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Submission on the Review of Schedule 5 (“the Schedule”) to the *Broadcasting Services Act 1992*

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Introduction

Alone amongst western liberal democracies, Australia has experimented with a strict censorship regime applied to internet content. The code of practice adopted by Australian ISPs is a lenient interpretation of the requirements of the Schedule, limiting the harm caused to our free information society. The restrictions imposed have nonetheless damaged Australia’s international credibility as a free society, and the threat of more draconian enforcement remains.

The function of the arts is to reflect society, including fears and desires that some prefer to deny. The internet is a mirror of unprecedented clarity because it is accessible to many who did not previously have a safe means of expressing themselves. Censorship is an attempt to distort this image of society.

The content prohibited by the Schedule includes all explicit sex (rated X), and content which requires an adult perspective (rated R) not subject to a restricted access system. Noncommercial providers, such as communities¹ and individuals, cannot afford to implement such systems, so the Schedule has the effect of banning a considerable amount of content suitable only for adults. The Schedule also prohibits content that would be refused classification under the OFLC guidelines, including depictions of well-known and harmless fetishes, such as bondage and discipline, lawfully practiced between consenting adults. The internet is a refuge for those who are unjustly persecuted under this regime.

This submission discusses the technical, social, and human rights failure of the Schedule, concludes that individual responsibility is the only practical solution, and recommends that the Schedule be repealed.

¹Communities may be geographically dispersed.

Technical failure

The prohibition on hosting adult content in Australia is ineffective because most content on the internet is produced and hosted overseas. The principal effect of the prohibition was for the small amount of adult content hosted in Australia to be moved to hosts in the United States, where freedom of expression is protected by the First Amendment of the Constitution. This change of host location does nothing to limit the availability of adult content on the internet, but merely raises the barrier to participation for Australian producers, thereby silencing Australian voices. This prohibition also costs Australian IT jobs because the business of hosting adult content has relocated overseas.

The Schedule appears to be based on a faulty view of online services as being like broadcasting, in which a small number of producers feed content to the masses. In fact, the robustness of the internet derives from its decentralised structure, in which every connected machine is a peer (a *host*) that can both send and receive information. Broadcast-like services are merely one species of tree in this teeming, squawking rainforest of complex human interactions.

Technological advances are already increasing decentralisation and empowering individuals to directly create and publish their own content. These technologies each weaken the effectiveness of censorship, and when combined are decisive. Some examples include:

- Permanently connected internet services, either dialup or broadband such as ADSL and cable, enable individuals to host their own content on home PCs without using a web server operated by their ISP. This gives individuals fine-grained control over content and protocols, enabling them to run services such as web servers, proxy web servers, and decentralised peer-to-peer systems, any of which may employ encrypted protocols.
- Encrypted web connections (HTTPS), already used for secure web-based commerce, can just as easily carry proxy connections. This permits content to be transferred via a proxy in a free country, circumventing censorship. A blanket ban on HTTPS would cripple electronic commerce, estimated to be worth \$43 billion in Australia alone.² Circumvention can also be achieved by a range of other techniques, including virtual private networks.
- Because multiple web sites are often hosted at a single internet protocol address (*virtual servers*),³ it is not possible to block HTTPS access to a single

²“Australian Net economy worth \$43b: Cisco study,” *The Age*, 23 October 2002
<http://www.theage.com.au/articles/2002/10/23/1034561542812.html>

³The content served is determined by the host name in the request (encrypted in HTTPS).

site without blocking access to many other unrelated sites which share the same hosting service. In general, encrypted protocols prevent network-level censorship based on content because eavesdroppers cannot determine the nature of the content.

- Decentralised peer-to-peer systems, best known for their use in sharing music, are readily adapted to other content. The *Freenet* system,⁴ specifically designed to defeat censorship, is notable because it was created in response to the enactment of the Schedule.⁵
- Wireless networking standards such as IEEE 802.11b aid the formation of free wireless community networks (known as *freenets*⁶).⁷ Hosts participating in a freenet do not need to know the identity or physical location of their peers. Automated discovery of networks and gateways allows mobile hosts to roam within and between freenets and to communicate via gateways with other networks, including the internet.
- Handheld computers can be equipped with wireless networking capability. Current models can store hundreds of megabytes of data on memory cards, and function as roaming, concealed, wireless servers.
- The next generation internet protocol (IPv6), which is being steadily adopted worldwide, includes builtin security (encryption and authentication) to defeat eavesdropping, and has an expanded address space designed to facilitate automatic address assignment (particularly useful for roaming devices). By comparison, in the previous version of the internet protocol (IPv4), these features have to be provided as layers on top of the basic protocol.
- Convenient and affordable digital cameras can take both still images and video clips. Now it is easy for anyone to record their sexual activities and share them with their friends. A substantial amount of adult content on the internet is obviously the work of unskilled but enthusiastic amateurs.

