PORNOGRAPHY, PROTECTION, PREVARICATION: THE POLITICS OF INTERNET CENSORSHIP

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Come on, get real! We are not talking about that sort of stuff. We are talking about the fact that you have only got to press P on the Internet and all this stuff appears free of charge in front of you and young children can access it.

- Senator Paul Calvert[1]

I think Alston knows perfectly well how utterly stupid this idea is, as do the forces that pull his strings.

- Greg Taylor[2]

The *Broadcasting Services Amendment (Online Services) Act* 1999 (Cth) (*"Online Services Act"*) has brought the Internet into line with other Australian 'mass' media by including it within our relatively complex censorship system. The political debate surrounding the issue of Internet censorship has been characterised as either machine politics, to attract the vote of staunch anti-pornography Senator Brian Harradine, or an extension into cyberspace of the ongoing battle between libertarianism and social conservatism. These explanations focus on the surface-level rhetoric engaged in by all sides in the political conflict.

The *Online Services Act* is a largely ineffective and wasteful piece of legislation. Unnecessarily long and complex, it applies a regulatory model designed for oligopoly media models to a pluralistic communications medium. Further, its operation depends on what is effectively delegated legislation

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prepared by the Internet Industry Association ("IIA"),[3] and implemented by the under-resourced Australian Broadcasting Authority ("ABA").[4] When implemented, the legislation will encourage Australians to move their sexually explicit and illegal content overseas, while promoting the user-level filtering preferred for years by the Internet service provider ("ISP") industry.

The Minister for Communications, Information Technology and the Arts, Senator Richard Alston, would undoubtedly call the legislation a 'best attempt'[5] at sensible and consistent censorship given the complexities associated with controlling new media. His detractors, however, cite the *Online Services Act* as evidence that the Government is not technically savvy enough to handle the Internet.[6] Both sides may be correct. In essence, the debate was never about the advantages of one technological solution over another, it was about the big things in politics: perceptions, beliefs and attitudes.

The *Online Services Act* exemplifies "symbolic politics", as defined by Murray Edelman.[7] Symbolic politics is the desire of the decision-maker to appear active on an issue when he or she is not. It is the victory of *style* over *substance*. However, Edelman's view is not based on a banal interpretation of politics as cynical manoeuvring for personal edification. Symbolic politics, he argues, results from two factors: the difficulty in measuring empirically the motivation behind public calls for governmental action; and/or the fact that the problem which the policy claims to address is one that will or may occur in the future. These factors encourage decisions emphasising the search for information to resolve uncertainty (often fed by rumour and speculation), and publicised governmental action asserting a factual state of affairs that may not actually exist. However, while symbolic politics may encourage cynicism, Edelman concludes that symbols can be powerful influences on public action, allowing government to influence conceptions of what is proper, factual and expected.

Australia's experiment with Internet censorship is a case in point. From the outset, the premise on which the legislation was proposed was highly questionable. Although the Government continually attested to community

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3   The IIA (the largest industry group in Australia with a well-developed code of practice before the introduction of the *Online Services Act*) has had three content codes recognised by the Australian Broadcasting Authority as industry standards. The content codes are available at <http://www.iia.net.au/code.html>. The documents are written, structured and prepared in the same manner and form as legislation and are distinctly different to the code of conduct prepared by the Western Australian Internet Association, available at <http://www.waia.asn.au/Documents/CodeofConduct.html>.

4   The ABA only received an additional $1.9m per year to administer the policy. This must cover the costs of staff, community education, operating a complaints hotline, research, and money to be paid to the Office of Film and Literature Classification for classification. G Grainger, Senate Select Committee on Information Technology, *Senate Proof Committee Hansard*, 27 April 1999, p 4.

5   The Minister has never claimed that this legislation would be universally effective. Rather, he has promoted it as a "workable regime". Department of Communications, Information Technology and the Arts, "Senate Passes Internet Content Legislation", Media Release, 26 May 1999.

