



15 July 2011

Australian Law Reform Commission
Level 40, MLC Tower
19 Martin Place
Sydney NSW 2000

Dear Professor Flew

RE: National classification scheme review

As discussed in our meeting on 16 June, my submission will focus on two issues:

1. The problematic nature of the current "RC" category, and
2. Difficulties associated with the operation of classification legislation in an evolving technological environment.

The RC Category

The RC category, as currently defined, contains two types of content:

(RC1) Content that has been internationally condemned, most obviously child pornography, and

(RC2) Content that cannot be sold in Australia.

Unlike RC1 content, RC2 content can be legally possessed in Australia. While possession of child pornography or child abuse material is an offence,¹ it is not illegal (except in Western Australia)² to possess RC2 material. For example, in New South Wales, it is illegal to sell or publicly exhibit an RC2 film,³ but presumably legal to share such material amongst adult friends.

The fact that both types of content are given the same label is problematic for several reasons.

First, there are different goals and purposes underlying censorship of RC1 and RC2 content. RC1 content is rightly treated as falling outside even a broad notion of freedom of speech. Children are harmed whenever *actual* child pornography is created, viewed or disseminated. Restrictions on RC2 content, on the other hand, are more controversial. While some have identified harms associated with X and RC content, others do not

¹ For example, see *Crimes Act 1900* (NSW) s 91H.

² *Classification (Publications, Films And Computer Games) Enforcement Act 1996* (WA) ss 62, 81(1), 89(1)

³ *Classification (Publications, Films And Computer Games) Enforcement Act 1995* (NSW) s 6

agree that there are harms or that any harms justify a ban.⁴ Further, as mentioned above, the legislation is directed at the *commercialisation* of RC2 content, not (generally speaking) its creation, use and dissemination per se.

Secondly, the RC category has the potential to muddy the waters in political debates on censorship. When discussing the proposed Internet filter, politicians focussed on child pornography even though the proposed filter would cover all RC content.

Thirdly, regulatory strategies appropriate to child pornography may not be appropriate to other RC content. For example, during the debate over the proposed Internet filter, there was concern about filtering based on an unpublished list to prevent access to material that can be legally possessed in most Australian jurisdictions. Conversely, relying on *ad hoc* reporting of content to ACMA may be appropriate for RC2 content available on-line, but would be an insufficient regulatory response to RC1 content. The community expects an active police response to RC1 content, including the prosecution of those responsible for its production.

Fourthly, there are avenues for regulating access to RC1 material, particularly on-line, that are not available for RC2 material, including through international co-operation.⁵ An international agreement concerning on-line distribution of RC2 content would be unlikely. Types of prohibited material vary significantly between countries according to their culture, history and value on freedom of speech.⁶

In short, by giving RC1 material and RC2 material separate labels, censorship regulations can be better targeted.

I have deliberately left vague the precise line between RC1 and RC2 content. For example, opinions may differ as to which side of the line fictionalised (eg cartoon⁷ or text fantasy⁸) representations of child pornography ought to fall.

The problem of regulating content in an evolving technological environment

I have written elsewhere on the problems faced by legal rules, especially statutory rules, in an evolving technological environment.⁹ These problems cannot be entirely avoided by adopting “technological neutrality” as a drafting technique.¹⁰ The difficulties with technological neutrality are particularly evident in the context of content regulation.¹¹

There is obviously a need to consider a classification scheme holistically, taking into account the availability of content through a variety of media. A classification scheme that was

⁴ This debate is evident in the recent report of the Senate Committee on Legal and Constitutional Affairs.

⁵ For example, through the *Convention on Cybercrime*.

⁶ Dieter Grimm, ‘Freedom of Speech in a “Globalized World”’ in Ivan Hare and James Weinstein (eds), *Extreme Speech and Democracy* (OUP 2009).

⁷ See *McEwen v Simmons* [2008] NSWSC 1292.

⁸ Such as the ‘slash’ genre.

⁹ See, for example, Lyria Bennett Moses, “Recurring Dilemmas: The Law’s Race to Keep Up with Technological Change” (2007) 7 *University of Illinois Journal of Law, Technology and Policy* 239-285.

¹⁰ *Ibid.*

¹¹ Lyria Bennett Moses, “Creating Parallels in the Regulation of Content: Moving from Offline to Online” (2010) 33 *University of New South Wales Law Journal* 581.

technology specific in the sense of ignoring some media would be deficient. However, if one strives to achieve parity of outcome (so that as hard to access material on-line as in a local bookstore or library or movie theatre), then one would need to impose very restrictive laws on on-line content. The laws required to achieve that objective on-line would likely have greater negative impact on freedom of speech than laws required to achieve the same objective off-line. It is not that it is impossible – if the Chinese government does not want its citizens to view particular material, it cannot prevent it absolutely but it can achieve high levels of control. The real question is whether Australians would consider similar measures to be a balanced response to the problem of access to RC2 material on-line.

Similarly, if one strives to draft laws in a technology neutral way (thus not differentiating between different technologies in the wording of the legislation), then the laws may not be equally effective or cost-effective in all contexts. Thus banning material in Australian bookstores or movie theatres means that it will be hard (though likely not impossible) to access that material off-line. A similar ban on hosting such content on-line in Australia has had very little effect on the difficulty of obtaining such material on-line, given the international nature of the Internet. Further the economic impact of a requirement to have content classified differs off-line and on-line: it is not unreasonable to ask a film distributor to pay a couple of thousand dollars, it is unrealistic to impose similar costs on developers of mobile phone apps.

Ultimately, it is important to have a content regulation scheme that is cost-effective both on-line and off-line. That is not, however, the same thing as assuming that “what applies off-line ought to apply on-line” or adopting technological neutrality as a mantra.

This does not mean that a review of the classification scheme ought not to remove obsolescent distinctions. For example, the Internet has blurred the boundary between text and film; treating on-line text as films demonstrates the growing obsolescence of the distinction.¹²

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If there are any other issues arising from our meeting on 16 June on which a written submission would be of assistance, please do not hesitate to contact me on (02) 9385 2254.

Sincerely,



Lyria Bennett Moses

¹² *Broadcasting Services Act 1992 (Cth)* sch 7 cl 25 (unless it is an electronic version of a print publication).