

28 February 2011

Committee Secretariat
House of Representatives Standing Committee on
Social Policy and Legal Affairs
PO Box 6021
Parliament House
CANBERRA ACT 2600

Dear Committee Secretariat

Please accept the attached submission from the Castan Centre for Human Rights Law regarding the Social Policy and Legal Affairs into the Regulation of Billboard and Outdoor Advertising. Please note that we were provided granted an extension to submit the submission until this Friday 4 March.

This submission was prepared on behalf of the Centre by Tania Penovic, Amanda Thompson and Lisa Harrison.

We are glad, of course, to answer any questions you may have regarding the submission, and should you require, we would be happy to provide oral evidence to the Committee.

Yours sincerely



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Submission to

House of Representatives Standing Committee

on

Social Policy and Legal Affairs

into the

Regulation of Billboard and Outdoor Advertising

Prepared by Tania Penovic, Amanda Thompson and

Lisa Harrison

We are grateful to the Committee for the opportunity to make written submissions to this timely enquiry. The proliferation of sexual images and content in outdoor advertising has been a topic of significant public concern. Such concerns are often expressed in the context of morality, feminist theory, psychological or socio-cultural analyses. Our submission will focus on the impact of such advertising on the realisation of Australia's human rights obligations enshrined in Convention on the Rights of the Child (CRC). We will also consider the extent to which further restrictions upon the freedom of expression may be introduced in the context of advertising and the importance of maintaining sex education campaigns in a range of media, including outdoor advertising.

Introduction

Outdoor advertising occupies a privileged place in the public space. It cannot be switched off, or shut down. It demands to be seen by a maximum number of viewers. While it may market products which are targeted to a particular societal demographic, it is visible to all. It thus pervades our space and thereby our consciousness.

The prevalence of sexual images and messages in the media has been of particular concern with reference to children. The depiction of children in a sexual light has been of concern in various sectors of the media. Highly sexualised images in outdoor advertisements have on occasion raised concerns associated with the youthful appearance of the model. Nevertheless, the predominant concern is that outdoor advertising material of a sexual nature which addresses itself to the adult market may be inappropriate for children who are exposed to it.

It is not surprising that advertisers continue to push the boundaries of what is considered appropriate. Advertising is essentially designed to attract attention in pursuit of commercial advantage and is not informed by the interests of the broader community. In circumstances where material is neither classified nor vetted prior to display, the tendency to push boundaries is likely to be exacerbated. A key area in which boundaries may be (and are) pushed pertains to content of a sexual nature, whether this be in the form of images or messages conveyed in writing. Much has been written about the mainstreaming of pornography. Dr Lauren Rosewarne's analysis of outdoor advertising in Melbourne in 2003 identified a preponderance of highly sexualised advertising featuring women, including

examples of outdoor advertising which referenced pornographic material.¹ Rosewarne concludes that '[w]hen elements from pornography leave the private sphere and feature in publicly displayed outdoor advertisements, choice regarding exposure evaporates and concerns relating to pornography consumption become important public policy concerns'.² We believe that the current scheme of self-regulation requires adjustment in order to address these public policy concerns, particularly insofar as they compromise the realisation of human rights enjoyed by children. We will conclude our submissions with recommendations as to how the self-regulation model can be improved.

1. The Convention on the Rights of the Child

The CRC is the most widely ratified international human rights treaty, with near-universal ratification. Its standards apply to persons under the age of 18 and encompass both civil and political rights and rights which may be characterised as economic, social and cultural. The CRC was ratified by Australia in December 1990. Its standards therefore bind Australia under international law. The implementation of state parties' obligations under the CRC is supervised by the United Nations (UN) Committee on the Rights of the Child. The Committee considers state parties' periodic reports concerning their compliance with CRC obligations in addition to providing guidance on its interpretation.

The CRC's Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography was adopted by the United Nations in 2000 and ratified by Australia in 2007. The pornographic material to which the optional protocol addresses itself is not on display in Australia's public space. We will accordingly focus our observations on the CRC.

Specific standards which are relevant to the enquiry include the following:

- The overarching principle, enshrined in article 3(1) of the CRC, that the best interests of the child shall be the primary consideration in decision-making concerning the child.

