Mannkal Essay Competition

Internet Censorship in Australia
- A 'clean-feed'?

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Internet Censorship in Australia – A clean feed?

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Recently the Australian government made a decision to implement internet censorship through provision of a mandatory 'clean feed' internet service for all homes, schools and public computers. This 'clean feed' requires Internet Service Providers[1] to filter out a prescribed list of websites deemed prohibited by the Australian Communications and Media Authority[2] with the apparent aim of ensuring children are *'protected from harmful and inappropriate online material'.[3]* The decision to impose censorship puts Australia at the forefront of the spread of this practice from authoritarian regimes such as China and Iran to Western democratic nations,[4] marking the first time that a Western democracy has formally legislated to prohibit users accessing material online.[5]Rather than implementing compulsory statutory censorship, other Western nations such as the United Kingdom and Canada have favoured placing informal pressure on ISPs to voluntarily filter material.[6] Thus the Australian approach to filtering has been subject to considerable disapproval, with critics arguing that the decision to impose legislative standards constitutes unnecessary, illegitimate and irrational governmental interference into the public sphere.[7]

The concern about filtering has been amplified by the government's failure to outline criteria which lead to blocking; whilst filtering will certainly attempt to block child pornography,[8] the government has also suggested that 'unwanted content' may be filtered.[9]

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[1] Hereafter 'ISPs'

[2] Stephen Conroy, *Labor's Plan for Cyber Safety 5 (2007)*, *available online at* http://www.alp.org.au/download/now/labors_plan_for_cyber_safety.pdf

[3] Ibid

[4] Derek Bambauer, *Filtering in Oz: Australia's Foray into Internet Censorship,* Brooklyn Law School Legal Studies Research Papers, Volume 125 *at* 2

[5] Ibid *at* 3

[6] Frank Fisher, Caught in the Web (The Guardian Jan 17 2008), *available online at* www.guardian .co.uk/commentisfree/2008/jan/17/caughtintheweb.

[7] *See, e.g.* Darren Pauli, *Anti Internet filtering rebels hit the streets*, COMPUTERWORLD, Dec. 3,2008, *at* http://www.computerworld.com.au/article/269615/anti_content_filtering_rebels_take_stree ts?fp=16&fpid=1; Computerworld, *Save the Internet!*, *at* http://www.computerworld.com.au/user/login?destination=hands_off_the_internet .

[8] *See, e.g.,* Stephen Conroy, Labor's Plan for Cyber-Safety 5 (2007), *available at* http://www.alp.org.au/download/now/labors_plan_for_cyber_safety.pd

Allowing for discretionary filtering of websites is particularly alarming, creating scope for political will and ethical values of the government to interfere with the private sphere. Moreover on a practical level the government's filter is expected to slow down servers by up to 86%[10] which is likely to have detrimental impact upon productivity of Australian businesses, a costly side-effect in an economic downturn. The costs involved with the Rudd Government's 'clean-feed' legislatively mandated internet filter may be viewed as an example of the inefficiencies of government intervention and regulation. Whilst there is a definite public interest in shielding children from disturbing or harmful internet content, encouraging paternalistic governmental intervention to do so will be to the detriment of both Australia's democracy and economy.

Australia's Censorship Plan

The desire to protect children is a quality inherent in human nature. Whilst the internet is an invaluable tool providing educational and social benefits to children, as in any other area of life there are risks involved. At the 2007 election, the Australian Labor Party capitalised on the community's desire to protect children by promising to introduce compulsory internet filtering. Stephen Conroy, the then Shadow Minister for Communications and Information Technology claimed that this mandatory filter would safeguard children from being exposed to internet risks such as online *'identity theft',* sex offenders, and cyber-bullying. The proposed regime was relatively simple; the Government would grant authority to the Australian Communications and Media Authority (ACMA) to maintain a blacklist of websites which would form the basis for the mandatory filter implemented by internet service providers. The clean feed will censor material that is "harmful and inappropriate"[11] for children. In the ALP's first budget after their election, a total of $128 million was allocated for cyber safety and law enforcement[12] with $44 million dedicated to filtering[13]; a colossal figure in times of economic downturn. However whilst the concept of state imposed internet censorship is simple and the protection of children is an attractive

[9] *Senator Conroy expands reach of net filters to "unwanted content,"* ITNEWS AUSTRALIA, Nov. 13, 2008, *at* http://www.itnews.com.au/News/88908,senator-conroy-expands-reachof-net-filters-to-unwanted-content.aspx.

