

# Response to ALRC Discussion Paper 77

## Executive Summary

My overall response was one of disappointment.

This isn't really fundamental reform. It tidies up numerous inconsistencies in the treatment of traditional media and proposes a mechanism to get consistency across Australia. That's all.

- The elephant in the room (online content) was inadequately addressed.
- There was a distinct lack of balance i.e. skewed towards government control, restriction, punishment - while paying insufficient attention to the rights of adults in a free society.
- I was disappointed that the ALRC did not feel able to question more strongly whether restrictions are actually appropriate. The ALRC should feel free to make recommendations that will be unpopular with government.
- The overall principle (one classification system applying to all content, regardless of the type of content and regardless of the delivery mechanism, across all of Australia) has been so diluted with exceptions that one has to question that principle.
- How the connection between classification and censorship will work is not clear.

These five bullet points are elaborated upon in their respective subsections of the following section, Elaboration on the Executive Summary.

I wonder whether my previous submission was even read.

In addition it is noted that the tight schedule means that I am preparing this response without having had the opportunity to read all the non-confidential submissions (because they are anecdotally not all available on the ALRC web site yet) and without having had the opportunity to read the summary of all submissions that was promised in the Discussion Paper at 1.25. (Part of this summary was made available on November 17, the day before the deadline. This is not reasonable.) I understand that the government may not have resourced the ALRC adequately for this task and that that may not be within the control of the ALRC.

It is also noted that there was a surprisingly high number of confidential submissions (about 25% of around 2,500 submissions in all). While this is not really within the control of the ALRC, that is not a good foundation for public consultation.

## Elaboration on the Executive Summary

### The Elephant

Given the emphasis in the Terms of Reference on technology, not enough of the proposals focus on the important issue of online content. It is plausible that in the foreseeable future nearly all content will be distributed online (as the ALRC itself notes at 13.30) - and yet the proposal is basically "business as usual". It is not adequate to say "both offline and online" and imagine that online content is now covered consistently. The ALRC is really just still clinging to an analogue idea in a digital world.

In a few places the ALRC does acknowledge some of the issues e.g. at point 77 in Issues Paper 40 and e.g. 14.34 in the Discussion Paper. However acknowledging the issues is not the same as addressing them.

If the ALRC isn't going to engage with the unique challenges of online delivery, perhaps it would be better to exclude online content completely from the new classification system i.e. leave online content under the *Broadcasting Services Act*. A substantial number of worthwhile improvements to the remainder of the classification system could still be made - and that wouldn't preclude bringing online content under the proposed *Classification of Media Content Act*, hereinafter referred to as the CMCA, in the future.

It seems likely that the ALRC does not understand the technology behind online content. That is neither surprising nor a sin. Concerningly though, the ALRC has seemingly not sought input from those experts who do. It is noted from Appendix 1 that seemingly no Computer Science or Information Technology academic was consulted. Even among ISPs, the only two consulted were the two who are already in bed with the government regarding internet censorship, which is not a good look.

It seems likely that the government will be in the same position (i.e. does not understand technology) and that ultimately the impossible task of dealing with online content will be pushed onto ISPs.

To take one "big picture" example of how the online challenge hasn't been wrestled with ... at a time when the ALRC is manfully attempting to make classification consistent between the states of Australia, Australians have already moved on to a *global* consumption environment.

I here summarize all issues that I am aware of relating to online content.

- the quantity of online content - e.g. there are hundreds of thousands, if not millions, of web sites offering content that would most likely be classified X, if classified (which in turn is a tiny fraction of the entire web which in turn is a subset of the internet) - the internet truly is jumbo sized
- content is dynamic - content may be created 'on the fly' on request from the consumer, taking into account specific attributes of the consumer or specific inputs provided by the consumer, or based on other factors
- content is mutable - the content available at a particular URL may change for other reasons e.g. due to action on the part of the producer
- content does not have a single, immutable *name* (identifier) - if the URL is erroneously taken as the name (rather than as the location, which is what it more closely is) the content can have an infinite number of names and can change name (i.e. content can move from one URL to another) and, in an extreme case, the URL can be strictly "one-time" i.e. works to access the content once but never thereafter
- the number of entities producing content
- most entities producing content are non-commercial (e.g. private individuals), who should not need a lawyer and should not need to pay the Classification Board or an industry classifier before making content available online
- most entities producing content are anonymous
- content is produced and hosted all over the world
- the difficulty of determining the consumer's age (for the purposes of age restriction) - that difficulty becomes impossibility in a global environment
- some attempts at implementing age restriction and some attempts at implementing more general prohibition come at a cost to society (e.g. increased risk of fraud, identity theft and decreased network security), a cost that should not be created by a new legislative framework
- prohibition regarding online content is ineffective, leading to the situation where online content is classified in secret (whereas the same content in the offline world would not necessarily be classified in secret)

## **Role of ISPs**

The Discussion Paper does not spell out what will happen when overseas online content providers are unwilling or unable to comply with the CMCA.