¹ Lauren Rosewarne, 'The Men's Gallery, Outdoor Advertising and Public Space: Gender, Fear and Feminism, 28 Women's Studies International Forum (2005) 67-78 at 72.

² Ibid.

- State parties are to recognise parents as having the primary responsibility for the upbringing and development of the child, with the best interests of the child being their primary concern, backed up by appropriate from the state (article 18).
- the right to access information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health (Article 17)
- the right to seek, receive and impart information and ideas in any other media subject to restrictions provided by law which are necessary for respect of the rights or reputations of others; the protection of national security or of public order or of public health or morals (art 13)
- the right to the highest attainable standard of health (article 24(1))
- state parties are to take measures to develop preventive health care and family planning education (article 24(2)(f))
- to the child who is capable of forming their own views, the right to express those views freely in all matters which affect them and to have those views given due weight in accordance with the age and maturity of the child (article 12(1))
- protection from all forms of sexual abuse and exploitation (art 34) and other forms of abuse prejudicial to their welfare (art 36)
- the right to education (art 28) which must, among other things, be directed to the development of the child's personality, talents and mental and physical abilities to their fullest potential (art 29(1)(a)) and preparation for a responsible life which should include promotion of sexual equality and respect for racial difference (art 29(1)(d)).

The standards contained in the CRC have thus been characterised as assuming a triangular relationship between children, parents and the state,³ with the primary parental role supported as necessary by the state. The extent to which children require guidance in the exercise of rights is in accordance with the evolving capacities of the child.

³ G van Bueren, *The International Law on the Rights of the Child*, Martinus Nijhoff Dordrecht 1995.

Best interests

Article 3(1) contains the overarching principle that '[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration'. The 'best interests' principle also informs the exercise of the parental role pursuant to article 18, with appropriate support from the government. Accordingly, in determining whether and how advertising which is accessible to children should be regulated, the Australian government should accommodate the best interests of the child.

The CRC's supervisory Committee on the Rights of the Child has urged state parties to take steps to promote the best interests of the child by providing effective media regulation. Concern has been expressed about the effect of marketing on adolescent health behaviours.⁴ More specifically, in exercising their obligations concerning the health and development of adolescents, the committee has called on state parties to protect adolescents from information that is harmful to their health and development⁵ and ensure that adolescents 'acquire life skills, ...obtain adequate and age appropriate information, and...make appropriate health and behaviour choices.'⁶

2. The Advertising Standards Board Process

We believe that the best interests of the child have not been promoted by the system of self-regulation as it currently operates. The Australian Association of National Advertisers (AANA) Code of Advertising and Market Communications to Children (Children's Code) is directed to advertising which, 'having regard to theme, visuals and language used, are directed primarily to children aged 14 years or younger and are for goods, services and facilities which are targeted toward and have principal appeal to children' [section 2.4]. While we have reservations as to the extent to which the Children's Code promotes the best interests of the child, outdoor advertising which does not address itself to children but nevertheless commands their attention, falls outside the code. The AANA Code of Ethics

⁴ Committee on the Rights of the Child, General Comment No 4, 'Adolescent Health and Development in the context of the Convention on the Rights of the Child' at [38], UN Doc CRC/GC/2003/4.

⁵ Committee on the Rights of the Child, General Comment No 4, 'Adolescent Health and Development in the context of the Convention on the Rights of the Child' at [39], UN Doc CRC/GC/2003/4.

⁶ *Ibid.*

affords little scope for consideration of the best interests of the child. While the broad stipulation in section 2.3 that advertising ‘shall treat sex, sexuality and nudity with sensitivity to the relevant audience’ affords scope for examination of children’s interests, an analysis of the complaints determined by the Advertising Standards Board (ASB) raises concerns that these interests have been accorded insufficient weight.

Information about the complaints process is not widely publicised, so many concerned citizens will lack the knowledge about the process or the level of motivation required to find out. Those who undertake the complaints process are unlikely to succeed. An analysis of recent complaints reveals a very small proportion to be upheld. Complaints about advertisements of a sexually suggestive nature which, as Rosewarne has observed, draw on pornography have been dismissed on the basis that there is no nudity, or that the degree of sexualisation is acceptable.⁷ Determination of complaints is based on the narrow grounds in the AANA Code of Ethics and shows insufficient regard to the rights of children and the role of parents in providing appropriate direction and guidance with a view to children’s evolving capacities.

