be found by clients because they want to earn money. We would appear to be getting complaints about material that is not so much in that area because people know how to avoid those once they have a bit of Internet savvy. But people do not like coming across things they do not expect. It is a bit like going to a movie with your family that you think is going to be a comedy, you take everyone under 12 only to find that it has some very gory, bloody scenes.[82]

6.5 Although this might be the intention of the national on-line regulatory scheme, the Committee does not consider that this is necessarily consistent with the provisions of the NSW Act or its stated policy objective. A largely reactive enforcement regime would not achieve much except possibly deter otherwise law-abiding people from using the Internet to the fullest scope. Without a motivated and highly resourced enforcement body actively seeking potentially objectionable content, the Act is not effective. As pointed out by a witness from the Internet Industry Association:

> At the moment we have still only got probably less than half the community on the Internet but sooner or later people are going to twig to the fact that these efforts are very laudatory in their intention, but are very poor in their effect. When I was at law school they used to say there is one thing worse than a bad law, and that is the law that is unenforceable because it brings the law into disrepute. That is the kind of argument we are running. Let us find a good enforceable law and really try to make that work and leave those bits that are going to be very difficult to enforce to other strategies that will complement those laws, not replace them.[83]

Does the model meet the policy objectives?

6.6 As noted in Chapter 2, the policy objectives of the Act are twofold:

- to protect minors from unsuitable material, and

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81 Evidence Polden, 5 March 2002

82 Evidence Wright, 6 March 2002

83 Evidence Coroneos, 6 March 2002

- to deter the uploading of objectionable material.

Effectiveness of protection mechanisms

6.7 As the Act was designed to operate as part of a national scheme for regulating Internet content, it is appropriate to consider the effectiveness of other protection mechanisms for meeting the Act's objectives by examining:

- the operation of restricted access systems on Australian content to protect minors from unsuitable material, and
- the use of filters for protecting people from known objectionable material.

Restricted access systems

6.8 The Act provides a defence for making available on-line material that is unsuitable for minors if the material was protected by a restricted access system.[84] It defines an approved restricted access system as either the same as in the Commonwealth *Broadcasting Services Act 1992* (BSA) or as declared by the Minister.

6.9 Restricted access systems are used in an attempt to establish that the person seeking access to a site is at least 18 years of age. According to a declaration under the BSA, the essential elements of an approved access system are that people apply declaring that they are at least 18 years of age, their application is assessed and, if approved, they are issued with a PIN or a password which they are not supposed to pass on to a minor. Under the declaration, the tools for verifying age are:

- for electronic applications, either a credit card number or a digital signature, or
- for postal applications, either credit card details or other evidence of age such as a copy of a passport, birth certificate or a driver's licence.

6.10 Approved systems are also required to comply with privacy standards and should provide security for the electronic transfer of credit card information.[85]

6.11 The Committee heard from a number of submissions and witnesses that there were concerns about the effectiveness of these systems for verifying the identity of applicants.[86] Unlike restricting entry to a cinema, there is no face to face assessment of who is trying to gain access, and there are no fool-proof systems. For instance, as pointed out by the witness from the Australian Computer Society:

> Internationally there have been many attempts to implement what are known as adult verification exercises. They range from reasonably simplistic issues, such as saying that if you have a credit card we will assume you are an adult, on the assumption that banks—certainly in Australia at the moment—should not be

84 s45D(2)-(3)

85 Restricted Access Systems Declaration 1999 (No 1)

86 For example, Submission No 11, Mr Craig Small, Submission No 31, Electronic Frontiers Australia

> issuing credit cards to minors. That is in one sense a proxy for adult verification. If you are able to enter a credit card number and the details of it you are assumed to be an adult. Plainly, in the real world, it is not unheard of for children to raid mum's purse or dad's wallet and get hold of a credit card.[87]

6.12 A witness from the ABA told the Committee that they had confidence in these criteria, stating in evidence:

> First of all, we would require registration and a declaration of age and that age declaration must be validated by a credit card validation. We gave a lot of thought to that, but after we had spoken with credit card companies we understood then clearly the practice to be that if you are a minor and you have a credit card you must have an adult or parent or guardian sign for you. We were therefore able to proceed in that way. We were able to receive comfort that minors would not receive credit cards easily or through other pathways; that a parent or guardian had to give consent. We thought that was a good validation means for age.[88]

6.13 In their submission, Electronic Frontiers Australia argued that there are numerous problems with currently available systems such as the unwillingness of credit card companies to verify that a credit card is correct unless a charge has been made to the account, and the ease of using another person's credit card. In a submission on the national model provisions they suggested that these systems could be avoided easily by using a credit card algorithm generator to supply credit card details. These generators are apparently readily available on the Internet.[89]

6.14 Electronic Frontiers Australia was particularly concerned about the impact of restricted access systems on the way that most people use the Internet. The Committee heard that, because people were likely to consider that providing this sort of information in order to verify their age risked their privacy, these systems would be a real deterrent for people to enter non-commercial sites:

> If you are going to put material that would be classified R behind restricted access systems, because there is only one approved restricted access system, adults who want to visit the restricted site will have to do one of two things. The first is to give their credit card details to the website operator and wait for that person to send back a pin number. … I would not [give my credit card details to the unknown operator of a website], because that would be giving criminals a prime opportunity to collect credit card details.
>
> Alternatively, you could send to the website provider a copy of your driver's licence or your birth certificate. This is the other way, under the Australian Broadcasting Authority approved system, that you can get a PIN number to access a restricted site.
>
> You have to send it snail mail; post off a copy of your driver's licence or birth certificate. Why would you give that kind of information to a website you did not

87 Evidence Argy, 5 March 2002

88 Evidence Wright, 6 March 2002

89 Submission No 31, Electronic Frontiers Australia, and Electronic Frontiers Australia, *Submission Draft Model State/Territory Legislation On-line Content Regulation*, Sep 1999, p 21

> know? What I am coming down to is the restricted access system in the end makes New South Wales content providers unable to provide the material that would be classified R, because the majority of potential visitors to their sites, adults, are not going to send their credit card numbers or their birth certificates in order to access that website. Potential visitors will take one look at the fact that they have to send identifying information and they will be gone to a website in Western Australia, Canberra or the United States of America.[90]

6.15 The EFA also told the Committee that restricted access systems only suit the adult industry sites which aim to sell products to customers paying by credit card. These systems do not suit most forms of net surfing where attention spans are brief.[91] Another submission commented that complying with the security requirements was very onerous for non-commercial sites.[92]

6.16 The Committee notes that use of a digital signature could avoid use of a credit card, however it appears that this technology is not sufficiently developed to enable its widespread use as a way of verifying adult identity.