It is not just that these providers are *unwilling* to comply. The ALRC is only looking at it from the point of view of Australia. If there are 200 countries in the world and a law-abiding content provider (here or overseas) wanted to classify it all in accordance with the laws in those 200 countries, the cost and time penalty would be extraordinary. The content provider also has no *reliable* way of knowing where the consumer is and hence no way of supplying the correct classification even if the classification were available. You wouldn't blame a content provider for ignoring requirements from external jurisdictions i.e. only paying attention to the jurisdiction in which the content is hosted.

The ALRC does not clearly indicate whether ISPs will be held responsible on behalf of overseas online content providers who are non-compliant. This is an essential aspect of the legal framework. I understand that internet censorship is a very controversial issue but it is part of the legal framework to cover this question. Clearly the ALRC is aware of this question, as it is alluded to in numerous places in the Discussion Paper.

Please note that I am not suggesting that the ALRC must form an opinion about whether internet censorship is a good thing, only to indicate whether it is part of their proposed legal framework or not. Given the controversial nature of this question, it is not reasonable to have public submissions where the public does not know what it is that they are responding to.

Supposing for a moment that ISPs will be required to act on behalf of overseas online content providers who are non-compliant. Apart from the obvious unfairness of this, the incentives are all wrong.

- An ISP has no incentive (other than legal compulsion) to act in this way. For example, where the overseas content provider is a commercial enterprise, the ISP does not get a cut from the sale. (In fact, the ISP has no involvement in the creation or hosting of the content and has no knowledge of its involvement in the movement of the content. This is quite a different dynamic from any other delivery mechanism.)
- An ISP has plenty of disincentives. In particular, the ISP is in an invidious position because it is being wedged from its customers, which is a bad situation for any business. If the ISP has any customers who seek to access restricted or prohibited content then clearly the ISP is being forced to act in a way that is directly opposed to the desire of its customers, and not aligned with its own desires.
- Where an ISP does act in this way, it has an incentive to do so in the cheapest way even though this may not satisfy anyone i.e. not the government and not the customers.

It should not be imagined that involving ISPs really "solves" anything anyway. Like "squeezing a balloon", ISPs would just be involved in an arms race with producers and consumers, one that ISPs would always be behind in, particularly as the ISP has an incentive to lose the arms race. It is not realistic to think that there won't be changes in the behaviour of producers and consumers as a consequence of blocking content. Just ask anyone who works on tax law.

In addition, the overall result of that arms race may not be in the interests of society, particularly given the dubious motivation (morality by legislation) in the first place.

Along similar lines, making something prohibited can make it more attractive and/or ensure that many more people access the content than otherwise would. That is not unique to online content of course.

### **Pushing business off-shore**

Whether ISPs are roped in on behalf of overseas online content providers who are non-compliant, or not, restriction and prohibition of online content will be largely ineffective. As such, the result of continuing the current legislation, or making it even more restrictive, is only to push business off-shore. This violates Principle 6, for negligible benefit.

At 6.73 the ALRC makes clear that it recognizes that the benefits are largely symbolic i.e. "telling the rest of the world what Australia stands for". What price though should we pay for the government to be able to make such a gesture? There is a price being paid in business lost off-shore and, if applicable, a price being paid by the ISPs - and *a price that can't be measured in dollars*, a price in lost freedom.

## **Links**

It is only a small point but there is nothing in the Discussion Paper about the current link takedown regime. While the link problem is theoretically not unique to online content, in practice that is where the issue will crop up most of the time. Will the current link takedown regime be retained? Will it be scrapped? I recommend that it be scrapped. It is enshrining in law that not only is some content in some way restricted but that even references to that content are restricted.

Again, the mere existence of the link takedown regime is an acknowledgement that prohibition regarding online content is ineffective.

## **Rights**

To quote one Barack Obama, "Prosperity without freedom is just another form of poverty."

Given the emphasis on government control throughout most of the Discussion Paper, I thought it appropriate to provide some additional principles that should guide legislation i.e. additional to those given in Chapter 4.

### **Principle 9: Don't allow government to act without challenge. The court system must not be able to be bypassed.**

Included here is "shoot first, ask questions later" where action can be taken by government that infringes the rights of a person and the person has to undertake court action to get the government action reversed.

Included here is "secrecy" where action is taken in secret so that the person does not even know that his rights have been infringed - and hence does not have the opportunity to appeal to a court.

### **Principle 10: Consider the potential for abuse by a future rogue government when creating a framework for legislation.**

Included here is the extent to which there is transparency, not secrecy, about government action.

The Discussion Paper does not seem to spell out whether any classification decisions will be made public, let alone whether those pertaining to online content will be made public. Transparency is an important aspect of any legislative framework.

### **Principle 11: Convenience to government, including law enforcement, should not be used as an excuse to infringe rights.**

### **Principle 12: Cost should not be used as a barrier to persons retaining their rights.**

This includes cost of classification and cost of litigation.

## **Principle 1 needs to be strengthened.**

This principle should really be extended into a constitutionally-guaranteed right to freedom of expression. Let's assume that that is not going to happen. The government would not willingly give up its power to trample on our right to freedom of expression.

