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Committee Secretary
Senate Legal and Constitutional Committees
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Canberra, ACT, 2600

Justice and International Mission Unit Submission to Inquiry into the Australian film and literature classification scheme

The Justice and International Mission Unit of the Synod of Victoria and Tasmania, Uniting Church in Australia, welcomes this opportunity to make a submission on the Australian film and literature classification scheme. The Unit's focus in making this submission is to argue that the National Classification Scheme should be consistent with Australia's obligations with regards to human rights and combating transnational criminal activities.

1.Recommendations

1. Material that facilitates gross human rights abuses or transnational criminal activity should continue to be Refused Classification.
2. Further steps should be taken to require the IT industry to assist in respecting the Australian National Classification Scheme on the Internet in relation to Australian citizens accessing material that is Refused Classification.
3. Legislative requirements should be introduced to require those in the IT industry to report to authorities detection of clients accessing child sexual abuse material at a minimum, if not other material that facilitates gross human rights violations and transnational crime.
4. The Refused Classification category should include pseudo-images of child sexual abuse.

2. Material that facilitates gross human rights abuses and transnational criminal activity should be Refused Classification

The Unit's primary interest in the review is around Australia ensuring that by what material it allows Australians to purchase and possess that does not inadvertently create demand for materials that involve human rights abuses or transnational criminal activity in their production. The Unit is concerned by a small, but vocal, minority in the Australian community who believe that Australians should be able to view whatever they like with no restrictions imposed by Government or the wider community, with a reckless disregard for the abuses such a position may facilitate.

The Unit believes that material that facilitates gross human rights abuses or transnational criminal activity should be Refused Classification. The Unit notes that most, if not all such material, would currently be Refused Classification (RC) under the definition of RC:

- (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 or morality, decency and propriety generally accepted by reasonable adults to the extent that they should not be classified;
- (b) describe or depict in a way that is likely to cause offence to a reasonable adult, a person who is, or appears to be, a child under 18 (whether the person is engaged in sexual activity or not); or
- (c) promote, incite or instruct in matters of crime or violence.

The Unit notes that newer technologies, such as the internet and mobile phones, have created new avenues to profit from human rights abuses and transnational criminal activity. The UN Office of Drugs and Crime has noted that human trafficking feeds particularly the commercial child sexual abuse industry on the Internet.¹ The UNODC report estimates the commercial child sexual abuse industry on-line, as opposed to non-commercial peer-to-peer networks, generates an estimated 50,000 new child sexual abuse images each year and is worth about US\$250 million globally. It involves thousands of commercial child sex abuse sites. Commercial child sexual abuse sites are more likely to involve the abuse of very young children, with the Internet Watch Foundation noting that 69% of victims appearing to be younger than 10 and 24% being less than 7 years of age.

A higher number of offenders who are at low risk of reoffending or going on to commit contact offences appear to be accessing images of child abuse of younger children and depicting more serious victimisation than those offenders at high risk of reoffending or going on to commit contact offences.² In a sample of 72 Internet offenders from the UK, 85% viewed images up to severity levels 4 and 5, with 31% of offenders viewing level 5 images. These categories refer to images depicting 'penetrative sexual activity between child(ren) and adult(s)' (level 4) and images of 'sadism and bestiality' (level 5). None of those offenders assessed as being high risk were found to be in possession of level 5 images. In contrast, a quarter of those assessed as medium risk and 35% of those assessed as low risk had been found to have level 5 images.³

Offenders who purchase images of child sexual abuse on the Internet, on average, seek images of younger children than those likely to be involved in contact offences.⁴

The Unit notes that adults are also trafficked and forced to produce sexual abuse material for sale on the internet. Thus a classification system that allowed for violent rape materials to be available for viewing by Australian adults may facilitate human trafficking by allowing Australia to contribute to a market for such materials.

