

Submission

on the

Communications Legislation Amendment (Content Services) Bill 2007

to the

Senate Environment, Communications, Information Technology and the Arts Committee

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1. Introduction

The Communications Legislation Amendment (Content Services) Bill 2007 seeks to provide for the regulation of content services delivered over convergent devices, such as broadband services to mobile handsets, and new types of content provided over the Internet. It would give effect to the recommendations of the Review of the Regulation of Content Delivered over Convergent Devices conducted by the Department of Communications, Information Technology and the Arts.

The Bill has been referred to the Senate Environment, Communications, Information Technology and the Arts Committee for inquiry.

Public submissions are due by 28 May 2007 and the Committee is due to report by 12 June 2007.

2. Prohibited content

The Bill defines prohibited content to include all material which is classified RC or X18+. It will be an offence for content/hosting service providers to host or make available prohibited content. This is a suitable provision as it seeks to ensure that material which is prohibited from broadcast, sale or publication under Commonwealth and State laws is also prohibited in this new environment of convergent communications.

Electronic equivalents of individual publications which are classified RC, Category 2 - Restricted or Category 1 – Restricted will also be prohibited content. This is a useful provision as the electronic equivalent of printed publications will be easier to copy and distribute in such a way as to make it more likely that children may be exposed to them.

The Bill defines as ‘potential prohibited content’ material that is not classified but would, if classified, be likely to be classified as RC, X18+ or Category 2 - Restricted. It would be an offence to host or make available potential prohibited content.

The Bill also defines as prohibited (or potential prohibited), content any material which is classified R18+ (or if unclassified would be likely to be classified R18+) unless access is subject to appropriate age verification mechanisms.

2.1 MA 15+ material

Certain material that is classified MA15+ (or unclassified material that, if classified would be likely to be classified MA15+), is also prohibited (or potential prohibited) content, unless access is subject to appropriate age verification mechanisms. Certain kinds of material, such as text with still visuals only and news services, are excluded from this provision.

While the Bill provides for differing age verification mechanisms to be authorized by the Australian Communications Management Authority for R18+ content and MA15+ content, it is acknowledged in the Explanatory Memorandum¹ that “at the current time, however, the only reliable and efficient mechanisms to verify the age of consumers is to do so by reference to whether or not they are 18 years of age.” This is an appropriate approach which gives priority to the protection of children from unsuitable and harmful material above commercial interests in marketing MA15+ material to children aged 15-17 years.

Recommendation 1: The Committee should resist any call from industry or civil libertarian interests to weaken the provisions relating to MA 15+ material.

2.2 Restricted Category 1

The Bill provides that individual electronic equivalents of publications that are classified Category 1- Restricted are prohibited material. However, individual electronic equivalents of publications that are not classified but which, if classified, would be classified Category 1- Restricted are not included in the definition of potential prohibited material.

This seems inconsistent with the general approach taken by the Bill to seek to protect children from material that is unsuitable for a minor to see.

It would be no harder to make a judgement that an electronic equivalent of a publication would, if classified, be classified as Category 1- Restricted than it would be to make a similar judgement in relation to MA15+ material.

State laws prohibit the sale of Category 1- Restricted material to minors. This Bill should, for consistency, seek to ensure that the electronic equivalents of such publications are not available as unrestricted content.

Recommendation 2: Electronic equivalents of publications that are unclassified but which, if classified would be likely to be classified Category 1 – Restricted, should be treated as potential prohibited material in the Bill.

3. Stopping access

The outline of the Bill in the Explanatory Memorandum² states that “carriage service providers who do no more than provide a carriage service that enables content to be delivered or accessed are not providing a content service, but may be required to remove access to a service where it is considered to contain prohibited material”.

There do not appear to be any new provisions in this Bill dealing with the requirement for carriage services to remove access to a service. However, the existing provisions in Section 40 of Schedule 5 of the Broadcasting Services Act 1992 would remain in force.

It is readily apparent that these provisions are grossly inadequate in ensuring that children are protected from prohibited material hosted outside Australia. A search on the Internet using any standard search engine can, within seconds, turn up material that would be classified RC or X18+. Most of this material is hosted overseas.

3.1 Children as sex abusers

A paper³ presented at the Ninth Australasian Conference on Child Abuse and Neglect in November 2003 by staff from the Child at Risk Assessment Unit, Canberra Hospital has reported that exposure to pornography on the Internet is one significant factor in children younger than 10 years old sexually abusing other children.

In the first six months of 2003 the Unit had identified as many as 48 children under 10 years of age who had engaged in sexualised, sexually abusive behaviour. There has been a dramatic escalation in the reported incidence of this type of behaviour since the mid-1990s when staff recall an average of 3 children per year coming to their attention with this problem.

Most children in this category had accessed pornography on the Internet. For 25% of these children, deliberate viewing of pornography was their main use of the Internet. While several children first

came across pornography on the Internet accidentally, 25% of the children had been shown how to access pornographic images by another person.

The paper does not claim that Internet pornography is the only factor in children becoming sexually abusive. Other factors include issues with substance abuse, mental health and domestic violence (95%) in the family. Having parents with a history of having been sexually abused (90% of mothers and 40% of fathers) seems to be a key factor. Autism spectrum disorder (20%) is also a factor. Other studies cited by the authors point to family structure as a factor with between 27% and 93% of sexually abusive children living with single parent families.