6   J Casimir, "Act of Stupidity" *Sydney Morning Herald (Icon)*, 17 July 1999, p 11.

7   M Edelman, *Politics as Symbolic Action: Mass Arousal and Quiescence*, Markham (1971).

concern over pornographic, sexually violent and paedophilic material online,[8] no statistical evidence was presented detailing the amount and the accessibility of such material.[9] When evidence was released during the debate, such as survey data produced by the online research firm www.consult,[10] it showed limited support for government censorship among Internet users – a measure of concern, rather than the perception of a social problem.[11]

Furthermore, while online censorship was raised in 1999 to be comprehensively considered and resolved, the Internet had only become 'an issue' because of trends in its technological development and its increasing pervasiveness in Australian homes. Members of the Senate Select Committee on Information Technologies, which reviewed the proposed legislation in early 1999, were conscious of trends in this field, particularly the expected convergence of the Internet with mainstream television hardware. Although wanting to produce flexible legislation to deal with technical innovation, Select Committee members were also concerned to establish an acceptable policy to protect minors online before convergence occurred.

Despite uncertainty regarding the immediacy of Internet-television convergence,[12] concerns over Internet content have existed for several years.[13] These reached a media highwater mark in 1995 when Time magazine ran its (in)famous "Cyberporn" cover story.[14] The hysteria accompanying this and other similarly under-informed media coverage had dissipated by 1999. The million plus Australians regularly using the Internet were likely to react with derision to warnings made by Senator Alston about paedophiles and snuff film makers.

It is unsurprising that, during debate over the initial content of the *Online Services Act*, the view emerged that Senator Alston was producing policy that was incomprehensively foolish. The Government renounced previously stated

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8   For example, Senator Alston linked community concerns about online content to the protection of children from "makers of snuff movies, paedophiles, drug pushers and other offensive or disturbing material". R Alston, "Regulation is Not Censorship" *The Australian*, 13 April 1999, p 55.

9   The Australian Bureau of Statistics reported in 1998 that the two major impediments to the uptake of the Internet were cost (30%), and lack of interest (29%). Australian Bureau of Statistics, *Household Use of Information Technology*, Australia, June 1998.

10   See <http://www.consult.com.au>.

11   R Marzbani, "Excuse Me, Facts?" <ramin@consult.com.au>, email (28 April 1999). Archived at <http://www.anu.edu.au/mail-archives/link/link9904/0580.html>.

12   This will depend on the commercial interests that drive the move towards convergence. G Lee, "Net/TV Convergence Myth Exploded" *The Register*, <http://www.theregister.co.uk/990831-000016.html> at 31 August 1999 (Copy on file with author).

13   The issue's 'prehistory' goes back to the use of Bulletin Board Systems during the late 1980s and early 1990s. However, the usage of these technologies remained small and never attracted the public attention of the Internet.

14   P Elmer-Dewitt, "On a Screen Near You: Cyberporn" *Time*, 3 July 1995, p 38. The article edited the study undertaken by Rimm entitled *Marketing Pornography on the Information Superhighway: A Survey of 917,410 Images, Descriptions, Short Stories and Animations Downloaded 8.5 Million Times by Consumers in Over 2000 Cities in Forty Countries, Provinces, and Territories*. The initial research was undertaken using a non-Internet-based service (a Bulletin Board System). Therefore, the implicit linking of pornographic services with "Cyberspace" (a term increasingly being used to describe the Internet rather than Bulletin Boards) tended to misrepresent the study as uncovering an overwhelming amount of pornographic material on the open Internet itself rather than through commercial direct-line systems. Having attracted so much attention, the work has since been heavily criticised.

policy intentions of "light touch" regulation, free from interference with offshore content,[15] and ignored its Government commissioned CSIRO report which warned that backbone or ISP-level filtering would significantly degrade network performance and impede the development of electronic commerce in Australia.[16] The suggestion that the ABA would establish a blacklist of webpages, and that filtering would be mandated for ISPs, encouraged the view of Government policy as simply a knee-jerk, luddite response to technological change. This view, however, is misplaced.

