



Communications Law Centre, UTS

Submission to the Australian Law Reform Commission
National Classification Scheme Review (Issues Paper 40)

15th July 2011





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15th July 2011
Sabina Wynn
Executive Director
Australian Law Reform Commission
GPO Box 3708
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Dear Ms. Wynn,

Please find attached the submission of the Communications Law Centre, UTS to the National Classification Scheme Review, in accordance with Issues Paper 40 released May 2011.

Yours sincerely,

A handwritten signature in cursive script that reads "Michael Fraser".

Professor Michael Fraser AM
Director
Communications Law Centre, UTS



National Classification Scheme Review Issues Paper

Communications Law Centre Submission

Professor Michael Fraser

The Communications Law Centre, UTS (CLC) is an independent, non-profit, public interest centre specialising in communications, media and online law and policy. We appreciate the opportunity to comment on the Australian Law Reform Commission (ALRC) National Classification Scheme Review Issues Paper. Should the ALRC have further questions or require more information from the Communications Law Centre we shall be happy to assist.

Approach to the Inquiry

Question 1: In this Inquiry, should the ALRC focus on developing a new framework for classification, or improving key elements of the existing framework?

We consider that in a network communications environment that there are considerable benefits to a uniform framework for classification throughout the Commonwealth and a single system of classification for all categories of work in all media. Classification decisions should be made through one body and one appeal body to ensure consistency of categories and of interpretation. Nonetheless, the existing classification categories are broadly well understood and well accepted by the community and a new schema of classifications should be based on improvements or adjustments to the existing schema.

Why classify and regulate content?

Question 2: What should be the primary objectives of a national classification scheme?

It is one of the primary, fundamental responsibilities of government to maintain a community standard of public decency. This responsibility applies to every aspect of society. For example, members of the community are not permitted by law to behave in public in any manner that they can. A system of classification and censorship of content should maintain a community standard of public decency in content and communications in Australia. To assert as some do that there is no community standard of decency is to assert that there is no such thing as a society or culture in Australia and that is clearly not the case. Opponents of classification and censorship argue that adults should be free to access any content that they choose. However, as a community we have a right to assert that there are some materials which are so far contrary to fundamental human rights, or which are such an attack on basic human dignity, or which are so depraved, obscene, destructive or criminal that we do not admit them into our community even for adults.

The second objective of a national classification scheme should be to protect vulnerable persons who may be unduly influenced by and who also may act on material which they see. Minors are an obvious example of those who may be susceptible to harm from extreme material but they are not the only category of persons in the community who may be affected by exposure to the most extreme, inhumane materials in ways which may damage them seriously and as a consequence they may go on to pose a risk of harm to themselves and to the community.

The third objective of a national classification scheme is to provide guidance to those selecting materials they may wish to see and particularly to assist parents to select material for their children. It should also help prevent people from inadvertently accessing material they do not wish to see.

What content should be classified and regulated?

Question 3: Should the technology or platform used to access content affect whether content should be classified, and, if so, why?

In principle it should not matter which technology or platform is used to access content. It is the content which is the object of classification, no matter what the channel or device which conveys the content. In practice, however, it is not practicable to classify actively all content online due to the volume and fluidity of online material. Consequently, it may be necessary to limit the application of the classification scheme for online materials. For example, to classify online material in general only in response to a complaint concerning that material and to routinely classify all online materials from mainstream media channels only.

Question 4: Should some content only be required to be classified if the content has been the subject of a complaint?

See our answer to Question 3 above.

Question 5: Should the potential impact of content affect whether it should be classified? Should content designed for children be classified across all media?

As stated in the Issues Paper, many parents and guardians use classification information in making highly discriminating choices of material for young children that will be suitable for them as individuals at that time. The gradations of content and impact are of great importance in making such choices and the potential impact of content should be taken into account in deciding whether it should be classified. All content designed for children from mainstream media and channels should be classified across all media. However, as noted above, this may be impracticable for other content online.

Question 6: Should the size or market position of particular content producers or distributors, or the potential mass market reach of the material, affect whether content should be classified?

In our view, the size or market position of particular content producers and distributors and the potential mass market nature of the material should affect whether content should be classified.

Consumers in a networked digital communications environment are inundated with content of every type from countless sources. In these circumstances, it is perhaps ironic that consumers will doubtless come to rely more and more on mainstream content channels. That is because mainstream channels will offer the consumer the assurance of brand, reputation, provenance, authority, integrity, editorial judgement and standards of quality of content. The considerations outlined in the question will have more weight than ever in guiding consumer choices for content and the classification of content which enjoys a powerful market position will play an important role in assuring consumer welfare and community benefit.

Question 7: Should some artworks be required to be classified before exhibition for the purpose of restricting access or providing consumer advice?

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As we have argued above, in the broad sense, a uniform scheme of classification and censorship should apply to all material no matter how it is made available. However, again it would be impracticable to classify all artistic works for all exhibitions, just as it is impracticable to routinely classify all content online. Artistic works which may fall within the RC or X categories should be submitted for classification before exhibition by the exhibitor or when exhibited if they are the subject of legitimate complaints.

Question 8: Should music and other sound recordings (such as audio books) be classified or regulated the same way as other content?

In principle music and other sound recordings from mainstream channels should be classified or regulated in the same way as other content. Other online materials should be classified only in response to a complaint concerning that material.

Question 9: Should the potential size and composition of the audience affect whether content should be classified?

In principle, the potential size and composition of the audience should not affect whether content should be classified because the classification system operates at the benefit of individuals as well as the community. Moreover, it is no longer possible in a networked communications environment to determine or predict the size and composition of an audience for material once it is first made available.

Question 10: Should the fact that content is accessed in public or at home affect whether it should be classified?