6.17 The Committee agrees with the view that the mandatory use of restricted access systems for R-rated material is likely to be ineffective in protecting minors from unsuitable Internet content as the use of these systems does not guarantee that minors are excluded from viewing unsuitable material.

Filters

6.18 Under the codes of conduct for Internet Service Providers (ISPs) developed by the Internet Industry Association and approved under the BSA, ISPs are required to offer customers access to an approved filter. The makers of "approved filters" have agreed to filter out internationally hosted sites which have been notified by the ABA as containing prohibited content. A witness from the ABA stated in evidence that the choice of availing themselves of filters has probably contributed to the small number of repeat complaints they receive.[93] (The effectiveness of filters is discussed in Chapter 7).

6.19 However, the Committee notes that the use of filters is purely voluntary. Therefore, residents of NSW are free to see objectionable material, that is material which is illegal to host in Australia, if they do not choose to use filters.

6.20 The Committee considers that restricted access systems and filters are not completely effective in protecting minors from unsuitable material, or from protecting adults from known objectionable material.

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90 Evidence Graham, 5 March 2002

91 Evidence Graham, 5 March 2002

92 Submission No 8, Dr Peter Chen

93 Evidence Wright, 6 March 2002

Content outside the ambit of the Act

6.21 As discussed in Chapter 5, the Committee was told by a number of people that the Act would have limited effectiveness because it could not affect material hosted internationally and it did not cover direct emailing or real time chat.[94] For instance, there is nothing in this Act which prevents a predatory paedophile from sending explicit material to a child by email. One submission described the alleged supply of pornographic material to a child by a modem-based system mimicking an Internet connection which would also be outside the coverage of this Act.[95] The Committee notes that some of these offences could be addressed through other legislation such as the Commonwealth Telecommunications or Crimes Acts, but considers that the legal limitation of the Act's coverage does seriously reduce the potential effectiveness of the on-line regulatory model.

6.22 The jurisdictional problem referred to in Chapter 5 means that there is a high degree of likelihood that uploading content on overseas based sites would normally lead to evasion of the possibility of prosecution under the Act. A parliamentary inquiry into a similar Bill in South Australia considered that overseas or interstate based content would still be covered by the local law. However, any enforcement body would need to identify the content provider and that they were based in NSW before action could be taken. The Committee considers it unlikely that R-rated material hosted overseas (which does not need to be protected by a restricted access system) would lead to enforcement action.[96]

6.23 As noted by a witness from Watch on Censorship, the Act cannot directly prevent internationally hosted Internet content being available.[97] A witness from the ABA stated that the great majority of material about which they had received complaints was hosted overseas. However, she also stated that the ABA can deal with international content indirectly by working with international law enforcement agencies and hotlines to either remove it or to discourage people from accessing it.[98]

6.24 The Committee considers that these initiatives are only likely to cover the more extreme forms of objectionable material such as child pornography. As will be described more fully in Chapter 7, there can be no obligation on international bodies to apply Australian definitions of objectionable material to Internet content.

6.25 When asked whether the Act would meet its policy objectives, Mr Peter Coroneos of the Internet Industry Association stated:

> [T]he paradigm of a government creating legislation in response to a community need does not translate that well in a medium that is global and as instantaneous

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94 eg Submission No 35, Arts Law Centre of Australia, Submission No 31, Electronic Frontiers Australia

95 Submission No 34, Mr Mark Dunstone

96 Parliament of South Australia, *Report of the Select Committee on the Classification (Publications, Films and Computer Games) (Miscellaneous) Amendment Bill (No 2) 2001*, October 2001, p 13

97 Evidence Shannon, 5 March 2002

98 Evidence Wright, 6 March 2002

> and diffuse as is the Internet. I think particularly in the case of pornography, where so much of the content is hosted outside Australia, created by people from outside Australia, completely outside the reach of any Australian legislature or regulator, the single act of passing legislation, quite frankly, will not do anything more than show the community that you are concerned about the issue. But if you are serious about delivering an outcome, then there are probably better ways to do that….To be perfectly frank, if you were to ask me whether this legislation will deter making objectionable material available on the Internet, my answer would be that it could in respect of a limited amount in New South Wales but in terms of the ocean of content—the 1.6 billion pages that Google now catalogues—I do not think the answer would be yes.[99]

6.26 A witness from Electronic Frontiers Australia, Ms Irene Graham, commented that the Act was trying to achieve the impossible:

> [I]t is not that we are saying that children should be able to access unsuitable material. We do not agree with that at all. But the legislation basically is trying to legislate against it raining. It is not going to work. What will happen is that it will restrict adults' rights on-line far more than off-line, whilst not actually achieving anything towards protecting children. [100]

6.27 Ms Graham also stated in evidence that it is very difficult for users to identify whether sites are based in Australia or overseas. This makes it difficult to protect children by limiting them to visiting Australian-based sites only where unsuitable material should be protected by restricted access systems. She also commented that the regime in this Act could lead to parents having a false sense of security and even exposing children to risks of predatory paedophiles:

> We think the legislation is potentially dangerous because we think it is giving parents who are not knowledgeable about the Internet a false sense of security. In effect, you have legislation that is saying to parents, "The Government has fixed the problem. We have banned this material on the Internet." We do not believe that this legislation is going to help protect children at all. It needs parents to be responsible for what their children are accessing and we really feel there is a risk of this false sense of security amongst people who do not understand the realities of the Internet.[101]

Conclusion

6.28 As noted in Chapter 2, the regulatory model contained in Schedule 2 is based on model national enforcement provisions approved by the Standing Committee of Attorneys-General in 1999. The Committee notes that if the Act were to commence, NSW would be the first, and possibly the only, State to implement the "national" provisions.

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99 Evidence Coroneos, 6 March 2002

100 Evidence Graham, 5 March 2002

101 Evidence Graham, 5 March 2002. Similar views were expressed in Evidence Coroneos 6 March 2002

6.29 The Committee also notes that the national on-line regulatory scheme must be reviewed before January 2003. There will be little opportunity for the scheme to operate before this review and therefore limited value in commencing the Act.

6.30 Schedule 2 of the Act does not contribute to an effective regime for the regulation of on-line material if material that cannot be legally provided in NSW is still readily accessible from other sources.

6.31 Schedule 2 has the potential to meet some of the policy objective of deterring the uploading of "objectionable material" by NSW residents but it is unlikely to deter those determined to evade prosecution or protect minors from the worst sorts of unsuitable material of which the majority is from overseas.

6.32 The Committee considers that these conclusions do not mean that the NSW Government should not regulate Internet content at all, but other ways should be found to ensure that regulation is effective, enforceable and proportionate to the scale of the problem that it is intended to address.