[10] *Australian Communications And Media Authority, Closed Environment Testing Of Isp-Level Internet Content Filtering* 41, 62-68 (June 2008), *available at* http://www.acma.gov.au/webwr/_assets/main/lib310554/isplevel_internet_content_filtering_trial-report.pdf.

[11] Stephen Conroy, Labor's Plan for Cyber-Safety 5 (2007), *available at* http://www.alp.org.au/download/now/labors_plan_for_cyber_safety.pd

[12] Glenn Mulcaster, *Opposition rises to Internet filter*, THE AGE, Nov. 11, 2008, at 5.

[13] Samela Harris, *The hand that's on your mouse… and why it will make your internet a whole lot slower*, THE ADVERTISER, Oct. 28, 2008, at 19

aim, like many attempts by the government to intervene in the private sector the potential inefficiencies arising from the proposal are far-reaching and costly.

A. THE COSTS OF THE 'CLEAN-FEED'

One of the most fundamental economic concepts is that of cost-benefit analysis. The total social cost of a governmental action consists of both the economic cost of the action and the costs inflicted on the external environment and other stakeholders. Understandably, a sound policy is one in which the benefits incurred outweigh the total social cost. In the context of internet censorship it is necessary to inquire as to whether the monetary costs of implementing the policy, and the collateral costs in restricting access to information and effects on functionality of the internet surpass the apparent benefits in protecting children - if the set of measures achieve the end or combat the evil at issue, and how tolerable the drawbacks will be.[14] Like many attempts by the government to intervene in the private sphere, the decision to impose legislative controls on flow of information is fraught with inefficiencies.

Limited benefits of filtering

The notion of *perfect, efficient censorship* is a mythical concept.[15] Whist filtering abhorrent content such as child pornography may sound like a fair and reasonable idea in theory, in practice it is a logistical nightmare. It requires retrofitting the internet filtering to a network infrastructure which did not contemplate information control as a design goal.[16] As Australia's internet use has developed in a free form manner, rather than a centralised plan such as in Saudi Arabia where all internet traffic flows through a 'choke point', Therefore attempting to keep block lists up to date poses an impossible task for the ACMA.[17] The internet contains far more content than could ever be effectively rated by a governmental organisation; containing at least one trillion unique URLs, with the number of individual web pages is growing by several billion pages per day.[18] The difficulty of monitoring

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[14] Derek Bambauer, *Filtering in Oz: Australia's Foray into Internet Censorship,* Brooklyn Law School Legal Studies Research Papers, Volume 125 *at* 29

[15] Derek Bambauer, *Filtering in Oz: Australia's Foray into Internet Censorship,* Brooklyn Law School Legal Studies Research Papers, Volume 125 *at* 25

[16] *See generally* OpenNet Initiative, *at* http://opennet.net/research/regions/au-nz; Derek Bambauer, *Filtering in Oz: Australia's Foray into Internet Censorship,* Brooklyn Law School Legal Studies Research Papers, Volume 125 *at* 8

[17] Derek Bambauer, *Filtering in Oz: Australia's Foray into Internet Censorship,* Brooklyn Law School Legal Studies Research Papers, Volume 125 *at* 12

[18] As estimated by Google; *We Knew The Web Was Big,* July 2008, available online at http://googleblog.blogspot.com/2008/07/we-knew-web-was-big.html

websites containing child pornography is even greater, as the majority of the commercial websites involving this illegal content only remain 'live' for less than fifty days before transferring to alternate locations.[19] The current blacklist maintained by the ACMA is complaints based[20] and relatively static, containing only a few thousand websites.[21] This constitutes an insignificant minority out of the vastly large number of pages containing material which may be unsuitable for children. Thus the ACMA is ill-equipped to filter the billions of websites with potentially harmful content; relying on a complaints based system which is vastly inadequate. Likewise Senator Conway has made it clear that the censorship will not attempt to filter 'peer to peer' transmission of information through BitTorrent.[22] Yet numerous studies have revealed that direct transmission of pornographic material is evolving into the favoured method of gaining access to child pornography.[23] Therefore the mandatory blocking of web-pages is likely to have minimal impact on transmission of pornographic material, let alone reduce child sexual abuse.[24]