The role of the Internet and other new technologies in facilitating more readily human rights abuses and transnational criminal activity has been receiving growing recognition globally. For example, the resolution of the UN Human Rights Council A/HRC/8/L.17 of 12 June 2008 called for governments:

¹ UNODC, *The Globalization of Crime: A Transnational Organized Crime Threat Assessment* on 17 June 2010

² J. Osborn, I.A. Elliott, D. Middleton and A.R. Beech, *The use of actuarial risk assessment measures with UK internet child pornography offenders*, J. of Aggression, Conflict and Peace Research **2(3)**, July 2010, p.16.

³ J. Osborn, I.A. Elliott, D. Middleton and A.R. Beech, *The use of actuarial risk assessment measures with UK internet child pornography offenders*, J. of Aggression, Conflict and Peace Research **2(3)**, July 2010, p. 20.

⁴ J. Osborn, I.A. Elliott, D. Middleton and A.R. Beech, *The use of actuarial risk assessment measures with UK internet child pornography offenders*, J. of Aggression, Conflict and Peace Research **2(3)**, July 2010, p. 20.

2(g) To establish mechanisms, where appropriate, in cooperation with the international community, to combat the use of the Internet to facilitate trafficking in persons and crimes related to sexual or other forms of exploitation and to strengthen international cooperation to investigate and prosecute trafficking facilitated by the use of the Internet.

Australia has obligations to combat transnational criminal activity under the *United Nations Convention against Transnational Organized Crime*. It also has obligations to ensure that Australian businesses do not profit from transnational criminal activity. Australia is a State Party to the *UN Convention Against Corruption (UNCAC)*. Article 2 of UNCAC defines "Proceeds of Crime" as "any property derived from or obtained, directly or indirectly, through the commission of an offence". By this definition, videos and images produced through the use of human trafficking and forced sexual exploitation should be considered proceeds of crime, along with any revenue derived from such videos and images.

Article 23 of UNCAC addresses the proceeds of crime:

- 1. Each State Party shall adopt, in accordance with fundamental principles of its domestic law, such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally*
 - (a) (i) The conversion or transfer of property, knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action;*
 - (ii) The concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing that such property is the proceeds of crime;*
- (b) Subject to the basic concepts of its legal system:*
 - (i) The acquisition, possession or use of property, knowing, at the time of receipt, that such property is the proceeds of crime;*
 - (ii) Participation in, association with or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the offences established in accordance with this article.*
- 2. For purposes of implementing or applying paragraph 1 of this article:*
 - (a) Each State Party shall seek to apply paragraph 1 of this article to the widest range of predicate offences;*
 - (b) Each State Party shall include as predicate offences at a minimum a comprehensive range of criminal offences established in accordance with this Convention;*
 - (c) For the purposes of subparagraph (b) above, predicate offences shall include offences committed both within and outside the jurisdiction of the State Party in question. However, offences committed outside the jurisdiction of a State Party shall constitute predicate offences only when the relevant conduct is a criminal offence under the domestic law of the State where it is committed and would be a criminal offence under the domestic law of the State Party implementing or applying this article had it been committed there;*

Article 31 of UNCAC requires that States Parties take legal steps to confiscate the proceeds of crime and to identify and trace the proceeds of crime, stating:

- 1. Each State Party shall take, to the greatest extent possible within its domestic legal system, such measures as may be necessary to enable confiscation of:*
 - (a) Proceeds of crime derived from offences established in accordance with this Convention or property the value of which corresponds to that of such proceeds;*
 - (b) Property, equipment or other instrumentalities used in or destined for use in offences established in accordance with this Convention.*

2. Each State Party shall take such measures as may be necessary to enable the identification, tracing, freezing or seizure of any item referred to in paragraph 1 of this article for the purpose of eventual confiscation....

Australia has obligations to combat human trafficking as a States Party to, amongst a number of treaties:

- the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children of the United Nations Convention against Transnational Organized Crime* (known as the Palermo Protocol);
- The *UN Convention on the Rights of the Child* (Article 35); and
- The *UN Convention on the Elimination of All Forms of Discrimination Against Women* (Article 6).

It is important that the Australian National Classification Scheme uphold Australia's commitment to human rights and to combat transnational criminal activity.