Finding 2

The Committee finds that

- the on-line regulatory regime established by Schedule 2 of the Act will not meet the policy objectives of deterring the making available of objectionable matter and protecting minors from unsuitable material in any practicable sense, and
- the proposed regulatory model is neither effective in meeting the policy objectives of the Act nor enforceable without the allocation of an unrealistically high level of resources.

Recommendation 2

The Committee recommends that Schedule 2 of the *Classification (Publications, Films and Computer Games) Enforcement Amendment Act 2001* be repealed.

Chapter 7 Other ways to achieve the objectives of Schedule 2

In this Chapter, various tools for managing access to on-line material are evaluated in order to identify the best ways to meet the policy objectives of the Act. These tools are drawn from a consideration of the available regulatory models both in Australia and in other countries.

Alternative forms of regulation

7.1 Apart from the issues discussed in previous chapters of this Report, the Committee was told that there was no need for the Act as:

- the *Crimes Act 1900* (the Crimes Act) already contains adequate provisions for prosecuting people making indecent material available on-line, and
- the Commonwealth *Broadcasting Services Act 1992* (the BSA) provides for the removal of objectionable material from websites with take-down notices.[102]

7.2 As discussed in Chapter 2, publication of an indecent article and possession of child pornography are offences with significant penalties under the NSW Crimes Act.[103] As noted in one submission, child pornography is already illegal and banning it twice will not make it go away any quicker.[104]

7.3 A South Australian parliamentary inquiry into a similar Bill examined the need for provisions for taking action against the provision of inappropriate Internet content. That Committee concluded that the provisions were required because the South Australian criminal law did not cover uploading of indecent material.[105] In NSW, however, the Crimes Act has been amended to deal with on-line pornography with the result that "publication" is taken to include publication on-line.[106]

7.4 One witness suggested that the Crimes Act should be strengthened to target the worst sorts of abusers on the Internet:

> Our feeling at the moment would be that the criminal provisions probably belong more properly in the Crimes Act, which could be toughened up to deal with some of the issues that really are at the heart of this. If there is to be some regime that deals generally with on-line material as opposed to, say, a specific offence of deliberately providing a minor with unsuitable or objectionable material, then there might be another category of regulation that needs to come in in terms of

102 eg Evidence Beal, 6 March 2002, Evidence Graham, 5 March 2002, Submission No 21, Australian Computer Society

103 s 578C and 578B NSW *Crimes Act 1900*

104 Submission No 11, Mr Craig Small

105 Parliament of South Australia, *Report of the Select Committee on the Classification (Publications, Films and Computer Games) (Miscellaneous) Amendment Bill (No 2) 2001*, October 2001, p 11

106 G Griffiths, *Censorship in Australia: Regulating the Internet and other Recent Developments*, NSW Parliamentary Research Paper 4/02, February 2002, p 34, p 42

> industry code or something of that kind. I think we would see a possibility of splitting some of it off into the Crimes Act and having more of a light touch regulation so far as other material is concerned.... Alongside that one could toughen the provisions in the criminal law dealing with people who deliberately go out, the predatory paedophile, if you like.[107]

7.5 The maximum penalties in the Crimes Act are in the order of 10 times as high as those in Schedule 2 of the Act. It is likely that these provisions would be more of a deterrent to the uploading of highly objectionable content than Schedule 2 of the Act.

7.6 The Committee considers that the Crimes Act is the most appropriate place to locate criminal provisions that deal with the publication of extremely dangerous or offensive material on-line. The Committee has not taken extensive evidence on the effect of the existing Crime Act offences but is aware that there are differing views on the adequacy of these provisions. The Committee therefore considers that the provisions of the Crimes Act should be reviewed to determine whether they provide a sufficient basis for prosecution of people who place highly dangerous or offensive material on the Internet. Such a review could take account of the outcomes of the forthcoming review of the on-line provisions of the BSA and could take place in conjunction with all other Australian jurisdictions.

7.7 The Committee notes that reliance on the Crimes Act will not address the issue of whether sufficient resources will be devoted to the enforcement of provisions penalising the provision of on-line content. However, it is more likely that law enforcement resources would be used to address serious instances of publication of dangerous or offensive material than the broad range of material potentially covered by Schedule 2.

Recommendation 3

The Committee recommends that:

- for the time being, Internet content should be regulated using the relevant provisions of the *Crimes Act 1900*, and
- the Attorney-General should review the existing provisions of the *Crimes Act 1900* relating to on-line content with a view to determining whether these provisions provide a sufficient basis for prosecution of people who publish highly dangerous or offensive material on-line.

Amendment to Schedule 2

7.8 An alternative to repeal of Schedule 2, as recommended in Chapter 6 above, would be to amend the Schedule in a way that addresses the key concerns raised in this inquiry.

[107] Evidence Polden, 5 March 2002

Repeal of Section 45D

7.9 A major concern related to the consequences of restricting the publication of on-line material that could potentially be rated R. One way of addressing this would be to repeal Section 45D which makes it an offence to make available or supply matter unsuitable for minors, unless there is an approved restricted access system in place. This would address the concerns raised in Chapter 6 about the difficulties non-commercial sites reportedly have in using restricted access systems because they are not user friendly and have quite high compliance costs. This approach would render the Act less likely to deter the legitimate use of the Internet for communication, research and entertainment purposes.

Amendments to address advertisement anomaly

7.10 The Committee considered whether the Act could be amended to address concerns about the definition of advertisements in the Act where regardless of their contents:

- any form of advertisement for X and RC material is defined as "objectionable material", and
- advertisements consisting of moving images for R-rated material are defined as "unsuitable for minors".

7.11 The proposed amendment would involve removal of any reference to advertisements in the definitions. This means that advertisements would need to contain R, X or RC content if they were to be included in the definition of objectionable content or content unsuitable for minors. The Committee notes that this would ensure greater consistency with the current system of take down-notices administered by the ABA.

Exemption for news and current affairs

7.12 It was suggested that exemptions could be provided under the Act for dedicated news and current affairs organisations. A witness from John Fairfax Holdings supported this approach as it would make the reporting of news consistent between on-line and off-line media. There are existing exemptions from broadcasting guidelines for news media in order to report potentially disturbing news items in the public interest.[108]

7.13 The Committee notes that there is merit in this proposal. However restriction of such an exemption to established news organisations would not accommodate the diversity of content providers on the Internet and would favour established providers. Any such exemptions would therefore have to be broad in operation.