When complaints are upheld, the advertisement remains on display until the ASB determines the complaint, notifies the advertiser of its determination and the advertiser complies with the determination by removal of the advertisement. While the compliance rate with Board determinations is high, the time taken to determine a complaint, notify the advertiser and comply with the determination may be sufficient for an advertisement to reach the desired market. Further time may elapse if the advertiser seeks independent review of the Board’s decision. The absence of a vetting mechanism places the onus on complainants to address concerns about outdoor advertising. It furthermore enables the most inappropriate advertisements to remain on public display for the duration of the complaints determination process, privileging the interests of the advertiser over those of the wider community.

3. Current Research

There is a body of research to support the contention that the cumulative effect of exposure to concepts which children are not developmentally ready to deal with has a range of detrimental effects on children’s abilities to develop their own healthy sexuality and sense of

⁷ See for example case 0198/10, 60/10 and 39/10.

self-worth. Research in this area is intrinsically time-consuming and rendered more complex by the inherent difficulty of determining the causal link between advertising material and child and adolescent behaviour. While further research into the effects of such advertising on children is important, we believe that there is sufficient research available to justify the need to take action to regulate outdoor advertising more effectively. An effective regulatory regime should have the capacity to be informed by up to date research.

Just as tobacco advertising has been linked with underage smoking⁸, exposure to sexual content has been found to play a significant role in the sexual conduct of minors. Drawing on nine longitudinal studies, the American Academy of Pediatrics has concluded that ‘sexy media’ including advertisements which use sex to sell, contributes to early sexual activity and concluded that ‘the media play a major role in determining whether certain teenagers become sexually active earlier rather than later, and sexually explicit media may be particularly important.’⁹

The academy asserts a significant link between exposure to sexual content in the media and early sexual activity, including an ‘intention to have sex in the near future’¹⁰ and makes the following observations:

Adolescents today frequently cite the media as a source of sexual information. For example, in a national survey the media rivalled parents and schools as a source of information about birth control. The media are powerful “scripts” concerning sexual situations, especially for inexperienced teenagers. Yet, parents and legislators fail to understand that although they may favour abstinence only sex education (despite the lack of any evidence of its effectiveness), the media are decidedly not abstinence only. In fact, the United States has some of the world’s most sexually suggestive media in the world. American media make sex seem like a harmless sport in which

⁸ See for example L MacFadyen, G Hastings and A MacKintosh ‘Cross Sectional study of young people’s awareness of and involvement in tobacco marketing’ 322 *British Medical Journal* 513 (2001); D While, S Kelly, W Huang and A Charlton ‘Cigarette advertising and onset of smoking in children: questionnaire survey’ 313 *British Medical Journal* 398 (1996); G Hastings, H Ryan and A MacKintosh ‘Cigarette advertising children’s smoking: why Reg was withdrawn’ 309 *British Medical Journal* 933 (1994).

⁹ American Academy of Pediatrics, ‘Policy Statement-Sexuality, Contraception and the Media’, Pediatrics, Volume 126, Number 3, September 2010 576-582. The statement observes at 578 that that while the proliferation of sexual images in the American media has an impact on adolescent sexual activity, ‘the United States is the only Western nation that subscribes to the dangerous myth that giving teenagers access to birth control-and media represent a form of access- will make them sexually active at a younger age.’