3. Enhancing Enforcement of the Classification Scheme on the Internet

The Internet poses significant problems for the Australian Communication and Media Authority (ACMA) in enforcing the National Classification Scheme. While 'take-down' notices can be issued to those hosting RC material on servers located within the Australian jurisdiction, action to remove material from servers located overseas requires the co-operation of the jurisdiction in question.

A study by Cambridge University compared times taken to take down different forms of content.⁵ It was found that Phishing sites and sites which threaten banks commercial interests are taken down very quickly. The child abuse image sites are by contrast likely to stay up for many weeks due to the complexities of the fact that different jurisdictions do not work together effectively, and reports are routed via local law enforcement which may not prioritise the issue or be properly trained to deal with it.

Dealing with RC material on the Internet is also hampered by the fact that much of this material is not illegal in countries where it is hosted. For example, many countries do not have laws to prosecute child pornography. A 2006 study by the International Centre for Missing and Exploited Children found that of the 184 member States of Interpol, 95 had no legislation at all that specifically addresses child pornography, and of those that do, 41 countries did not criminalise possession of child pornography, regardless of the intent to distribute. Given this is for child sexual abuse material, other RC rated material that promotes human rights abuses or transnational criminal activity, such as materials that promote torture and rape of adults, is even less likely to be illegal in countries where such material is hosted.

Research suggests that a reasonable proportion of offenders access child sexual abuse material use the World Wide Web, with one study finding of a sample of such offenders, 78% obtained images using Internet Relay Chat software, 42% used the World Wide Web, 39% used newsgroups, 30% e-mail and 21% ICQ.⁶ This sample included offenders who both shared images and those that purchased images.

Currently Section 313 of the *Telecommunications Act 1997* requires carriers or carriage service providers to do their best to prevent telecommunication networks and facilities from being used in, or in relation to, the commission of offences of which the downloading or dissemination of child sexual abuse material would present such offences. However, the current provision has not been enforced and there are those in the IT industry who do not

⁵ Moore, T & Clayton R, 'The Impact of Incentives on Notice and Take-down', (2008), www.cl.cam.ac.uk/~rnc1/takedown.pdf

⁶ A.R. Beech, I.A. Elliott, A. Birgden, and D. Findlater, *The internet and child sexual offending: A criminological review*, *Aggression and Violent Behaviour* **13** (2008), 226.

believe that this provision requires them to report clients who they know are accessing child sexual abuse material. One ISP we spoke to said that he would not report any clients accessing child sexual abuse material as he feared prosecution for breach of privacy. Both the Australian Crime Commission and the Australian Federal Police have complained that the IT industry do not adequately assist them through their failure to report online criminal activity (The Age 18/10/2010). In the case of the AFP, they publicly complained about the case where Facebook detected the activities of a child exploitation network and failed to report this network to law enforcement.⁷ Amazon is reported to have recently defended their online sales of the how-to manual for sex with children *'The Pedophile's Guide to Love and Pleasure'* under the banner of being opposed to censorship. They withdrew this title following a wave of consumer protest. However, it is not reasonable for the Australian Government to expect consumers to have to enforce compliance of the online industry with Australian law in what they allow their clients to readily access.

Significant businesses within the IT industry have also placed on the public record their opposition to the current formulation of the RC classification category, suggestive of their opposition to respecting Australian law in placing any restriction on Australians being able to access RC classified material on the Internet. For example, in opposition to the Government's plans that ISPs not provide unrestricted access to RC classified material the Google Australian managing director Karim Tamsamani stated that such a measure "goes way beyond child sexual abuse material and would block access to important online information for all Australians".⁸ Mr Tamsamani did not elaborate on what RC classified material Google Australia thought it was important for all Australians to have access to. With such public disregard for respect of the Australian classification system, it is difficult to believe that the IT industry can be collectively relied upon not to freely allow clients access to material that promotes human rights abuses or transnational criminal activities in violation of the RC category. It highlights the need for government regulation to force co-operation with law enforcement where it will not be freely given.