As well as only blocking a very small number of Web pages, the Rudd Government's proposed 'clean-feed' fails to meet its objective in protecting children's safety and well-

[19] *IWF Annual Report 2007; (17 April 2008)* available online at http://www.iwf.org.uk/documents/20080417_iwf_annual_report_2007_(web).pdf; at 7. See also *IWF Annual Report 2008, 29 April 2009* available at http://www.iwf.org.uk/documents/20090423_iwf_ar_2008_pdf_version.pdf at 7

[20] By *Broadcasting Services Act 1992* (Cth) s.147 and 149, the ACMA's blacklist is largely complaints based*; see also* Australian Communications and Media Authority, *Prohibited Online Content*, *at* http://www.acma.gov.au/WEB/STANDARD/pc=PC_90102 (last updated Aug. 11, 2008).

[21] While Australia's list of blacklisted sites currently is reported to stand at 1,370, the *Sydney Morning Herald* is reporting that that list could increase to around 10,000 sites – most of which are of illegal pornographic content, but could also includes sites that house incendiary political discussions; see Asher Moses; *Leaked Australian blacklist reveals banned sites*, Sydney Morning Herald; March 19 2009, available online at http://www.smh.com.au/articles/2009/03/19/1237054961100.html

[22] On "Blocking the Net", *Insight*, SBS TV, 31 March 2009 Senator Conway stated that *'We've never tried to suggest that a filtering - whether it be home-based or ISP - can deal with peer-to-peer. I keep hearing this argument day in, day out. It will never do this. We've never said it would.".* Transcript is available online at http://news.sbs.com.au/insight/episode/index/id/59#transcript. See also Australian Communications and Media Authority *Developments in Internet Filtering Technologies and Other Measures for Promoting Online Safety* (2008) available online at http://www.acma.gov.au/webwr/_assets/main/lib310554/developments_in_internet_filters_1streport.pdf

[23] *See generally* Los Angeles Field Division, Federal Bureau of Investigation, *Multi-Agency Investigation Targets Use of Peer-to-Peer Networks to Exchange Child Pornography*, *at* http://losangeles.fbi.gov/dojpressrel/pressrel08/la081908usa.htm (Aug.19, 2008); Statement of Linda D. Koontz, *File-Sharing Programs: Child Pornography Is Readily Accessible over Peer-to-Peer Networks*, Testimony Before the Committee on Government Reform, U.S. House of Representatives, *at* http://gao.gov/new.items/d03537t.pdf (Mar. 13, 2008).

[24] Derek Bambauer, *Filtering in Oz: Australia's Foray into Internet Censorship,* Brooklyn Law School Legal Studies Research Papers, Volume 125

being online. In Labor's own policy document, *'Labor's Plan for Cyber-Safety'[25]* the online risks identified included online identity theft, cyber-bullying and online activities of child predators. Whilst a successful filter may assist in mitigating children being exposed to content inappropriate for their maturity level, the ACMA's report into *Developments in Internet Filtering Technologies and Other Measures for Promoting Online Safety*suggests that content risks are of the least concern to parents and children.[26]Rather, the report revealed public is more concerned about communication risks such as inappropriate advances from strangers, and theft of personal information.[27] These arguably more concerning risks to the safety of children are not addressed by the *'clean-feed'.* In fact, some critics have suggested that the clean-feed may in fact have an inherently detrimental effect; not only failing to block inappropriate online content but also giving parents a false sense of security in believing that it will be safe to allow their children to access the internet in an unsupervised fashion.[28] Regardless of whether this is the case, it is clear that filtering of content by the government cannot serve as a replacement for active parenting in protecting children from the risks posed by internet usage.