Exemption for artistic merit

7.14 The Committee also heard that there might be benefit in including an exemption for making available or supplying material on the basis of genuine artistic merit. The Arts Law Centre of Australia suggested that it would be appropriate to introduce a defence of this

108 Evidence Polden, 5 March 2002

nature, meaning that the issue of artistic merit can be introduced as a factor during any court proceedings. The Committee considers that this approach could provide comfort to the arts community.

Conclusion

7.15 The Committee considers that these approaches are preferable to the commencement of Schedule 2 in its current form as they would reduce its impact on the community and business. However, such amendments will not promote nationally consistent legislation and will not take account of the outcomes of the review of the on-line provisions of the BSA.

7.16 It would therefore be preferable to repeal Schedule 2 as a whole, as recommended in Chapter 6, than to amend the Act in these ways. The issue of specific coverage of Internet content regulation should be considered in the recommended review of the Crimes Act.

International examples of on-line regulation

7.17 The Committee found it difficult to identify regulatory models used internationally which would suit Australian cultural and legislative circumstances. In general, most Western countries address concerns about Internet content by relying on non-regulatory approaches combined with local laws for off-line material. For instance, while British police have been given powers to investigate on-line materials and email,[109] the major means of addressing concerns about Internet content are private sector hotlines which pass information to law enforcement bodies. British hotline operators communicate with Internet Hotline Providers of Europe (INHOPE). The work of INHOPE is not Internet specific but addresses activities which would be illegal in off-line media.[110]

7.18 The governments of some countries take a more interventionist approach. China requires ISPs to monitor content and keep records of material accessed by users. ISPs are responsible for blocking large amounts of content. Saudi Arabia has attempted to filter all Internet content by centralising the country's access to the Internet.[111] The Committee does not believe that these approaches are acceptable in Australia.

7.19 In the United States of America, attempts to regulate Internet content at Federal level by limiting the supply of unsuitable material to minors have been challenged for breaching the First Amendment to the Constitution which guarantees freedom of speech. The Communications Decency Act was found to be unconstitutional on these grounds and subsequent legislation, the Children's On-line Protection Act (COPA), was recently

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109 Leonard R Sussman, "The Internet in Flux", *Press Freedom Survey 2001*, www.freedomhosuse.org. p 2

110 Evidence Tayt, 11 April 2002, Evidence Wright 6 March 2002, C Penfold, Australia's Internet Content regulation in the International Context" pp 9-15, *Computers and Law*, No 45, Sept 2001, p 11

111 C Penfold ibid., p 10

partially dismissed.[112] A further Act, the Children's Internet Protection Act (CIPA) which makes the provision of Federal funds to libraries conditional on the use of filters, is currently being challenged by librarians on constitutional grounds.[113] The Committee was told that the Los Angeles public libraries would not accept Federal funding in order to avoid the Act's condition of using filters. The Committee also heard that individual freedoms are protected in some US libraries by placing screens around computers so passers-by are not offended.[114]

The role of international treaties

7.20 One witness told the inquiry that the best way of addressing problematic Internet content would be through developing international treaties:

> The more appropriate way of dealing with something like child pornography in something like the Internet is, first, having criminal law such as the State legislation and, second, national legislation and, third, then entering into international treaties so that there is an international support for the means of not deterring but actually preventing that sort of material getting onto the Net, and there are such international treaties. Once you can have an international agreement as to things that should be prohibited, you can successfully enforce things at an international level and actually stop it from getting onto the Internet. But you cannot do that from within New South Wales, by itself.[115]

7.21 However there are difficulties with extending this approach to cover the range of content which is included in the Act's definitions of objectionable material and material unsuitable for minors. For political, cultural and historical reasons there are quite different definitions of inappropriate material in different countries. For instance, racial vilification is a particular issue for Germany while the French Government recently attempted to force a US-based site to remove Nazi memorabilia from sale. As noted by Electronic Frontiers Australia:

> Concerns about access to content on the Internet vary markedly around the world and regulatory policy reflects this. What is illegal in one country is not illegal in others, and what is deemed unsuitable for minors in one country is not in others. For example films classified R18 in Australia are often classified suitable for persons under 18 in other countries eg *Intimacy* (sex scenes) and *Hannibal* (violence) are classified R18 in Australia but are classified 12 in France. However France prohibits the display of Nazi memorabilia, including on web pages, which is not prohibited in Australia.[116]

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112 http://www.salon.com/tech/wire/2002/05/13/web_smut/index.html accessed 14 May 2002

113 http://www.wired.com/news/politics/0,1283,51591,00.html accessed 15 May 2002, Evidence Nicholson, 6 March 2002

114 Evidence Nicholson, 6 March 2002

115 Evidence Shannon, 5 March 2002

116 Correspondence from Ms Irene Graham, Executive Director Electronic Frontiers Australia, to Committee Director, 28 March 2002, p 3. The Committee notes that Australian adults were recently prohibited exposure to *Baise Moi*, another film shown publicly in France.

7.22 The Committee notes that there is unlikely to be any unanimity in definition of unsuitable material except for the worst types of child pornography. There may even be limitations on this as for instance the draft European Treaty on Cybercrime allows for local variations in the age of consent.[117] However even a "lowest common denominator" approach to enforcement of international treaties is more desirable than no action at all.

Conclusion

7.23 The Committee considers that international agreements are a useful part of a regulatory approach. International agreements regarding enforcement of Internet content removal may be helpful in deterring the uploading of some of the worst forms of objectionable content, and could provide a useful basis for law enforcement given the borderless nature of the Internet. However, they are only part of the answer.

Mandatory filtering of objectionable content

7.24 This section examines whether it is feasible or desirable to require:

- the blocking of all objectionable content by ISPs, and
- the use of filters on individual computers to block access to material unsuitable for minors at sites where minors use computers.

7.25 The first key question is whether this scenario would be possible. The second question is whether it would be culturally appropriate as a way of meeting the policy objectives of the Act. The Committee acknowledges that implementation of this option is highly unlikely but has included it for the sake of completeness.