Nonetheless the authors make a strong case for access to Internet pornography as decisively shaping this disturbing trend in the incidence of sexually abusive children. The authors present a case study of a nine year old boy, Steven, who first comes across Internet pornography accidentally. The boy tries to avoid it until he sees his mother's current de facto (her fourth since Steven was born) watching pornography on the Internet and concludes that this is an acceptable activity. He then gets involved in viewing pornography. Soon he is making his four year old half-brother Deacon act out homosexual acts with him. He also makes younger girls at school participate in sexual acts with him and threatens to hurt them if they tell anybody. While Steven certainly had significant social and developmental problems, the specific expression of these problems in sexually aggressive behaviour with younger children was shaped by his exposure to graphic sexual images on the Internet.

The authors call for more responsibility to be placed on Internet Service Providers (ISP) to censor material and for an expansion of the Australian Broadcasting Authority's (ABA) power to review websites and order their removal or blocking.

This paper follows on the work carried out by the Australia Institute⁴ earlier in 2003 which found that 38% of 16 and 17 year old boys were deliberately using the Internet to view sexually explicit material, while 84% of boys and 60% of girls had experienced unwanted exposure to sexual material. The Australia Institute has also called for more regulation of Internet content.

A scheme which focuses essentially on Australian hosted content is only going to marginally affect children's exposure to prohibited material. Device-based filtering systems will also fail to give adequate protection, as these are unlikely to be put in place in the homes of those children most at risk.

3.2 Mandatory filtering at ISP or national level

The most obvious means of ensuring adequate protection for children is to require content filtering at Internet service provider level. Unless this is done then the current Bill will fail to achieve its objects.

The Explanatory Memorandum states⁵ that "it is reasonable that, where content service providers offer services on a commercial basis, they should meet the costs of ensuring that adequate safeguards are in place to protect children in particular from the risk of exposure to offensive or harmful content that could be accessed using their service."

The same statement could be made in relation to carriage services. It needs to be acknowledged that carrier services which provide unfiltered access to the Internet are providing access to prohibited material.

Recommendation 3: The Committee should call for amendments to the Bill to require carriage services, including Internet service providers, to implement a filtering system which prevents prohibited material or potential prohibited material from being available to any end user of their services.

Recommendation 4: The Committee should also call for further investigation into the technical and economic feasibility of a national filtering system.

3.3 Internet filters on mobile phone

Clause 59 of Schedule 1 of the Bill amends the Broadcasting Services Act 1992 by adding the following provision to clause 60 of Schedule 5:

“(8A) If the Minister is satisfied that Internet content filtering is not viable in relation to access to Internet content using a particular device (for example, a mobile telephone handset), the Minister may, by legislative instrument, determine that paragraphs (1)(j), (k) 29 and (1) and (2)(d) do not apply in relation to access to Internet content using that device.”

This provision is not in keeping with the general approach of the Bill which is to ensure that regardless of the device used access to prohibited material is treated in a similar manner. This provision gives preferential treatment to those who wish to benefit commercially by marketing Internet access to users of mobile telephones. The target market for this group certainly includes minors who are heavy users of this technology. This provision allows an exemption from the requirement to offer device based content filter systems to mobile telephone users of Internet services.

It seems likely that it would be difficult to design device based content filtering systems for mobile telephones as such systems undoubtedly require a level of computing capacity that exceeds the capacity of a mobile telephone. However, this provision fails to consider the possibility of requiring the filtering to take place prior to delivery of the content to the mobile telephone, that is, at the service provider level.

Either all Internet content should be filtered by service providers as recommended above or, if that recommendation is not adopted, service provider filtering should be mandated in relation to access by devices for which Internet content filtering is not viable.

Recommendation 5: The proposed new subclause dealing with Internet content filtering for particular devices should be amended to provide that “If Internet content filtering is not viable in relation to access to Internet content using a particular device (for example, a mobile telephone handset) then the Internet service provider must ensure that content is filtered before transmission to the device in such a way that no access to prohibited or potential prohibited material is permitted.”

4. Recommendations

Recommendation 1: The Committee should resist any call from industry or civil libertarian interests to weaken the provisions relating to MA 15+ material. (2.1)

Recommendation 2: Electronic equivalents of publications that are unclassified but that, if classified would be likely to be classified Category 1 – Restricted, should be treated as potential prohibited material in the Bill. (2.2)

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Internet service provider must ensure that content is filtered before transmission to the device in such a way that no access to prohibited or potential prohibited material is permitted.”

5. Endnotes

1. Regulation Impact Statement, para. 61, Explanatory Memorandum, p.12
2. Explanatory Memorandum, p.2
3. 'Child Protection and the Internet' presented by Dr Janet Stanley, Ms Cassandra Tinning and Ms Katie Kovacs at the Ninth Australasian Conference on Child Abuse and Neglect 2003
4. 'Youth and Pornography in Australia: Evidence on the extent of exposure and likely effects' Michael Flood and Clive Hamilton, The Australia Institute Discussion Paper Number 52, February 2003 available at: http://www.tai.org.au/documents/dp_fulltext/DP52.pdf
5. Explanatory Memorandum, p.3