Costs of filtering

Direct financial cost

A filter requiring internet service providers to examine all web traffic will inevitably create enormous expenses and technical issues. The Rudd Government has set aside $44 million over four years for internet filtering. [29]However in 2004 the Howard Government commissioned report[30] found that the cost of mandatory filtering by internet service providers would be subject to installation costs of around $45million as well as ongoing costs of greater than $33million per year in administrative costs for filtering by the providers. Yet the Rudd Government has budgeted approx. 38% *less* than the estimated

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[25] Stephen Conroy, Labor's Plan for Cyber Safety 5 (2007), *available online at* http://www.alp.org.au/download/now/labors_plan_for_cyber_safety.pdf

[26] *Australian Communications and Media Authority (*2008) Developments in Internet Filtering Technologies and Other Measures for Promoting Online Safety available online at http://www.acma.gov.au/webwr/_assets/main/lib310554/developments_in_internet_filters_1streport.pdf

[27] Ibid

[28] See criticism by Libertus,net, *Australia's Government Mandatory ISP Filtering / Censorship Plan*, available online at http://libertus.net/censor/ispfiltering-au-govplan.html#s_31

[29] Samela Harris, *The hand that's on your mouse… and why it will make your internet a whole lot slower*, THE ADVERTISER, Oct. 28, 2008, at 19.

[30] Department of Communications, Information Technology and the Arts, *Review of the Operation of Schedule 5 to the Broadcasting Services Act 1992* (2004) 3. After outlining the cost implications of an ISP based internet filter, the report said: 'Given the limited benefits of an ISP-level filtering system, the costs of a mandated requirement to filter do not appear justified.'

installation costs as at 2004, and nothing for ongoing costs thereafter. Therefore the cost of the largely ineffectual 'clean-feed' will be passed on to consumers both directly through the Rudd government spending taxation revenue, but also by way of higher costs of internet access as internet service providers attempt to retain their profit margins. Imposing a further tax on consumers for their internet usage is highly undesirable , particularly given the current fragile state of the Australian economy.

Indirect Costs

The Rudd Government have shown commitment to drive broadband deployment, promising faster internet access speeds for Australians.[31] Yet imposing an internet filter will work in direct opposition to this development, with findings from recent trials suggesting that a content filter at the internet service provider level will slow internet access down by up to 80%.[32] Thus filtering will act as a tax, both with customers not only paying for the costs of censorship directly through levies passed on by the internet service providers, but will also need to invest in additional network capacity to retain current speeds.[33] Not only is this detrimental to e-commerce, it eliminates the personal choice of individuals to personally control content accessed on the internet and enjoy higher speed downloads.

Reducing access to legal information

Moreover the government's attempts to control the information flow in the internet is likely to both fail to prevent access to prohibited information, and filter material that is permitted. Even the most accurate software trialled by the Government would incorrectly block ten thousand permitted sites in every million, posing substantial information costs.[34] Most effective filters disallowing prohibited content are those which also block the most legal content; thus for the filter to have any real effect requires engaging in overblocking

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[31] Australian Labor Party, *National Platform And Constitution* (2007), available at *http://www.alp.org.au/platform/index.php*. at 30, 60-61, 65, 83 ; the Rudd Government has promised to invested over $40 billion in the development of a national high-speed fibre optic broadband initiative – an initiative that will be undermined by this ISP-level filter.

[32]5 out of 6 active filtering products educed performance by 20% or more, and one reduced to 16 % of the baseline measure. The level of performance degradation ranged from 18% through to 78%' - Australian Communications and Media Authority, *Closed Environment Testing of ISP-Level Internet Content Filtering (June, 2008)* at 48:

[33] Derek Bambauer, *Filtering in Oz: Australia's Foray into Internet Censorship,* Brooklyn Law School Legal Studies Research Papers, Volume 125 at 17

[34] Australian Communications and Media Authority, Closed Environment Testing Of Isp-Level Internet Content Filtering 41, 62-68 (June 2008), *available at* http://www.acma.gov.au/webwr/_assets/main/lib310554/isplevel_internet_content_filtering_trial-report.pdf

depriving Australians of valuable internet content.[35] These costs in access to innocent information, ability to use high speed connections and preventing access are real and must be weighed against benefits of filtering .