7.26 The Committee was told that filters are not ideal ways of controlling access to objectionable Internet content because of a number of problems, including the blocking of quite acceptable material. Examples include:

- blocking particular words regardless of the context so that for example information about breast cancer would be blocked because the word "breast" was blocked,
- blocking images whose characteristics resemble flesh tones, such as sand dunes, or
- selecting content to block based on particular concerns that may not be relevant to the Australian environment such as excessive concern about political discussions or religion.[118]

7.27 The Commonwealth Scientific and Industrial Research Organisation (CSIRO) recently undertook a comparison of the performance of various software filtering products for the Australian Broadcasting Authority (ABA) and NetAlert Limited. A witness from NetAlert summarised the results of this project as:

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117 C Penfold, op cit., p 11

118 Evidence Tayt, 11 April 2002, Evidence Nicholson, 6 March 2002

> I think it would be best in describing the outcome of the report to say that filters are probably 80 percent effective, on average. Some are more effective than others in terms of the subject matter that they will highlight or block and again, if you look at the report, you will see that some sites focus on pornography whereas others might focus on racialism or terrorism or something, and I think it reflects the original kind of basis or rationale that the software developer had, so they might have set about writing a filter that was going to specifically inhibit terrorism, for instance, so it does not block pornography that well. You see that quite clearly described in the bar charts in the report and there is quite a diverse result. Some filters might block less than 10 percent of pornography; other filters will block 98 percent.[119]

7.28 The CSIRO report concluded that:

> No filters will ever be 100 per cent effective or resist a determined and informed attacker but many are perfectly adequate in normal use.... A completely safe Internet may well be a very restricted Internet[120]

7.29 In order to block known inappropriate content, a large and sustained effort to identify objectionable material would be required in order to maintain accurate lists of this type of content. This is likely to be a Sisyphean task because, as one witness told the Committee, while it is possible to block websites known to contain objectionable material, numerous others would spring up very quickly.[121]

7.30 While it would be technically possible to protect the community to some level from objectionable content with the allocation of a high level of resources, this would be culturally inappropriate in Australia given the principle underlying the national classification regime that adults should be able to see, hear and read what they like. As a witness from the Internet Industry Association indicated, such an approach would be inconsistent with Western traditions:

> This is a tender area. In fact, when we negotiated the co-regulatory role in relation to content at a Federal level, it was on the basis that ISPs would not have the role of tracking down everyone's Internet activity and reporting on that or mandatorily filtering those sites that people can access. This approach has been tried in countries like China and Burma, under a very military regime, and even there they have had difficulty in making it work. Our argument was that—I guess we are putting on a philosophical hat—in a liberal Western democracy it is really not for government to require common carriers of information, like Australia Post, to open every letter to check the kind of content that is passing through them, if they are the conduit.[122]

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119 Evidence Tayt, 11 April 2002

120 P Greenfield, P Rickwood, H Cuong Tran, *Effectiveness of Internet Filtering Software Products*, CSIRO Mathematical and Information Sciences, September 2001, p 6

121 Evidence Tayt, 11 April 2002

122 Evidence Coroneos, 6 March 2002. Similar views were expressed by Evidence Nicholson, 6 March 2002.

Mandatory age-specific filtering to cover R-rated material

7.31 The Committee has heard that filtering products could help create a safe Internet environment for minors. For instance, a witness from Electronic Frontiers Australia said that "white list" filtering could limit users to sites which had been pre-approved as acceptable:

> [I]f you want them to access only Nickelodeon, you can put on your computer a filtering program that will ensure they can only access Nickelodeon. You can certainly get filtering software that will limit access to a specific set of sites that you have pre-approved. Some types of filtering software work quite differently and do not necessarily properly protect against unwanted access, but you can certainly get packages that are called white lists. Those are all pre-approved sites suitable for certain age groups of children. If you let your children roam the Internet with that software on the computer, they cannot get outside those pre-approved sites, because that is what the software is designed to do. It is the same as saying you will subscribe to only one television channel because you know that is a children's pay-TV channel and if the children turn on that channel it has material suitable for children. These white list software packages work very much like that: the children can still roam around a variety of sites, but they have all been pre-approved.[123]

7.32 Other products which work on "black lists" or content filters are more suitable for older children. However, the use of filters on their own is unlikely to protect minors from all unsuitable material. The Committee heard that this approach would be more powerful when combined with education about the Internet. The use of education strategies is considered below.

Conclusion

7.33 The Committee considers that mandatory use of filtering to protect adults from objectionable material would provide an inappropriate balance of freedom to the community and interfere with legitimate Internet use. It is also very doubtful that widespread filtering would be effective. There does, however, seem to be a role for filtering in protecting particularly younger children from unsuitable material. The Committee considers that discretionary use of age-specific Internet filtering products would provide a high level of protection for minors from unsuitable material.

Promoting education about the Internet and filtering

7.34 A number of witnesses and submissions stressed the need to provide the community with information about how to manage access to the Internet safely, particularly in protecting minors from unsuitable material.[124] According to recent research undertaken by the ABA, the community has expressed a desire for a range of tools from which they are able to

123 Evidence Graham, 5 March 2002

124 For example, Evidence Nicholson 6 March 2002, Evidence Argy 5 March 2002

choose what suits their needs in obtaining a positive on-line experience. A witness from the ABA stated:

> We think industry codes are an excellent idea. We think the hotline is an excellent idea. But without community education and an informed user community you are nowhere at all, are you? So we also put a lot of emphasis on getting the message out there about how people can have a very positive Internet experience.[125]

7.35 The Internet Industry Association considered it important for governments to work with industry in providing information and tools to empower the community:

> Parents are not forced to install these filters and if they do install them they can turn them off at will. It is a very elegant model that we have got here. The model is that under the code, ISPs have to make available to those families the tools and the information to empower them to take control. A family can say "No, thanks, we have already got house rules. We have got our computer in the kitchen and our kids don't look at porn because we have told them that they must not do that." Other families might say, "Actually, we are a bit concerned. We know that filters are not going to solve the entire problem but we have little kids, six years old, and we don't want them to see anything inappropriate. We are going to supervise them but we will have a filter on there as well." In those situations, how the scheme works is that when the ABA gets a notification that a site is outside the classification, within RC or prohibited content in any event, that goes through to the filter company. The filter company then updates the software—this software is often designed to be live updated just like your virus software is, so as new viruses come on the Internet your software automatically knows—it is enhanced to deal with it. It is the same sort of model.[126]

7.36 The Committee heard from a witness from John Fairfax Holdings that parents should take some level of responsibility for their children's access to the Internet:

> It is important to educate parents about the fact that they cannot just abrogate all responsibility to the State and say, "There's a machine over there and I can't control what my children are doing on it." They are expected to exercise a certain degree of supervision with television watching, for example. With the computer it is in fact much easier to track where your kids have been; there is a log there and you can go in and check it. People may not be aware of that, and perhaps it is important to make sure that people are aware of that and have a bit of a program that educates people, whether through schools or otherwise, about issues of that kind, and as to the kind of filtering software that is available. Products can be put onto your computer that will filter out some, but not all, of the objectionable material you are concerned about.[127]

7.37 There are a number of formal education strategies underway to provide the community with appropriate tools for managing Internet access. For instance, the ABA operates a

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125 Evidence Wright, 6 March 2002

126 Evidence Coroneos, 6 March 2002

127 Evidence Polden, 5 March 2002. This view was echoed by a witness from Electronic Frontiers Australia, Evidence Graham 5 March 2002

website called "cybersmart kids on-line" to provide information about filters and safe zones.[128]