¹⁰ American Academy of Pediatrics, ‘Policy Statement-Sexuality, Contraception and the Media’, Pediatrics, Volume 126, Number 3, September 2010 576-582 at 578.

everyone engages, and results of considerable research have indicated that the media can have a major effect on young people's attitudes and behaviours. In fact, the media may function as a "superpeer" in convincing adolescents that sexual activity is a normative behaviour for teenagers. In a survey of 2010 11-to-17-year-old girls, only the 11-year-olds reported that they did not feel pressure from the media to begin having sex.¹¹

The Australian Psychological Society has linked ubiquitous sexualised advertising with a range of problems in children which are inconsistent with the realisation of human rights, including 'self-objectification', whereby 'girls learn to see and think of their bodies as objects of others' desire, to be looked at and evaluated for its appearance.'¹² Adolescent girls who engage in self-objectification are noted to have diminished sexual health, including reduced sexual assertiveness and a decrease in protective behaviours. A further link is noted with mental health problems including eating disorders, low self-esteem and depression or depressed mood.¹³

The emerging picture would indicate that the cumulative effect of exposure to such advertising over time may have a deleterious effect on the physical and mental health of children and frustrate the realisation of article 24 of the CRC. The best interests of the child have not been prioritised under the current regime. In accordance with article 13(1), we believe that some restrictions in the form of more effective regulation should be applied to the dissemination of highly sexualised images and information in the outdoor environment.

4. Parental responsibilities

Significantly, state parties to the CRC are required by article 5 to respect the responsibilities, rights and duties of parents to provide appropriate direction and guidance to the child with respect to the exercise of their rights under the CRC and the child's evolving capacities. To this end, advertising policy should support the responsibility of parents to provide age appropriate information and make decisions concerning their children's sexual development

¹¹ Ibid at 577.

¹² The Australian Psychological Society, Submission to the Inquiry into the sexualisation of children in contemporary media, Senate Standing Committee on Environment, Communication and the Arts, April 2008 at http://www.aph.gov.au/senate/committee/eca_ctte/sexualisation_of_children/submissions/sub115.pdf

¹³ Ibid.

in accordance with their maturity. The nature and extent of complaints emanating from parents provides a strong indication of community values and parental priorities concerning the display of material in the public space. State parties to the CRC are required to support parents in discharging their primary responsibility as articulated in article 18 for the upbringing and development of the child.

In discharging their responsibilities, parents are expected to regulate or control the media consumed by their children. Research is regularly invoked as a foundation for recommendations about children's access to television and internet. Because the assumption that parents can monitor and exercise some control over their children's access to media does not extend to outdoor advertising, parents require greater assistance from the government. The initiation of the present enquiry demonstrates the government's willingness to assist parents in discharging their responsibilities and to promote the rights of children more generally.

Of 22 complaints brought to the ASB in 2010, 15 were made with respect to the exposure of children to sexualised images. Six complaints made specific reference to the complainants' own children. One complaint expressed concern that young children do not possess the self-control necessary to disregard sexualised images which may have a detrimental impact on their developing sexuality.¹⁴ Another complainant was concerned that their children would absorb the message that they would be viewed as sexual beings only.¹⁵ The complaints reveal a widespread concern that parents are placed in the difficult position of being required to explain images to children which they are not developmentally ready to deal with.¹⁶ The parents who have brought the complaints do not appear to be engaging in moral panic around sex. While morality informed by religious beliefs has on occasion been invoked in support of complaints¹⁷, this has not been the predominant concern. The common thread in each of these complaints is a parental desire to guide children in the development of their healthy sexuality with reference to their evolving capacities.

¹⁴ Case no. 14/10.

¹⁵ Case no. 0154/10.

¹⁶ See for example case no. 39/10.

¹⁷ See for example case no 0471/10.

In a number of determinations concerning sexually suggestive images of women, the ASB has given brief reasons or a simple conclusion as to why an advertisement does not breach the AANA Advertiser Code of Ethics. A number of determinations concern the statement that ‘[t]he Board noted that it had previously considered advertisements featuring scantily clad women and that the use of such images has at times been a divisive issue for the community.’ Such complaints have been too readily dismissed on the basis that there is sufficient sensitivity to sex, sexuality and nudity¹⁸ with insufficient consideration for concerns expressed by parents.

Images which are sexually suggestive and prominent billboards displaying terminology such as ‘premature ejaculation’ may interfere with parents’ abilities to offer age appropriate guidance to their children. It is not surprising that parents of children who have just mastered the phonological task of sounding out words are reluctant to explain the meaning of terminology such as ‘STRONGA LONGA DONGA’ to their young children. The cumulative effect of such advertising on children may be antithetical to the realisation of human rights.