The Internet has been promoted as a democratising political force, capable of changing the way people communicate and form social relationships and communities.[17] Its central promise to governments, however, is its potential to facilitate domestic and international commerce. Thus, it is unremarkable that the Coalition Government strongly supports the benefits of an online economy. It has sought to bring information technology ("IT") issues together and develop overarching government machinery to coordinate policy.[18] Combine this with the Coalition's socially conservative underpinnings, and it is not surprising that the Government established the National Office for the Information Economy ("NOIE") rather than a National Office for the Information Society.

The major concern of NOIE, to date, has been developing policies to regulate and encourage the growth of electronic commerce. This includes consumer protection and privacy, and the development of digital signatures to ensure credit card transactions are free from surveillance and fraud. As well as promoting the development of online technologies in Australia, NOIE raises awareness of the benefits of IT within the mainstream Australian community.[19]

If Australia is to remain a developed economy it requires not merely the skills and technology to access the online environment. It needs a willingness to engage with the technology in a creative way, to live with the technology and invite it into the home. John Nieuwenheizen observes that there has been limited debate about the development of the Internet in Australia past the problem of rampant pornography.[20] Yet there has been a degree of veiled IT policy development. The Federal Government, through bodies such as NOIE, has been actively working on online policy in relation to the economic effects of the latest information revolution. However, this work has been overshadowed by debate on pornography and the Internet.

The issue of pornography had largely drifted from the public spotlight by 1999. Religious organisations that had previously pushed the issue moved their

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15   Commonwealth Government of Australia, *Principles for a Regulatory Framework for On-Line Services in the Broadcasting Services Act 1992 (Cth)*, 1997, available at <http://www.dcita.gov.au/cgi-bin/trap.pl?path=/policy/framework.html>.

16   CSIRO Report, *Blocking Content on the Internet: a Technical Perspective*, June 1998.

17   See M Hauben and R Hauben, *Netizens: On the History and Impact of Usenet and the Internet*, IEEE Computer Society Press (1997).

18   Such as the Australian Information Economy Advisory Council, The Online Council and the Ministerial Council for the Information Economy.

19   See <http://www.noie.gov.au/>.

20   J Nieuwenheizen, *Asleep at the Wheel: Australia on the Superhighway*, Australian Broadcasting Corporation (1997).

efforts elsewhere.[21] However, the question of assuring the non-Internet using public of the safety of the technology remained important to the Government. Additionally, given the change in Senate composition in mid-1999, the Government's ability to enact legislation was limited by the Australian Democrats' unwillingness to support legislation that would increase, or be perceived to increase, censorship.

Essentially, the Government wanted a policy that would assure Australians who had not yet embraced online technology that the Internet was a 'safe' environment for this generation and the next. In order to meet with the approval of Senator Harradine and conservative elements in the Coalition, the legislation needed to appear to contain strong provisions against pornography. If surveying can be relied on, concerns about 'net nasties' are not particularly relevant to actual users. Therefore, the message that the Internet is 'safe' needed only to reassure the technologically unfamiliar public, without interfering with one of the most important aspects of the Internet: *business*.

That the policy was going to be largely symbolic (in Edelman's use of the term) was apparent in the lack of genuine consultation with industry or users over the draft legislation prior to its announcement. The policy neatly evaded quite serious concerns such as the transmission of 'hate speech' and harassment, and the question of online gambling.