Filipino law already requires the active participation of the IT industry in combating child sexual abuse online. Given the anecdotal evidence of Australians both assisting in the running of child sexual abuse businesses in the Philippines and of being customers of such businesses, it would be good if Australia could assist the Philippines in combating this transnational criminal activity by matching their laws. Section 9 of the Republic Act No. 9775 *An Act Defining and Penalising the Crime of Child Pornography, Prescribing Penalties Therefor and for Other Purposes* has the following requirements:

- "All internet service providers (ISPs) shall notify the Philippines National Police (PNP) or the National Bureau of Investigation (NBI) within seven (7) days from obtaining facts and circumstances that any form of child pornography is being committed using its server or facility. Nothing in this section may be construed to require an ISP to engage in the monitoring of any user, subscriber or customer, or the content of any communication of any such person."
- "An ISP shall preserve such evidence for purposes of investigation and prosecution by relevant authorities."
- "An ISP shall upon the request of proper authorities, furnish the particulars of users who gained or attempted to gain access to an internet address which contains any form of child pornography."

Section 11 of the Filipino law requires internet content hosts to "Within seven (7) days, report the presence of any form of child pornography, as well as the particulars of the person maintaining, hosting, distributing or in any manner contributing to such internet address, to the proper authorities."

⁷ AFP media release 27 August 2010 and Dylan Welch, 'Facebook fails to alert police on child porn', *The Age*, 27 August 2010, p. 1.

⁸ Asher Moses, 'Conroy backs down on net filters', *The Age*, 9 July 2010.

Under US criminal law §2258A of USC Title 18 provides that any ISP that becomes aware of its servers being used to provide child pornography material must report that to national authority (the Cyber Tipline). ISPs must furnish as soon as possible a report that includes various information in relation to the identifying material of individuals who it is aware of that are registered as controlling the material. It also requires that ISPs provide the details of any other customers of theirs who access the material in the period prior to the material being taken down.

However, §2258A does expressly prohibit the ISPs from monitoring their customers, making it illegal to track customers for any length of time. This is largely a product of American concerns about the right to freedom of speech being impinged by ISPs being granted a broad-ranging right to monitor their customers.

Liability for breaching any of the rules of §2258A is set at a company level (in the form of fines), but individual directors or officers of companies cannot be criminally prosecuted unless it can be shown that they acted intentionally or recklessly.

The Unit is supportive of Australian ISPs being required not to provide clients with unrestricted access to RC classified materials hosted on overseas servers. The easiest way to do this would be the use of block list.

4. Ensuring Pseudo-Images of Child Sexual Abuse are captured under Refused Classification

Images of child sexual abuse can also be manifested in the form of non-real or pseudo-images, including lifelike virtual abusive images without the use of actual children at all. Four typical methods are used in the creation of pseudo-images:⁹

1. an image of a child is inappropriately sexualised (for example, removal of clothing);
2. aspects of a sexualised image of an adult are given child-like qualities (for example, reduction of breast size, removal of pubic hair);
3. an image of a child is superimposed onto a sexualised picture of an adult or child; or
4. a montage of abusive images can be created.

Pseudo-images are prohibited in most Western countries as it is argued that the images represent the sexual victimisation of a child and should therefore be treated as such. However, in the US there has been a long running legal battle over the application of First Amendment rights in cyberspace and the subsequent constitutional legality of laws prohibiting pseudo-images. In 2002 a US Supreme Court decision (*Ashcroft vs Free Speech Coalition*) agreed that criminalisation of 'virtual child pornography' under the *Child Pornography Prevention Act 1996* was unconstitutional, after it was argued that no real children are harmed. However, legislation criminalising virtual images was quickly restored when the US Congress passed the *Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today (PROTECT) Act 2003*, again criminalising both abusive images involving real children and virtual pseudo-images.¹⁰

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⁹ A.R. Beech, I.A. Elliott, A. Birgden, and D. Findlater, *The internet and child sexual offending: A criminological review*, *Aggression and Violent Behaviour* **13** (2008), 221.

¹⁰ A.R. Beech, I.A. Elliott, A. Birgden, and D. Findlater, *The internet and child sexual offending: A criminological review*, *Aggression and Violent Behaviour* **13** (2008), 221.