7.38 There is a view that governments are not always the best source of information for the public on these issues. A witness from Watch on Censorship suggested that ISPs were an important source of information for people to learn about dealing with the risks of the Internet:

> [T]he only way you are going to educate the parents is through the Internet Service Providers, because that is the connection. One thing a parent has to learn is how to set up an account. That is the point at which you can educate them. That is the way you have got them. You have had your own personal experience, as I have, of going from complete ignorance of the Internet and wondering how even to set up an account. The first person I learned anything about the Internet from was Telstra's help line. You know, "What do I do now? What button do I press." If, at that interface you have an ISP who is under self-regulation providing information and giving handouts, parents concerned for their children are going to absolutely lap up that information and do something about it. If you have legislation in the abstract, parents are probably not even going to know it has been passed, unless you spend a lot of money telling them.[129]

7.39 Watch on Censorship was also very supportive of the work of the Internet Industry Association (IIA) in developing codes for ISPs to provide guides for customers as to appropriate filters that can be used. The Committee heard that the IIA had launched a scheme to improve education about the "Family Friendly ISP Scheme", which involves participating ISPs incorporating a ladybird logo on their home pages which indicates they are compliant with family friendly initiatives. This aims to empower families to take better control of these issues for the protection of their children.[130]

7.40 The Committee also heard evidence regarding the valuable role undertaken by NetAlert Limited, a Commonwealth funded community education organisation. NetAlert provides information to smaller ISPs about their obligations and to schools and concerned members of the public about safe use of the Internet. It operates a website[131] and a hotline and appears to reach a wide range of the community and the industry with a small level of resources.[132] The Committee heard that a large scale media campaign by NetAlert is under development and understands that the Commonwealth Government will soon review the organisation's operations and required level of resources.

7.41 Given the importance of education in informing the public about the best means of dealing with the risks of the Internet, the Committee considers that NetAlert should be encouraged to continue its vital role and be provided with additional resources in order to expand its activities.

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128 http://www.cybersmartkids.com.au

129 Evidence Shannon, 5 March 2002

130 Evidence Shannon, 5 March 2002, Evidence Coroneos, 6 March 2002, http://www.iia.net.au/news/020304.html accessed 11 April 2002

131 http://www.netalert.net.au

132 Evidence Graham, 5 March 2002, Evidence Tayt 11 April 2002

7.42 Education provides the community with tools for managing Internet access including information about filters and how to protect people's privacy. As this report has pointed out, the size, diversity and borderless nature of the Internet means that regulation cannot ensure the safety of those who use the Internet. This means that people are less likely to be offended and surprised by objectionable material if they should encounter it. This approach also helps achieve an environment where minors are protected by appropriate filtering software when they need it and are prepared for dangers when they are older and able to encounter it with less harm. As the Committee heard from a witness from Watch on Censorship:

> Think about it. In the lifetime of a child if they have that safe experience of the Internet at the time when they are not net savvy, before they get to that level of being a bit too clever and able to get around Net Nanny, at least they have had that safe experience. There has been an opportunity for them to be properly educated and informed about it. There is a point at which you cannot stop a 14-year-old child from running out in front of an oncoming car, but you can do everything possible to teach the child that that is a stupid thing to do. You can do everything possible to try to protect them from that harm.[133]

Conclusion

7.43 The Committee believes that work on promoting understanding in the community of the risks inherent in the Internet is likely to provide far better results than simply criminalising content providers.

The most effective tools for managing access to on-line content

7.44 The Committee considers that there are better ways of regulating on-line content than that offered by the Act. The best results seem likely from using a combination of

- the NSW Crimes Act provisions for punishing content providers,
- take-down notices in the Commonwealth BSA for removal of content on Australian sites,
- international agreements that underpin international efforts to deter or remove content placed on overseas sites, and
- increasing the amount of education available to people about the risks of the Internet, including information on appropriate filters.

7.45 This mix of regulatory and non-regulatory tools still offers the opportunity to prosecute people for making available the worst sorts of material, but the community would be better armed to deal with objectionable or unsuitable material because of a higher level of awareness of the risks. This provides a better balance between protecting the public from objectionable material and respecting the rights of adults to see, hear and read what they choose.

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133 Evidence Shannon, 5 March 2002

7.46 The Committee considers that the metaphor of a witness from Watch on Censorship is particularly apt:

> If you envisage the Internet as television, then you'll imagine that you can legislate to control it and prevent things from being in it. I prefer, and I think it is more accurate to perceive of the Internet more like our roads system. You cannot prevent accidents or stop people from seeing dead bodies on the side of the road. You can set road speed limits. You can create things to be as safe as possible, but there will always be unregistered motor vehicles on the road and people haring around doing dangerous things. You can seek to make it a safer place for those who choose to behave responsibly in it. That is by having legislation that creates a level of legal and illegal content. Within that you educate the drivers and have a form of self-regulation so that they are informed about how they can control their environment and make it safer.[134]

Finding 3

The Committee finds that:

- a far better way of achieving the policy objectives of the Act would be to use a combination of
  - (a) the current provisions in the *Crimes Act 1900* for prosecuting suppliers of seriously offensive content,
  - (b) the complaints/take-down notices system established by the Commonwealth *Broadcasting Services Act 1992* for removing less offensive content,
  - (c) the voluntary use of appropriate filters, and
  - (d) increased efforts to provide education and advice to the community and parents about the safe use of the Internet both for minors and adults.

Recommendation 4

The Committee recommends that, in order to increase community awareness of the safe use of the Internet, the Attorney-General should approach his Federal counterpart and the Federal Minister for Communications, Information Technology and the Arts, recommending that NetAlert Limited be provided with additional funding to undertake its vital community educational role.

[134] Evidence Shannon, 5 March 2002

Chapter 8 Other issues

This Chapter provides a brief outline of some issues raised with the Committee during this inquiry which, while not directly related to the main terms of reference, still warrant further consideration.

Constitutionality of the classification scheme

8.1 A number of witnesses commented that in light of the High Court decision in *R v Hughes*, the national co-operative classification scheme was vulnerable to challenge on the basis that it is unconstitutional.[135] The Committee is not in a position to consider the constitutionality of the national scheme, but notes that leaving this question unresolved invites challenge. It would be appropriate for there to be a proper assessment of these risks by the Standing Committee of Attorneys-General with a view to amending the legislation to maintain the scheme if necessary.