Classification of media content has a long history and has been developed in order to protect children from exposure to material deemed to be inappropriate in light of their developmental needs and maturity. The lack of effective classification of outdoor advertising has facilitated the proliferation of material which would be considered unsuitable in other contexts. Many advertisements deemed by the ASB to treat sex, sexuality and nudity with sensitivity would be considered inappropriate in the context of free to air television viewed by children. In accordance with the CRC, steps should be taken to ensure that the regulatory system operates to prevent the display of outdoor advertising which would be classified as inappropriate for children.

¹⁸ See for example cases no 60/10, 39/10, 09/10.

5. Children in the public space

Rosewarne has charted the link between sexual harassment in the workplace and advertising of a sexual nature¹⁹ and observed the similarities between outdoor advertising and sexualised pin ups which fall within the ambit of sexual harassment if displayed in the workplace. Sexual harassment in the workplace may encompass the display of posters, magazines or screen savers of a sexual nature.²⁰ Images which may amount to harassment in employment are unlikely to promote the interests of the general public when displayed in the outdoor environment.

Rosewarne has also posited that women are excluded from full participation in public life by 'highly sexualised advertising imagery [which] works to decorate public space in a way that imbues the outdoors with male concepts of sexuality [with the consequence that] such an environment is exclusionary for women.'²¹ Such an environment is moreover likely to have a marginalising or exclusionary effect on children. Sexual content is not directed at them and does not promote their best interests. In light of children's evolving capacities, they have nothing to gain from exposure to images they are developmentally unable to process.

6. Children and the media

The protection of children against harmful influences through the media has been a matter of ongoing concern to the Committee on the Rights of the Child,²² which has asserted a link between degrading and exploitative images of women and girls in advertising with values and models of behaviour which contribute to the perpetuation of inequality and inferiority.²³

Article 17 of the CRC reads as follows:

¹⁹ Lauren Rosewarne, 'Pin ups in Public Space: Sexist outdoor advertising as sexual harassment', *Women's Studies International Forum* 30 (2007) 313-325 at 321.

²⁰ See sections 14 and 28A of the *Sex Discrimination Act 1984* (Cth) and http://www.hreoc.gov.au/sex_discrimination/publication/guide/index.html The Sex Discrimination Act aims, in part, to incorporate into Australian law the human rights standards in the Convention on the Elimination of all forms of Discrimination against Women, which was ratified by Australia in 1983.

²¹ *Ibid* at 70.

²² Committee on the Rights of the Child, Report of the Thirteenth Session (1996) UN Doc CRC/C/57 at [245].

²³ Committee on the Rights of the Child, Report of the Eighth Session (1995) UN Doc CRC/C/38 at [291].

States Parties recognize the important function performed by the mass media and shall ensure that the child has access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health.

To this end, States Parties shall:

- (a) Encourage the mass media to disseminate information and material of social and cultural benefit to the child and in accordance with the spirit of article 29;
- (b) Encourage international co-operation in the production, exchange and dissemination of such information and material from a diversity of cultural, national and international sources;
- (c) Encourage the production and dissemination of children's books;
- (d) Encourage the mass media to have particular regard to the linguistic needs of the child who belongs to a minority group or who is indigenous;
- (e) Encourage the development of appropriate guidelines for the protection of the child from information and material injurious to his or her well-being, bearing in mind the provisions of articles 13²⁴ and 18²⁵.

Article 17 recognises the significant role played by the mass media in the lives of children. The mass media serves a significant educative role in the lives of children and adults. This educative role extends to information about sex. The American Academy of Paediatrics has observed that '[b]ecause so many sex education programs have recently been focussed on abstinence only, the media have arguable become one of the leading sex educators in the United States today.'²⁶ The American media has demonstrated a reluctance to impart information about birth control, such as advertisements for condoms, in accordance with the prevailing view that such information is likely to make adolescents sexually active at a

²⁴ Freedom of expression, including the right to seek, receive and impart information through the media of the child's choice, subject to restrictions on grounds including public health and morals.

²⁵ Parents are to exercise primary responsibility for the upbringing and development of the child, guided by the best interests of the child.

