To Ms. Sabina Wynn, Executive Director of the Australian Law Reform Commission and whomever else it may concern:

Access is a global movement premised on the belief that political participation and the realization of human rights in the 21st century is increasingly dependent on access to the internet and other forms of technology. Founded in the wake of the 2009 Iranian post-election crackdown, Access teams with digital activists and civil society groups internationally to build their technical capacity and to help them advocate globally for their digital rights. Access provides thought leadership and practical policy recommendations in the broader field of internet freedom, and based on that expertise mobilizes its global movement of citizens to campaign for an open internet accessible to all. We have a particular interest in open and balanced approaches to access to internet services and welcome the opportunity to respond to the ALRC's National classification scheme review issues paper (IP 40).

Introduction

The first question of this consultation asks, "In this Inquiry, should the ARLC focus on developing a new framework for classification, or improving key elements of the existing framework?" The existing framework largely serves the purpose of *advising* the Australian public as to the character of offline media (e.g., movies, TV shows, and computer games). This is to say that the existing classification system is meant to guide Australian citizens, in particular parents, in making decisions regarding the nature of content; indeed, as the ALRC rightly notes, "it is not illegal to possess most RC material in most parts of Australia" (Paragraph 115). As such, the existing classification system is not a censorship scheme, and any proposals to the classification scheme that the ALRC might suggest as part of this Inquiry should be sure to maintain the advisory nature of the current classification system.

As the ALRC notes, one of the primary objectives of this Inquiry is to examine how the existing classification system could be applied to online media. Access would like to begin this brief by drawing the ALRC's attention to a statement by the UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression in a recent report about freedom of expression online: "Approaches to regulation developed for other means of communication – such as telephony or broadcasting – cannot simply be transferred to the Internet, but, rather, need to be specifically designed for it."[1]

Critically missing from the ALRC's Issues Paper published as part of this Inquiry, is the issue of whether a classification system for online content is actually necessary. The questionnaire is dominated by questions of *how* to implement a new online classification system, not *whether* to implement such a system. While it is difficult to conduct an impact assessment of a classification for online content when the contours and provisions of such a system are difficult to foreknow, Access encourages the ALRC to consider the following points:

[1] http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf

Establishing a need for a new classification system for online content

Paragraph 50 gives three answers to the question: "why classify and regulate content?" The first two answers are given as "providing advice to consumers to help inform their viewing choices, including warning them of material they might find offensive" and "protecting children from harmful or disturbing content." Yet, no evidence is given to support the idea tacitly asserted in these answers that consumers currently need advice and that children currently need protection, even for offline content.

Before any online classification scheme is applied to content on the internet, there needs to be ample proof that the current set of self-regulatory measures, such as the community standards or Terms of Service agreements on websites such as Facebook and YouTube, are failing to such an extent that users need the heavy-hand of government classification to prevent them or, despite close parental monitoring, their children from unwittingly stumbling across content which is harmful or disturbing.

Instead of asking whether or not effective methods of controlling access to online content exist, Question 12 asks "What are the most effective methods of controlling access to online content, access to which would be restricted under the National Classification Scheme?" and thus presupposes an answer which does not exist. As many repressive regimes can attest, short of pulling the plug on the internet entirely, completely restricting access to online content is practically impossible.

Worryingly, the impetus for this Inquiry points to the intention of Senator Conroy and the Australian Government to use any classification system for online content to impose a mandatory filtering policy on all ISPs. Not only would such a use of an online classification system far extend the mandate of the current classification system, but it would also make Australia the first democratic nation to implement a mandatory filter for purposes other than blocking child pornography, a precipitous fall from its place of leadership as a defender of human rights. Moreover, there is a very real threat that if Australia imposes an internet filter, then it will lend legitimacy to non-rights respecting states who continue to censor their citizens. Moreover, given the potential for mission creep with such a filter, Australia's proposed internet blocking regime could over time come to resemble China's notorious "Great Firewall."

The infeasibility of classifying online content

Questions 4, 7-11, and 13 ask in various ways how should access to content be controlled? As the ALRC rightly notes, there are many obstacles to effective regulation of online content. These include:

The quantity of online content

YouTube reports that over **2 days of video** are uploaded to its website **each minute**,[2] while Facebook averages **100 million photos per day**, peaking at **750 million** uploaded on last New Year's Day alone.[3] As paragraph 62 puts it, "the sheer quantity of content that may be delivered via new media, the speed with which it is released, and the fact that much content is user-generated or produced by small entities throughout the world" effectively nullifies the possibility of pre-screening any media which is *predominantly produced for and consumed on the internet*. As the ALRC rightly notes in paragraph 68, "It may be that some content does not need to be classified at all, because it is likely to have no impact, or a negligible impact, on any viewer." Access believes that this is the case for an overwhelming majority of online user-generated content.

The content is dynamic

Unlike offline media, online media is incredibly dynamic; the content of an online article or game, let alone a whole website, can change without a moment's notice. This makes it extremely difficult, if not downright impossible, to determine a classification of online content that can benefit Australians in any meaningful way.

By way of contrast, a wide-release film, for example, which is already covered under the current classification scheme, is inherently unchanging. Such content should and easily can have that same classification carry over when distributed on the internet; there is no reason a film with a PG rating exhibited in theaters should not also have that rating when distributed online, where such a classification would serve the same advisory function as it does offline.

The number of persons producing content

Due to the relatively limited and easily identifiable number of entities that produce offline content, it has historically been relatively feasible to track down these publishers and compel them to have their content classified where required. With nearly 2 billion people on the internet, an overwhelming number of which have or will produce some kind of online content – most of which are located outside of Australia – it is impossible for the Australian government to exercise control over all producers of online content.