Effectiveness of current classification scheme for films

8.2 The Committee heard testimony from Sharon Austen Limited about the effect of the lack of enforcement on the sale of unclassified adult videos in NSW. It was suggested that a large proportion of adult videos currently on sale in NSW would be Refused Classification under the scheme because they contain explicit violence or demeaning content. According to Sharon Austen Limited, the illegal sale of adult videos in NSW has a significant impact on the legal X-rated video trade based in the Australian Capital Territory. The Committee has heard that the ACT has a good compliance record and operates within a tightly enforced licensing structure.[136] Licence fees from the sale of X-rated material are used to fund the enforcement of classification guidelines. As a consequence, material that would be refused classification is considerably less available in the ACT than in NSW.

8.3 The Committee notes the anomaly that in NSW it is perfectly legal to possess these products, but not to publish them or to sell them.

8.4 The Committee considers that this position should be revisited by the Attorney-General so that there is either a commitment to enforcing the current restrictions on adult films in NSW or a consideration of legalising their sale within an appropriately regulated licensing scheme.

National on-line regulatory scheme

8.5 In Chapter 2, the Committee noted that the operation of the on-line regulatory scheme included in Schedule 5 of the Commonwealth Broadcasting Services Act must be reviewed before January 2003.

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135 For example, Evidence Shannon, 5 March 2002

136 Evidence Ellis, Patten and Haines 11 April 2002

8.6 The Committee heard that there are serious inconsistencies in implementation of enforcement provisions in State and Territory law because the original national model provisions have not commenced in any jurisdiction. [137]

8.7 The Committee considers that it would be useful to develop nationally uniform or consistent provisions that are more effective and enforceable than those used as the basis of the Act, in the review of the Commonwealth legislation.

8.8 The Committee also notes that the Commonwealth legislation has a number of objectives ranging from protecting minors from unsuitable material, making legal on-line what is legal off-line, to not excessively burdening the development of the industry. There is no indication of which objectives are the most important and these objectives can easily conflict with each other.[138] The Committee considers that a review of the Commonwealth Act could achieve a more effective regulatory model by carefully defining and prioritising the scheme's objectives.

Recommendation 5

The Committee recommends that:

- the Attorney-General, through the Standing Committee of Attorneys-General, investigate the constitutionality of the national classification scheme and take any remedial action required,
- the Attorney-General consider either establishing a licensing scheme, similar to that which operates in the ACT to allow controlled premises to sell X-rated material in NSW or taking more enforcement action against breaches of the legislation, and
- the Attorney-General write to the Minister for Communications, Information Technology and the Arts suggesting that the review of the operation of the on-line regulatory scheme consider:
  - (a) including a weighted list of objectives of the scheme, and
  - (b) developing effective and enforceable nationally uniform enforcement provisions for implementation by States and Territories.

137 Evidence Nicholson and Coroneos, 6 March 2002, Polden 5 March 2002, Submission No 37, John Fairfax Holdings

138 This view was expressed by C Penfold op cit. p 13

Appendix 1

Submissions received

Submissions to Inquiry

No	Name or Organisation
1	Reba Kearns
2	David Bruce-Steer
3	Benn Cizauskas
4	James Howison
5	John Gilmore
6	Geoff Leonard
7	Chris Jensen
8	Peter Chen
9	Alex Davidson
10	Viveka Weiley
11	Craig Small
12	Sean Badenhorst
13	Patrick Jordan
14	Watch on Censorship Inc
15	WWWalker Web Development Pty Ltd
16	Geoffrey Brent
17	NSW Prisoners and Inmates Welfare Association
18	Yolanda Corduff
19	Ben Felton
20	Australian Library and Information Association
21	Australian Computer Society
22	Internet Society of Australia
23	Australian Society of Authors and the Australian Publishers Association (Joint submission)
24	Brendan Scott
25	Patricia Wagstaff
26	Neil Fisher
27	The Hon Peter Breen MLC
28	Timothy Barbour

29	Adam Johnston
30	F C Crook
31	Electronics Frontiers Australia Inc
32	Sharon Austen Ltd
33	The Rev the Hon Fred Nile MLC, Christian Democratic Party
34	Mark Dunstone
35	Arts Law Centre of Australia
36	Australian Visual Software Distributors Association
37	John Fairfax Holdings

Appendix 2

List of Witnesses at Hearings

Witnesses at Hearings

5 March 2002	
Mr Phillip Argy	National Vice President Australian Computer Society
5 March 2002	
Ms Megan Simes	Chief Executive Australian Visual Software Distributors Association
5 March 2002	
Ms Irene Graham	Executive Director Electronic Frontiers Australia
5 March 2002	
Mr Mark Polden	Solicitor John Fairfax Holdings
5 March 2002	
Mr Des Clark	Director Office of Film and Literature Classification
5 March 2002	
Ms Raena Lee Shannon	Watch on Censorship Inc
5 March 2002	
Ms Tina Kaufman	Watch on Censorship Inc
6 March 2002	
Ms Elizabeth Beal	Supervising Legal Officer Arts Law Centre of Australia
6 March 2002	
Ms Jennefer Nicholson	Executive Director Australian Library and Information Association
6 March 2002	
Ms Michelle Baird	Australian Library and Information Association
6 March 2002	
Ms Andree Wright	Director of Industry Performance and Review Australian Broadcasting Authority
6 March 2002	
Ms Suzanne Shipard	Manager of Content Assessment Section Australian Broadcasting Authority

6 March 2002	
Mr Peter Coroneos	Chief Executive
	Internet Industry Association
11 April 2002	
Mr David Haines	Chairman
	Sharon Austen Limited
11 April 2002	
Ms Fiona Patten	Consultant
	Sharon Austen Limited
11 April 2002	
Mr Craig Ellis	Managing Director
	Sharon Austen Limited
11 April 2002	
Mr Alan Tayt	Executive Director
	NetAlert Limited

Appendix 3

On-line Content Provisions

Classification (Publications, Films and Computer Games) Enforcement Amendment Act 2001, Schedule 2

Schedule 2 Amendments relating to on-line services

(Section 3)

Part 5A

Insert after section 45:

Part 5A On-line services

45A Definitions

In this Part:

access has the same meaning as it has in Schedule 5 to the *Broadcasting Services Act 1992* of the Commonwealth.

Internet content has the same meaning as it has in Schedule 5 to the *Broadcasting Services Act 1992* of the Commonwealth.

Note. ***Internet content*** is defined so as to mean information that is kept on any article or material (for example, a disk) from which information is capable of being reproduced, with or without the aid of any other article or device and that is accessed, or available for access, using an Internet carriage service (as defined in that Act) but so as not to include ordinary electronic mail or information that is transmitted in the form of a broadcasting service.

matter unsuitable for minors means Internet content consisting of a film that is classified R, or that would, if classified, be classified R, or an advertisement for any such film consisting of or containing an extract or sample from the film comprising moving images.