Despite draconian legislation, individuals are able to express themselves and communicate with others without the interference of governments. The number of individuals creating and accessing internet content will continue to grow, as

⁴“the free network project : liberty through technology”

<http://freenetproject.org/>

⁵“Australian web censors provoke net anonymity,” ABC News in Science, 23 March 2000

<http://www.abc.net.au/science/news/stories/s112671.htm>

“Ian Clarke has Big Plans for the Internet,” O’Reilly Network, 14 November 2000

<http://www.openp2p.com/lpt/a/457>

⁶Not to be confused with the Freenet system.

⁷Community Wireless Networking in Western Australia

<http://www.wafreenet.org/>

will the different means of exchanging information. Censorship, as a centralised system, does not scale well: this means that censorship becomes ineffective because the amount and type of information exchanged grows more quickly than it can accommodate.

Social failure

The internet community was founded in the United States, and has a culture of freedom of expression which reflects this origin. The Schedule ignores this culture and instead seeks to impose Australia's oppressive censorship regulations. The enactment of the Schedule has provoked outrage in Australia and derision worldwide. The attempt to adapt Australia's censorship regime to the internet is misguided: that regime only survived because of the limited sources and distribution channels of films and publications. To achieve a consistent legislative framework, state and federal governments should instead adapt the freedoms found on the internet and apply them to all media in Australia, including film and publications.

The absence of censorship would not prevent law enforcement from investigating and prosecuting child pornographers and other child abusers. In the United States, where the internet is uncensored, the FBI is renowned for its success in prosecuting such child abusers. A draconian censorship regime which seeks to deprive adults of their right to freedom of expression will encourage the widespread use of technical circumvention measures, and make it more difficult to detect child pornography. In contrast, an acceptance of the internet as an adult medium will marginalise child abusers and let adults know that they can report child pornography without losing their own freedom to engage in adult discourse. It is essential that the actions of the government do not further alienate the internet community.

Human rights failure

The internet provides an opportunity for individuals to express themselves and to form communities that transcend geographical boundaries. In these communities, people deal with issues that they may be too fearful to discuss face-to-face or with their neighbours. Many entirely lawful activities carry a social stigma, particularly those concerned with sex. The relative anonymity and distance of communication of the internet provide a great deal of physical safety and so encourage

openness. This physical safety also makes the internet an important outlet for women, whom are often subjected to violence in our society. Some examples of these communities on the internet include:

- Survivors of sexual abuse.
- Gay, lesbian, bisexual, and transgendered people.
- Sufferers of sexually transmitted diseases.
- Adults who wish to share their sexual thoughts and experiences with other consenting adults through words or images.
- Adults who wish to display their bodies to other consenting adults for fun or profit.

The Schedule deprives adults of their human right to freedom of expression, discouraging them from expressing themselves through fear of prosecution or arbitrary disconnection by ISPs fearful of the legality of content. It also discriminates against poorer members of society, who may not be able to afford to establish foreign-hosted web sites or subscribe as content providers to restricted access systems. Article 19 of the *Universal Declaration of Human Rights* (1948) reads,

*“Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”*⁸

Nowhere in the Schedule is there any provision for this right to be recognised. This is a serious omission as Australia has no bill of rights. In the United States, freedom of expression is protected by the First Amendment to the Constitution (1789).⁹ Article 5(1) of the German Constitution (translated) includes the sentence “There will be no censorship.”¹⁰ Section 14 of the New Zealand *Bill of Rights Act 1990* reads,

⁸United Nations General Assembly resolution 217 A (III), 10 December 1948

<http://www.un.org/Overview/rights.html>

⁹Bill of Rights of the Constitution of the United States [from Cornell University]

<http://www.law.cornell.edu/constitution/constitution.billofrights.html>

¹⁰Constitution of Germany (in English) 3 November 1995 [from the ACE Project]

<http://www.aceproject.org/main/samples/lf/lfx%5f015.pdf>

*“Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.”*¹¹

The lack of support for internet censorship in western liberal democracies makes the operation of the Schedule impossible, because they will remain a reservoir of content and technical resources which will be used to defeat the Schedule.

Restricted access systems require users to surrender their anonymity, because each user must identify themselves to access content. These systems are thus a barrier to adults wishing to exercise their freedom of expression. In the United States, the right to anonymous freedom of expression has been recognised by the Supreme Court, most recently in *Watchtower vs Village of Stratton, Ohio* (2002) and *McIntyre vs Ohio Elections Commission* (1995).¹²

Conclusion

In the face of endless technological change, rigid restrictions imposed by authorities quickly become obsolete. The only realistic solution is to encourage individuals to think for themselves. Adults must take responsibility for deciding what content to access. It is the responsibility of parents to make these decisions for their children. The most effective control on content accessed by children is the judgement and guidance of their parents.

The Schedule oppresses adults while failing to protect children. Individual responsibility is the only solution that accommodates technological and social diversity. Protection of children is best achieved through public education and parental guidance, not censorship. Such an approach would restore freedom of expression to adults in Australia. The main threat to children is that they might grow up and not be free.

This submission recommends that the Schedule be repealed.

¹¹New Zealand *Bill of Rights Act 1990* [from the University of Bern]
<http://www.oefre.unibe.ch/law/icl/nz01000%5f.html>

¹²Supreme Court of the United States 00–1737 (2002)
<http://www.supremecourtus.gov/opinions/01pdf/00-1737.pdf>