The locus of access to content is not a relevant factor in deciding whether content should be classified. This is particularly the case when any content or digital copy of the content can be communicated from the home by a private individual easily and inexpensively to any number of recipients anywhere.

Question 11: In addition to the factors considered above, what other factors should influence whether content should be classified?

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How should access to content be controlled?

Question 12: What are the most effective methods of controlling access to online content, access to which would be restricted under the National Classification Scheme?

For material which would fall within the Refused Classification (RC) category a complaints-based system would be most effective. If a legitimate complaint were received the Classification Board (and the Classification Review Board, when required) should classify the content and if the content or site is Refused Classification then ISPs should be required compulsorily to block access to that content. If the content is hosted in Australia then the ACMA should issue a take-down notice. A list stating that content or a site has been filtered, the criteria under which it was refused classification and a general categorical description of the material that has been blocked should be published, to achieve at least some measure of transparency while at the same time not providing a menu and directory for those who might wish to access the material illegally. Should the blocked sites move to

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another address then the movement should be tracked in order to block that same material from another source so far as is technically possible.

In practical terms the most effective method of controlling access to other online content, access to which would be restricted under the national classification scheme, is by filtering services made available by ISPs and also filter systems made available as software packages to individual consumers. Access requirements including proof of identity and age may also be of some benefit in restricting access to content to the relevant age groups.

Question 13: How can children’s access to potentially inappropriate content be better controlled online?

See answer to Question 12 above.

Question 14: How can access to restricted offline content, such as sexually explicit magazines, be better controlled?

Improved monitoring and enforcement procedures would better control access to restricted offline content.

Question 15: When should content be required to display classification markings, warnings or consumer advice?

All content accessed from mainstream distribution channels should display classification markings, consumer advice and, where required, warnings.

Who should classify and regulate content?

Question 16: What should be the respective roles of government agencies, industry bodies and users in the regulation of content?

Government censorship is unacceptable in a democracy. It is the tool of oppressive and authoritarian regimes and cannot be countenanced. It is essential to our democratic freedoms that classification and censorship be conducted independently and at arm’s length from government in the public interest.

An independent Classification Board broadly representative of the community as far as is possible and an independent Classification Review Board should interpret and apply classification criteria such as the current G, PG, M, MA15+, R18+, X18+ and RC, or an amended set of classifications along these lines in a way which is consistent with the current community standards at the time. Community standards change and public debate about classification decisions is healthy. An independent statutory authority will act in the public interest and will provide a professional, consistent and reliable system of classification and censorship for the public. Industry fees could go some way to covering the cost of administration.

Question 17: Would co-regulatory models under which industry itself is responsible for classifying content, and government works with industry on suitable code, be more effective and practical than current arrangements?

See answer to Question 16 above.

Question 18: What content, if any, should industry classify because the likely classification is obvious and straightforward?

See answer to Question 16 above.

Classification fees

Question 19: In what circumstances should the Government subsidise the classification of content? For example, should the classification of small independent films be subsidised?

Government should subsidise the classification of small independent films and other small independent or start-up content in order to encourage and foster the creation and distribution of such content.

Classification categories and criteria

Question 20: Are the existing classification categories understood in the community? Which classification categories, if any, cause confusion?

Common classification categories and criteria placed in one instrument would be advantageous in the interests of simplicity, consistency, community information, education and understanding. A system of classification and categories such as that which applies for films (G, PG, M, MA15+, R18+, X18+ and RC) is well understood by the community and should be applied uniformly to every type of content. There may, however, be room to improve the definitions of the classification categories and the criteria for their application.

Question 21: Is there a need for new classification categories and, if so, what are they? Should any existing classification categories be removed or merged?

See answer to Question 20 above.

Question 22: How can classification markings, criteria and guidelines be made more consistent across different types of content in order to recognise greater convergence between media formats?

See answer to Question 20 above.

Question 23: Should the classification criteria in the *Classification (Publications, Films and Computer Games) Act 1995* (Cth), National Classification Code, Guidelines for the Classification of Publications and Guidelines for the Classification of Films and Computer Games be consolidated?

See answer to Question 20 above.

Refused Classification (RC) category

Question 24: Access to what content, if any, should be entirely prohibited online?

Access to Refused Classification (RC) content should be entirely prohibited online. It would be anomalous and unjustifiable for content to be inaccessible through one channel but the same content to be accessible through another channel.

Question 25: Does the current scope of the Refused Classification (RC) category reflect the content that should be prohibited online?

The current scope of the Refused Classification (RC) category broadly reflects the content which should be prohibited. The terms of the RC classification are, rightly, broad because particular terms cannot hope to cover all the various types of content which exist and will exist in future. It is up to the Classification Board and the Classification Review Board as independent boards which represent the community to apply the terms and concepts used in the RC classification in accordance with the then current community standard, which changes over time.

The RC classification should be applied in the same way to material offline as online.

The argument against Refused Classification (RC) per se which is made by some, that the criteria may change in future is no argument, since the same objection could be made to object to any law or to law in general.

Reform of the cooperative scheme

Question 26: Is consistency of state and territory classification laws important, and, if so, how should it be promoted?

A uniform Commonwealth state and territory classification law would provide for consistency throughout the Commonwealth which is essential to the development of Australia's knowledge economy and information society.

Question 27: If the current Commonwealth, state and territory cooperative scheme for classification should be replaced, what legislative scheme should be introduced?

See answer to Question 26 above.

Question 28: Should the states refer powers to the Commonwealth to enable the introduction of legislation establishing a new framework for the classification of media content in Australia?

Yes, in the interests of uniformity and efficiency enabling content classification through one framework.

Other issues

Question 29: In what other ways might the framework for the classification of media content in Australia be improved?

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Professor Michael Fraser, AM

Director

Communications Law Centre, UTS