Note. The National Classification Code set out in the Classification (Publications, Films and Computer Games) Act 1995 of the Commonwealth (``the Code'') provides for films and computer games to be classified RC that:

(a) 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) depict in a way that is likely to cause offence to a reasonable adult, a person who is, or who appears to be, a child under 16 (whether the person is engaged in sexual activity or not), or

(c) promote, incite or instruct in matters of crime or violence. Computer games that are unsuitable for a minor to see or play may also be classified RC.

objectionable matter means Internet content consisting of:

(a) a film that is classified X, or that would, if classified, be classified X, or

(b) a film or computer game that is classified RC, or that would, if classified, be classified RC, or

(c) an advertisement for a film or computer game referred to in paragraph (a) or (b), or

(d) an advertisement that has been, or would be, refused approval under section 29 (4) of the Commonwealth Act.

on-line service means an Internet carriage service within the meaning of Schedule 5 to the Broadcasting Services Act 1992 of the Commonwealth and includes a bulletin board.

45B Application of Part

(1) This Part applies to an on-line service other than an on-line service, or on-line service of a class, prescribed by the regulations.

(2) Nothing in this Part makes it an offence to supply objectionable matter or matter unsuitable for minors by means of an on-line service to any person, or class of persons, prescribed by the regulations.

(3) A person is not guilty of an offence under this Part by reason only of the person:

(a) owning, or having the control and management of the operation of, an on-line service, or

(b) facilitating access to or from an on-line service by means of transmission, downloading, intermediate storage, access software or similar capabilities.

45C Making available or supplying objectionable matter on on-line service

A person must not, by means of an on-line service, make available, or supply, to another person, objectionable matter:

(a) knowing that it is objectionable matter, or

(b) being reckless as to whether it is objectionable matter.

Maximum penalty: 100 penalty units for an individual, 250 penalty units for a corporation.

45D Making available or supplying matter unsuitable for minors on on-line service

(1) A person must not, by means of an on-line service, make available, or supply, to another person, any matter unsuitable for minors:

(a) knowing that it is matter unsuitable for minors, or

(b) being reckless as to whether it is matter unsuitable for minors.

Maximum penalty: 50 penalty units for an individual, 100 penalty units for a corporation.

(2) It is a defence to a prosecution under this section for the defendant to prove that access to the matter unsuitable for minors was subject to an approved restricted access system at the time the matter was made available or supplied by the defendant.

(3) In this section:

approved restricted access system means:

(a) any restricted access system within the meaning of the Broadcasting Services Act 1992 of the Commonwealth, or

(b) any other system of limiting access declared by the Minister, by order published in the Gazette, to be an approved restricted access system for the purposes of this definition.

45E Recklessness

(1) A person is reckless as to whether matter is objectionable matter or matter unsuitable for minors:

(a) if the person is aware of a substantial risk that the matter is objectionable matter or matter unsuitable for minors, and

(b) that having regard to the circumstances known to the person, it is unjustifiable to take the risk.

(2) The question of whether taking a risk is unjustifiable is one of fact.

Appendix 4

National Classification Code for Publications, Films and Computer Games

from Schedule to Classification (Publications, Films and Computer Games) Enforcement Act 1995 (NSW)

Schedule

National Classification Code

Classification decisions are to give effect, as far as possible, to the following principles:

(a) adults should be able to read, hear and see what they want;

(b) minors should be protected from material likely to harm or disturb them;

(c) everyone should be protected from exposure to unsolicited material that they find offensive;

(d) the need to take account of community concerns about:

(i) depictions that condone or incite violence, particularly sexual violence; and

(ii) the portrayal of persons in a demeaning manner.

Publications

Publications are to be classified in accordance with the following Table:

Description of publication	Classification
1. Publications that: (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 minor who is, or who appears to be, under 16 (whether the minor is engaged in sexual activity or not); or (c) promote, incite or instruct in matters of crime or violence.	RC
2. Publications (except RC publications) that: (a) explicitly depict sexual or sexually related activity between consenting adults in a way that is likely to cause offence to a reasonable adult; or (b) depict, describe or express revolting or abhorrent phenomena in a way that is likely to cause offence to a reasonable adult and are unsuitable for a minor to see or read.	Category 2 restricted

Description of publication	Classification
3. Publications (except RC publications and Category 2 restricted publications) that: (a) explicitly depict nudity, or describe or impliedly depict sexual or sexually related activity between consenting adults, in a way that is likely to cause offence to a reasonable adult; or (b) describe or express in detail violence or sexual activity between consenting adults in a way that is likely to cause offence to a reasonable adult; or (c) are unsuitable for a minor to see or read.	Category 1 restricted
4. All other publications	Unrestricted

Films

Films are to be classified in accordance with the following Table.

Description of film	Classification
1. Films that: (a) 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) depict in a way that is likely to cause offence to a reasonable adult a minor who is, or who appears to be, under 16 (whether or not engaged in sexual activity); or (c) promote, incite or instruct in matters of crime or violence.	RC
2. Films (except RC films) that: (a) explicitly depict sexual activity between adults, where there is no sexual violence, coercion or non consent of any kind, in a way that is likely to cause offence to a reasonable adult; and (b) are unsuitable for a minor to see.	X
3. Films (except RC films and X films) that are unsuitable for a minor to see.	R

Description of film	Classification
4. Films (except RC films, X films and R films) that depict, express or otherwise deal with sex, violence or coarse language in such a manner as to be unsuitable for viewing by persons under 15.	MA
5. Films (except RC films, X films, R films, MA films) that cannot be recommended for viewing by persons who are under 15.	M
6. Films (except RC films, R films, X films, MA films and M films) that cannot be recommended for viewing by persons who are under 15 without the guidance of their parents or guardians.	PG
7. All other films	G

Computer Games

Computer games are to be classified in accordance with the following Table.

Description of computer game	Classification
1. Computer games that: (a) 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) depict in a way that is likely to cause offence to a reasonable adult a minor who is, or who appears to be, under 16 (whether or not engaged in sexual activity); or (c) promote, incite or instruct in matters of crime or violence; or (d) are unsuitable for a minor to see or play.	RC
2. Computer games (except RC computer games) that depict, express or otherwise deal with sex, violence or coarse language in such a manner as to be unsuitable for viewing or playing by persons under 15.	MA (15+)
3. Computer games (except RC and MA (15+) computer games) that cannot be recommended for viewing or playing by persons who are under 15.	M (15+)

Description of computer game	Classification
4. Computer games (except RC, MA (15+) and M (15+) computer games) that cannot be recommended for viewing or playing by persons who are under 8.	G (8+)
5. All other computer games	G