B. SOCIAL AND DEMOCRATIC COSTS : NON-TRANSPARENT POLICY

Yet even if we make the fanciful assumption that filtering the internet is technically possible, the formulation of Australia's 'clean-feed' policy is problematic. It is widely acknowledged that in a democracy such as Australia, if the government is to engage in the undesirable act of censorship they should identify clear criteria for blocking content to ensure true accountability for their actions.[36] Transparency in disclosing what content the government seeks to block allows citizens and the media to evaluate how blocking content relates to the goals of censorship; ensuring the filtering is used for public protection rather than social and political gain.[37]

The government has made it clear that the filter will require extensive expansion of the ACMA's blacklist of prohibited content,[38] however ambiguity remains regarding the scope of targeted content.[39] Initial proposals suggested that the mandatory filter should block access to illegal or "prohibited" material, as defined by the *Broadcasting Services Act 1992.*[40] Whilst the term 'prohibited' alludes to a focus on filtering pornographic material, the potential scope of the legal definition of the term is far wider. In Commonwealth censorship legislation 'prohibited' content may include material merely unsuitable for children; such as that classified as R18+ or even MA15+.[41] Media statements by the government have revealed that they purport to extend the filtration of content beyond pornography to ban

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[35] Ibid at 62-68
[36] Derek Bambauer, *Filtering in Oz: Australia's Foray into Internet Censorship,* Brooklyn Law School Legal Studies Research Papers, Volume 125 at 20
[37] Ibid at 20
[38] Stephen Conroy, Labor's Plan for Cyber Safety 5 (2007), *available online at http://www.alp.org.au/download/now/labors_plan_for_cyber_safety.pdf* states that "...the Current ACMA blacklist under the Howard Government is inadequate. It does not contain enough sites to protect our children from harmful and inappropriate content... Labor's ISP policy will prevent Australian children from from accessing any content that has been identified as prohibited by ACMA..."
[39] Derek Bambauer, *Filtering in Oz: Australia's Foray into Internet Censorship,* Brooklyn Law School Legal Studies Research Papers, Volume 125 at 20
[40] Senate Hasard, Thursday 13 November 2008 (Canberra), pg 6903 available online http://www.aph.gov.au/Hansard/senate/dailys/ds131108.pdf
[41] "Prohibited content" is defined in the existing Commonwealth Internet censorship legislation- *Broadcasting Services Act 1992* Schedule 7 and Schedule 5

online gambling websites, websites supporting voluntary euthanasia[42] and even sites allowing download of video-games deemed unsuitable for fifteen year olds.[43] Whilst there may be grounds for blocking children from accessing this conduct, as the proposed 'clean feed' is compulsory for all internet users it is necessary to ask if it is truly the role of the government to mandatorily shield the eyes of fully grown adults from racy web games? Likewise is it logical to block online 'prohibited' content for all Australian users when they may legally obtain and possess the content offline?

The lack of clear criteria for blocking content is particularly concerning given the government's refusal to undertake the approach of other Western democratic nations and release a list of disclosed sites, and the lack of forums for review of ACMA decisions. Attempts to compel release of the limited ACMA blacklist under the *Freedom of Information Act*[44] have failed, with the government arguing that disclosure would undermine enforcement efforts by allowing access to prohibited content.[45] Yet this is inconsistent with the government's policy on offline content, where a list of banned materials is released.[46] Moreover the failure to release banned websites or set transparent guidelines for blocking content has raised concerns that the government may manipulate the filter for political purposes; a practice that has been criticised for being reprehensible in a democratic society.[47] For some critics these fears were confirmed in March this year where Wikileaks, an anonymous document repository for whistleblowers, was itself temporarily blacklisted for revealing and publishing the ACMA's list of prohibited sites.[48]

This concern is amplified by the fact the ACMA's decisions to add potential prohibited content to their blacklist are made by unnamed government staff, and are not subject to

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[42] MichaelDuffy, *Web filtering pulls plug on euthanasia debate*, Sydney Morning Herald; May 22, 2009 available online at http://www.smh.com.au/opinion/web-filtering-pulls-plug-on-euthanasia-debate-20090521-bh0s.html

[43] As Australia has not developed an R rating for video games, all games that exceed MA 15+ are deemed to be restricted content; Asher Moses, *Web filters to censor video games,* Sydney Morning Herald, June 25 2009, available online at http://www.smh.com.au/digital-life/games/web-filters-to-censor-video-games-20090625-cxrx.html

[44] *Freedom of Information Act 1982* (Cth)

[45] Electronic Frontiers Australia, *FOI Request on ABA*, *at* http://www.efa.org.au/FOI/foi_aba_2000.htm

[46] Andrew Hendry, *In Conroy's muddy waters you'll never know what's being filtered*, COMPUTERWORLD, Oct. 28, 2008, *at* http://www.computerworld.com.au/index.php/id;355409327.