²⁶ American Academy of Pediatrics, 'Policy Statement-Sexuality, Contraception and the Media', Pediatrics, Volume 126, Number 3, September 2010 576-582 at 578.

younger age.²⁷ Yet the media is saturated with unrealistic depictions of sex and sexuality. The combination of such images with a dearth of factual information about sex, contraception and infection control is reported by the Academy to have had a deleterious impact on adolescent health.

The Academy's observations indicate that mass media in the United States has, on balance, failed to promote the interests of the child enumerated in article 17.²⁸ While sex education and the role of parents must play a significant role in balancing the more harmful effects of the media, the parental role is curtailed in the context of outdoor advertising. In accordance with article 18 of the CRC, the role of the state in supporting parents becomes critical with respect to this type of material.

The government's role in encouraging and developing guidelines for the protection of children from harmful material in paragraph (e) of article 17 is to be exercised with reference to the parental responsibilities articulated in article 18 and the child's freedom of expression. While the parental role extends to protection from harms which emanate from the media, outdoor advertising impairs the ability of parents to make choices about disseminating age appropriate information to their children in a manner conducive to the development of a normal sexuality and healthy self-image. The state's role in supporting parents must negotiate the terrain between freedom of expression and censorship. The extent to which the state may limit freedom of expression in the context of advertising is considered in Part 7 below.

Some guidance on the state's role may be found in article 13, which provides that the child's right to receive information may be subject to restrictions enumerated in paragraph 2 which are necessary (a) for respect of the rights or reputations of others; or (b) for the protection of national security or of public order (*ordre public*), or of public health or morals. While we believe that restrictions on the media should not exceed the stipulations in article 13(2), we believe that greater control of outdoor images of a sexual nature would have the effect of promoting public health and respect for the rights of children.

Article 17(e) affords states considerable scope with respect to the form of regulation adopted. If self-regulation applying voluntary codes offers sufficient protection to children from

²⁷ American Academy of Pediatrics, 'Policy Statement-Sexuality, Contraception and the Media', *Pediatrics*, Volume 126, Number 3, September 2010 576-582 at 578.

²⁸ It may be noted that the US is not a party to the Convention on the Rights of the Child.

harmful influences in the media, state parties are not required to introduce further regulatory mechanisms. If regulatory mechanisms do not afford sufficient protection, states should take steps towards more effective regulation. We regard this current enquiry as an important exercise in determining whether the current regulatory regime has provided adequate protection to children.

7. Freedom of expression

An enquiry such as this will inevitably raise concerns about imposing limitations on the freedom of expression. The right to freedom of expression is enshrined in article 19 of the International Covenant on Civil and Political Rights (ICCPR). Article 19(2) provides that ‘[e]veryone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through other media of his choice.’

Paragraph 3 of article 19 provides that the exercise of the rights provided for in paragraph 2 carries with it special duties and responsibilities. Like the rights of children set out in article 13 of CRC, the right to freedom of expression is subject to restrictions. Article 19(3) provides as follows:

The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- (a) For respect of the rights or reputations of others;
- (b) For the protection of national security or of public order (ordre public), or of public health or morals.

Is commercial ‘speech’ protected?

The UN Human Rights Committee supervises the implementation of the ICCPR and under the ICCPR’s First Optional Protocol determines ‘communications’ brought alleging breaches of the covenant by member states. The Committee has determined that commercial activity in the form of outdoor advertising is encompassed within the freedom articulated in article 19(2).²⁹ The Committee’s finding is consistent with the jurisprudence of the European

²⁹ Ballantyne, Davidson, McIntyre v. Canada, Communications Nos. 359/1989 and 385/1989, U.N. Doc. CCPR/C/47/D/359/1989 and 385/1989/Rev.1 (1993).