Content is produced and hosted all over the world

Given that most content is produced or hosted outside of Australia, the lack of jurisdiction over most of the content-producers on the internet would make any classification system of online content grossly incomplete, and the costs associated with classification would place an unfair burden and needless disadvantage on Australians, stifling innovation and economic growth.

Question 24, asks: "Access to what content, if any, should be entirely prohibited online?" As the ALRC rightly states, "Countries differ as to what content they prohibit—depending on culture, historical content and differences of opinion on where the balance between freedom of speech and other interests lies'" (paragraph 118), and that "Some commentators have argued that much

[2] http://youtube-global.blogspot.com/2011/05/thanks-youtube-community-for-two-big.html
[3] http://siliconangle.com/blog/2011/01/04/facebook-breaking-record-with-750m-photo-uploads/

of the material deemed RC in Australia would not be refused classification in other Western democratic liberal countries" (paragraph 122). On the global commons of the internet, not only would the prohibition of some content on the internet be ineffective due to its hosting location elsewhere, it would also put into question Australia's standing as a Western democratic liberal country.

The difficulty of determining age

Question 13 asks, "How can children's access to potentially inappropriate content be better controlled online?" The existing classification system relies on age-based guidelines in an effort to advise parents on content that may be offensive or inappropriate for children. Any classification system of online content based on age would be largely ineffective due to the anonymity afforded by the internet. In practice, efforts to verify the age of users online amounts to little more than requesting the user's data of birth.

In an effort to protect children from harmful or disturbing content, it would be more effective for the Australian government to make client-based filtering available to parents. However, while such filters allow parents to exercise far greater control over the content that their children can see online, when Australia previously made such software available in 2007 -- at a cost of $85 million -- it was reported that just 2% of households with internet access and children made use of such software.[4] This suggests that Australian parents are clearly capable of making decisions by themselves over how best to protect their children when browsing the internet, and there's no need for government tools, advice, or intervention at the ISP level.

The internet is a public forum

Question 3 asks, "Should the technology or platform used to access content affect whether content should be classified, and, if so, why?" The internet differs from other media in that it functions as a new commons, and, in addition to functioning as a distributor of traditional content, it also serves as an increasingly necessary means of organizing both socially and politically. Thus, while a series of videos uploaded to YouTube may resemble content exhibited in a movie theater, it often is more closely analogous to a conversation in a public place than a blockbuster film. In the same way that public conversations, which can often be of a crude or offensive nature, should not be "classified" or given warning labels, content predominantly produced for and consumed on the internet should remain untouched and unlabeled. Access wishes to stress that, when the issue arises that "similar content may be subject to different regulatory requirements, classification processes and rules, depending on the medium, technology, platform or storage device used to access and deliver the content" (Paragraph 58), similar content is *not* defined broadly as, say, moving images, but instead should take into account the dialogical, user-generated nature of much of the content on the internet.

[4] http://www.news.com.au/technology/netalert-web-filters-dumped-over-holidays/story-e6frfro0-1111118667453

It is clear that content itself cannot feasibly be individually classified and that the internet is fundamentally different from traditional media. Thus the urge may later arise to classify the platforms which host content rather than the content itself, so that the places which people interact on the internet can be labeled in order "to protect children from harmful or distressing content, and to warn all consumers about potentially distressing content" (paragraph 68). However, this is already standard practice for most platforms that host user-generated content; social networking sites such as Facebook implement and enforce self-regulatory community standards guidelines and video sites like YouTube already remove sexually explicit content as a matter of policy as outlined in their Terms of Use agreements. Moreover, even web hosting providers (e.g., Amazon Web Services and Rackspace) also have Terms of Service that curtail the use of their platforms for unlawful activities.

The importance of upholding human rights

Finally, and most importantly, such a classification scheme must take into consideration its impact on the rights of Australian citizens. Specifically, any measures which restrict basic human rights must be limited to what is necessary and proportionate in a democratic society and achieved through the least restrictive means possible. While the purposes given are, as the Issue Paper lists them, "providing advice to consumers to help inform their viewing choices, including warning them of material they might find offensive; protecting children from harmful or disturbing content; and restricting all Australians from accessing certain types of content" (Paragraph 50), it implies that internationally established rights, such as the right to privacy and the right to freedom of expression, which are enshrined in the Universal Declaration of Human Rights (which Australia helped to draft), have not been adequately considered.

Every legislative intervention has costs for society. Access strongly urges the ALRC to consider whether the costs to human rights, as well as Australia's reputation as a democratic liberal society, are proportionate to the purposes listed in the Issue Paper.

Conclusion

In summary, Access believes that:

- regulation originally meant for other media – such as telephony or broadcasting – cannot simply be transferred to the internet, but must be specifically designed for it;
- a clear problem definition, supported by evidence (which proves that current self-regulatory approaches are failing to protect consumers online) is necessary before a classification scheme can be applied to online content;
- the dynamic nature and sheer quantity of content online today makes a classification system unfeasible;

- as most content is hosted and created outside of Australia, the majority of content falls outside of its jurisdiction, which would render a classification system grossly incomplete;
- to protect children online, the Australian government should avoid ISP level filtering, instead relying on the use of opt-in client-based filtering software;
- as the internet functions as a new commons, content predominantly produced for and consumed on the internet should remain untouched and unlabeled;
- a classification scheme must take into consideration its impact on the fundamental rights of Australian citizens;
- if a classification system is implemented, it will likely lead to a mandatory filtering policy on all ISPs, effectively making Australia the first and only democratic nation to implement such a regime; and
- if Australia does impose a mandatory filtering policy, it will lose the grounds on which to criticize non-rights respecting states, such as Iran and China.

For more information, please visit www.AccessNow.org or contact:
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