The symbolic nature of the proposed legislation provided the Government with its political strategy: make a strong statement against Internet pornography and acquire the support of conservatives. During parliamentary debate the Government could cave in and amend (negate) much of the legislation, thereby gaining the acquiescence of the IIA.[22] This approach would produce legislation that, while not impeding electronic commerce, would provide the Government with the ability to tout the law as a 'family-friendly' response to community concern. In securing 'safety' for children on the Internet, the Government could announce subsequent increases in Internet usage as a justification of its approach.[23] The Government could also support Australians' increasing adoption of Internet technology, a trend perceived as critical in Australia gaining a commercial advantage in 2000 and beyond.

It is clear that the *Online Services Act* was aimed at that vague group of 'battlers'. Prime Minister John Howard stated on Adelaide Radio 5DN: "You don't understand the mood of middle Australia on this, you don't understand how deeply many parents feel about it, with some justification".[24]

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21   Such as the Religious Alliance Against Pornography.

22   The core element of the legislation, the requirement for mandatory filtering, was removed through amendment in the Senate after negotiation with the IIA. The relevant provisions were replaced with others allowing ISPs and Internet users, through an industry code of practice, to use "alternative access prevention arrangements", including existing filtered feed offered by the larger ISPs and basic desktop filtering packages such as NetNanny. *Broadcasting Services Act* 1992 (Cth), Schedule 5, s 40(4) (as amended by the *Online Services Act*).

23   Department of Communications, Information Technology and the Arts, "Massive Growth in Internet Usage", Media Release, 7 September 1999.

24   AAP News, "Howard Slams Internet Bill Protests", 28 May 1999.

It is not clear, however, that political conflict over the legislation was necessary at all. Any regulatory action was bound to be strongly opposed by online libertarians (indeed the Government never bothered to negotiate with Electronic Frontiers Australia about the content of the Bill). Moreover, the Government, in alienating homosexuals[25] and ignoring the concerns of the Jewish community regarding 'hate speech' and the Internet, showed its predilection for slighting the views of 'special interests', regardless of their legitimacy.[26]

The legislation does provide the Government with a means of ensuring that illegal or pornographic material can be removed from Australian computers. However, the introduction of the law was an unwieldy means of bringing about industry regulation. The Government's position is that the legislation, being based on the concept of parity with other media forms, will not inhibit discussions of topical issues, such as heath, safe sex, politics and religion.[27] Yet the Internet censorship system for offshore content will effectively be devolved to commercial filtering services. Thus, Australian Internet access will be subject to the censors who design these systems, the majority of whom are Americans, reflecting American beliefs and values. Among Australia's increasingly large community of well-paid, educated IT professionals, the Government has seriously damaged its reputation as a progressive and thoughtful administration, a reputation that it might have easily won from the Australian Labor Party. While the political skills of the Government easily out-matched the technologists in 1999, the expanding importance of IT in our everyday life will increase the political shrewdness and impact of this group in the future. This will especially occur as the IT sector accounts for an increasing slice of the national economy.[28]

Overall, the Government undertook a lengthy and politically complex path to produce an underwhelming outcome for concerned Australian Internet users. The political debate over Internet censorship was based on questionable assumptions about the development of Internet technology, speculation about the actual amount of morally depraved and illegal material on the Internet, and unsubstantiated assertions about the level of community concern. It is therefore reassuring that the Government chose to engage in largely symbolic policy development, as opposed to endeavouring to tame cyberspace in a meaningful way.

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25   In particular, the content of the legislation, and the Minister's statement during debate over the legislation that lesbianism is "not normal". A Rollins, "Alston Brands Lesbians 'Not Normal'" *The Age,* 26 May 1999.

26   The Executive Council of Australian Jewry collects evidence on antisemitism in Australia. It compiles records of Internet based hate groups collectively and individually attacking members of the Jewish community online. The Executive Council of Australian Jewry, *Report on Antisemitism in Australia,* 1998.

27   National Office for the Information Economy, *Frequently Asked Questions,* July 1999, point 5.3.

28   Jock Given notes that the communications sector grew at four times the rate of the Australian economy. J Given, *The Death of Broadcasting,* UNSW Press (1998) p 8.