Commission of Human Rights with respect to the freedom of expression articulated in article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and the United States (US) Supreme Court³⁰ with respect to the First Amendment to the US Constitution, which prohibits, among other things, the making of any law infringing the freedom of speech. International jurisprudence also demonstrates that commercial speech, including advertising, is subject to a lower degree of protection than non-commercial or political speech.³¹ The European Commission of Human Rights has found that commercial speech ‘*ought to be afforded a lesser degree of protection than the expression of “political” ideas, understood in the broadest sense, which the values underlying freedom of expression purport to protect in the first place.*’³² This approach is consistent with the jurisprudence of the US Supreme Court.³³ The greater degree of protection conferred upon non-commercial speech is justified by factors which include the public benefit resulting from the free flow of political ideas, the dangers inherent in limiting political speech and the greater susceptibility of political speech to being ‘chilled’.³⁴ Commercial speech, on the other hand, is not designed to serve the public benefit and has been characterised as more robust and less susceptible to being ‘underproduced’ than non-commercial speech.³⁵

The Article 19(3) exceptions

The extent to which states may impose restrictions on freedom of expression is guided by the exceptions listed in article 19(3) of the ICCPR. The UN Human Rights Committee has observed that because the exercise of the right carries special duties and responsibilities, the restrictions in paragraph 3 are permitted with reference to the rights of other persons or the community as a whole.³⁶ The Committee has further noted that ‘*when a State party imposes certain restrictions on the exercise of freedom of expression, these may not put in jeopardy the right itself. Paragraph 3 lays down conditions and it is only subject to these conditions*

³⁰ See generally *Casado Coca v Spain* A 285 (1994); M H Randall, ‘Commercial Speech under the European Convention on Human Rights: Subordinate or Equal?’ *Human Rights Law Review* 6:1 (2006) 53-86.

³¹ See for example *X v Church of Scientology v Sweden* (1979) 16 DR 68 at [79],

³² *Ibid.*

³³ See for example *Central Hudson Gas & Electric Corp. v. Public Service Commission* 447 U.S. 557, 561 (1980).

³⁴ Randall, note 30 above at 84-85.

³⁵ *Ibid.*

³⁶ Human Rights Committee, General Comment 10, Article 19 (Nineteenth session, 1983), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 11 (1994).

*that restrictions may be imposed: the restrictions must be "provided by law"; they may only be imposed for one of the purposes set out in subparagraphs (a) and (b) of paragraph 3; and they must be justified as being "necessary" for that State party for one of those purposes.*³⁷

Limitations on the content of outdoor advertising of a sexual nature are consistent with the restrictions on the freedom of expression set out in article 19(3). More effective regulation of outdoor advertising content of a sexual nature is permissible for the purpose of protecting the children's rights considered above. The research considered above indicates that more effective regulation may also be necessary to promote public health more specifically. While there is no jurisprudence concerning the public health restriction as provided by article 19(3), it has been observed that 'the prohibition of misinformation about health-threatening activities and restrictions on the advertising of harmful substances such as tobacco are probably justified under this limitation.'³⁸ While we believe that children's rights and the protection of public health offer the strongest foundation for regulating outdoor advertising, the protection of public morals may constitute a further basis.

The body of international jurisprudence on the freedom of expression and the scope of article 19 of the ICCPR afford states with some leeway in imposing restrictions on outdoor advertising. Commercial speech may be regulated with reference to the exceptions enumerated in article 19(3) in addition to articles 13(2) and 17(e) of the CRC. We believe that more effective regulation is desirable provided that it falls within the strict parameters of the abovementioned articles.

8. Sex education

We believe that any changes to the regulatory regime should comprehend the public importance of sex education campaigns. As observed by the American Academy of Pediatrics, the media is a significant source of sexual information. The Academy's observations, cited in Parts 3 and 6 above, highlight the dangers inherent in pursuing public policy which provides children with insufficient sex education and unrealistic 'abstinence only' messages on the one hand and highly sexualised media images and messages on the other.

³⁷ Ibid.

³⁸ M Nowak, CCPR Commentary (NP Engel, Kehl, 1993, 358 cited in S Joseph, J Schultz and M Castan, The International Covenant on Civil and Political Rights (Oxford University Press, 2nd Edition, 2004).

Sex education campaigns should not be confused with the injurious material referred to in Article 17(e) but characterised as that which is ‘aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health.’ The provision of sex education in various media is consistent with article 17’s proviso concerning information and material aimed at the promotion of children’s physical and mental health. In line with the international jurisprudence discussed above, freedom of expression in this ‘non-commercial’ domain should be accorded a higher degree of protection. To this end, we believe that public advertising aimed at informing the wider community about matters pertaining to sex, including contraception and sexually transmitted infections, should be viewed in light of its important educative purpose.