[47] Derek Bambauer, *Filtering in Oz: Australia's Foray into Internet Censorship,* Brooklyn Law School Legal Studies Research Papers, Volume 125 at 20

[48]Wikileaks, *Australia Secretly Censors Wikileaks Press Release,* 16 March 2009, available online at http://wikileaks.org/wiki/Australia_secretly_censors_Wikileaks_press_release_and_Danish_Internet_censorship_list,_16_Mar_2009

appeal, parliamentary or public review or any other form of scrutiny. Such decisions cannot be subjected to review by the Classification Board, nor the Classification Review Board, nor the Administrative Appeals Tribunal, even if someone discovers that a particular page or site has been added to the blacklist.[49] The opacity in the process of classifying online material is in stark contrast to decisions of the Classification Board who censor offline content; where the members are independent and named, and decisions to censor material may be appealed to the Classification Review Board for reconsideration.[50] The failure to release a list of blocked content makes it difficult for citizens to assess whether the scope of the restricted material is appropriate and whether it fits the underlying rationale to protect children.

Nevertheless even if the government does not manipulate the filter for political gain, by censoring the entire country's Internet access down to the level of a child of indeterminate age, it robs Australian adults of ability to make their own decisions about the content to which they are exposed. Whilst the government may not agree with the content of some potentially censored sites, such as Nietzsche's views on euthanasia, one of the hallmarks of a democracy is the ability to freely express opinions. As John Stuart Mill famously stated *'we can never be sure that the opinion we are endeavouring to stifle is a false opinion; and if we were sure, stifling it would be an evil still'*[51]*.* Allowing the government to control the content to which all Australians are exposed by exporting their own values and choices represents an attempt by an overly paternalistic government to control the private sphere. The failure to expose blocked websites further eliminates accountability by the government for their decisions cannot decide whether the scope of censorship is appropriate.[52]

C. ALTERNATIVE MEASURES

There are alternate measures which may be taken to protect children from inappropriate internet content whilst avoiding the worst features of a government-imposed filter. In fact the previous Government spend $84.8 million on a scheme to provide free PC-based

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[49] See criticism by Libertus,net, *Australia's Government Mandatory ISP Filtering / Censorship Plan*, available online at http://libertus.net/censor/ispfiltering-au-govplan.html#s_31
[50] Ibid
[51] ~John Stuart Mill, On Liberty, 1859
[52] Similar criticism was leveled by Derek Bambauer in *Filtering in Oz: Australia's Foray into Internet Censorship,* Brooklyn Law School Legal Studies Research Papers, Volume 125 at 20

filtering to all Australian families.[53]This scheme is preferable as it allows parents to track and monitor their child's internet access and intervene concerning content which cannot be picked up by a filter.[54]Likewise, the PC-based filtering is voluntary, allowing individuals to elect to filter content on the internet rather than slowing down the system for all users and interfering with e-commerce. Moreover the Government's own studies admit education is more effective than filtering in protecting children.[55] An education campaign raising awareness of the voluntary filter and educating children about the dangers of the internet would be a more beneficial use of funds than paternalistic governmental attempts to control the flow of online information.

The Rudd government's decision to impose legislative filters on internet content constitutes an unnecessary, illegitimate and irrational attempt by the Government to control information flow in the private sphere. Regulation of the internet is both technically impossible and morally reprehensible, creating a greater scope for internal government corruption. Alternatives such as voluntary internet filters offer consumers true choice as well as offering a superior means of protecting children from potential harm over the internet; allowing parents to truly regulate the content to which their children are exposed without unnecessary government intervention.

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[53] *See* Senator Helen Coonan, *NetAlert: Protecting Australian Families Online*, Aug. 10, 2007, *at* http://www.minister.dcita.gov.au/coonan/media/media_releases/netalert__protecting_australian_families_online;

[54] By way of example of support for voluntary censorship, see Get Up!, *Save the Net Campaign* available online at www.getup.org.au/campaign/SaveTheNet

[55] Australian Communications and Media Authority *Developments in Internet Filtering Technologies and Other Measures for Promoting Online Safety*, available online at http://www.acma.gov.au/webwr/_assets/main/lib310554/developments_in_internet_filters_1streport.pdf