Recent outdoor advertising relating to sexual health includes a campaign concerning the use of condoms as a means of reducing the spread of sexually transmitted infections³⁹ and the Australian Federation of AIDS Organisations’ ‘Drama Downunder’ sexual health awareness campaign targeted at gay men. Both campaigns direct the viewer to websites which contained more detailed information and resources. A regulatory regime which limits the display of such public health messages in an effort to protect children from harmful influences would be inconsistent with Article 17 of CRC. Further restriction of such material would also be counter-intuitive, counter-productive and is to be avoided at all costs.

9. Conclusion

As a result of the research available, we believe that the current regime has failed to adequately accommodate the position of children and the role played by their parents in promoting children’s rights. In the balance between the interests of advertisers and the public interest (including the best interests of the child), the former have been privileged to the detriment of the latter. The preponderance of sexual images in outdoor advertising, the defects in the complaints mechanism and the high dismissal rate of complaints indicate that the best interests of the child have been accorded insufficient priority in the regulatory structure. The assumption that parents can exercise some control over their children’s access to media, with reference to children’s developmental needs and evolving capacities, does not

³⁹See <http://www.sti.health.gov.au/internet/sti/publishing.nsf/Content/research>

extend to outdoor advertising. Parents have been frustrated in the discharge of their responsibilities under articles 5 and 18 and their concerns have been too readily dismissed. The diminution of parental autonomy in this context heightens the importance of the governmental role in ensuring that the regulatory regime operates effectively.

Mechanisms consistent with article 17 of the CRC should be adopted to facilitate the protection of children from the material referred to in paragraph (e) while recognising that sex education does not fall within the paragraph's ambit. Revised mechanisms may be informed and limited by the stipulations in article 13(2) and address themselves to the protection of public health and promotion of respect for the rights of children. Our recommendations are set out below.

10. Recommendations

The current system of self-regulation should be revised to better protect the interests of children. In light of the public nature of outdoor advertising, we believe that advertising material which is unsuitable for children should be confined to alternative forms of media and should not be displayed in the outdoor environment. Unlike media such as television which may be regulated with reference to time zones, all outdoor advertising space is accessible to children and should be regulated with reference to the interests of children.

Vetting

There are a number of measures which may improve the system of self-regulation. First, there should be a mechanism for vetting outdoor advertising before it is put on display. While the vetting of all advertisements is one option, a more targeted process may direct itself to particular products or services or to advertisers who have been the subject of prior complaint.

While we lack expertise in the area of classification, we believe that outdoor advertising material which exceeds a 'PG' classification may be appropriate for vetting. Such advertising may be assessed with reference to the public interest, including the best interests of the child. For example, campaigns promoting sexual health may be viewed in light of their important educative purpose and the counter-productive effect of restricting such information in an effort to protect children.

The vetting task may be performed by the ASB, a vetting committee within the ASB or a body such as the Classification Board. Such a mechanism is consistent with a system of self-regulation and would be the most effective means of preventing the display of inappropriate images and messages. An effective vetting regime may be sufficient in itself to protect children's best interests.

Amending the AANA Code of Ethics

The AANA codes as they currently apply are weak and do not sufficiently address the interests of children. The Children's Code addresses itself to advertising directed to children up to the age of 14 and does not accommodate public concerns about outdoor advertising.

The Code of Ethics in its current form is also inadequate. Section 2.3 of the code reads as follows:

Advertising or Marketing Communications shall treat sex, sexuality and nudity with sensitivity to the relevant audience and, where appropriate, the relevant programme time zone.

Section 2.3 is broadly worded and allows scope for a range of different interpretations. The interpretations made by the ASB have placed insufficient emphasis on the reality that the 'relevant audience' for outdoor advertising is the general public. Revisions to the Code of Ethics pursuant to the current review may include a provision concerning the impact of advertising on children with reference to the paramount consideration of the best interests of the child. The application of such a provision may be informed by the use of current research and the involvement of parents, child health professionals and young people, where appropriate.