Principle 1 ("Australians should be able to read, hear, see and participate in media of their choice") should be the paramount principle in a free society. Any limitations on it must be justified and evidence-based. Justification would typically be based on harm to others. For example, few people object to the *principle* of defamation law as a restriction on freedom of expression.

Harm is not the same thing as offence.

## **Other comments**

Appendix 1 also appears to reveal that the ALRC did not consult with any organizations who might speak up specifically on behalf of the rights of Australians. No EFA. No civil liberties organizations. Who represents the people? Surely not the government.

It is fairly disturbing that the ALRC would consult with an organization like the Australian Christian Lobby but not with, for example, EFA.

## **Challenging the government**

I am concerned that the final report, regarding online content, may very closely match what the Rudd/Gillard government announced after the 2007 election. This would, rightly or wrongly, give rise to negative perception of the independence of the ALRC and its willingness to provide frank and fearless recommendations.

## **One system**

There are many inconsistencies regarding the overall principle noted above (bullet point 4 in the Executive Summary). These inconsistencies include:

- some delivery mechanisms are exempt (film festivals, art galleries) while most are not
- some subject areas are exempt (news, current affairs, sport) while most are not
- some purposes are exempt (training, reference) while most are not
- some types of content are subject to special rules (games, video) while most are not - it looks as if the "special" treatment of games lives on - most types of content are not required to be classified at all (unless X18+ or RC)

Other inconsistencies exist:

- live performances are exempt
- online content is classified in secret whereas the same content offline is not

As far as I can tell it would mean that a still image that is likely to be R18+ does not need to be classified but a video that comprises only such still images does need to be classified. Conversely, every frame from a video that is likely to be R18+ could be extracted and then distributed without classification. (In practice this is very unlikely to be an issue with cinema release and somewhat unlikely to be an issue with DVD release - if only because a court might choose to treat a collection of still images on a DVD as a video - but might be a feasible exploit in the online world.)

It's not clear what the ALRC's proposal really means for a daily newspaper (or other physically distributed medium on a tight timeframe). If the newspaper gets it wrong and publishes something that the Classification Board ultimately decides is RC (or X or R) then it is not possible to unpublish or to access restrict retrospectively, whichever apply. The decision would no doubt take place long after the day of publication. The only effect could be intimidatory for any future publication of other content. (Such a decision obviously could have an effect on the online copy of the newspaper, where the newspaper could do the "right" thing and take the online copy down or access restrict it, whichever apply.)

## **Classification v. Censorship**

I am confused by the ALRC's approach to the distinction between classification and censorship. I am of the general view that it is unrealistic to separate the two. Everybody knows that the government is going to use classification partly for the purposes of censorship or other restriction. The government has spent the last 4 years telling us that. It is impossible to ignore the censorship consequences of a classification decision. Because it is open to government to prevent or restrict distribution of any particular classification category, it becomes important what is in that category.

It is unclear whether the CMCA will include the censorship provisions, including penalties, or whether the censorship provisions will be in separate legislation. In my view it is more transparent for the CMCA to cover the whole lot. The ALRC should clarify.

## **General Comments**

### **Distribute**

Various parts of the Discussion Paper use the expression "sell, hire, exhibit and distribute". "Distribute" is not defined. It may well be too broad however.

In my view the classification regime should be limited to commercial distribution. If you make money distributing content then it is more reasonable to expect that you engage a lawyer and/or pay for classification. (Moving the emphasis of classification away from the Classification Board to industry classifiers does not magically make the cost of classification zero.)

As such, I would like to see the expression "sell, hire, exhibit and distribute" replaced with the expression "distribute commercially" where that expression is defined explicitly in the CMCA to require that a) the entity is a commercial entity, *and* b) the entity receives benefit in return for distributing the content. There would be an actual definition of "distribution". The effect of this would be to include the expected selling, hiring and exhibition arrangements. For the avoidance of doubt, a free-to-air TV station is distributing commercially (even though it receives no benefit from any party for distributing program content) because it does receive benefit from distributing advertisements and it cannot distribute program content without distributing advertisements and vice versa. (This may have the effect of exempting the ABC! That wouldn't be difficult to deal with though.)

If the ALRC doesn't limit the CMCA to commercial distribution then the framework is potentially picking up a range of scenarios that really should not be being made the subject of criminality etc.

Is the ALRC seriously suggesting that if I have a magazine that contains explicit sexual content and I give or lend it to a mate then I have just distributed X18+ content? In some world I can see that someone might have this point of view but in reality this would be an intolerable intrusion into the lives of individuals. Just because it is extremely unlikely that the giver or lender of the magazine would be caught, let alone prosecuted, does not make it right that that person may have committed a crime.

Please note that I am not suggesting that anyone, under any circumstances, should be permitted to

distribute content that is illegal to possess, whether under a commercial arrangement or not. Possession and distribution of child pornography would remain illegal, in the case of online distribution under the *Criminal Code Act*, and that is as it should be. However content that is illegal to possess (and hence to distribute) should not be covered by the classification system at all.

As a further example, if I get a few mates around to my place and I exhibit a video to them, it does not seem reasonable to me that this would be covered by the CMCA.

Sexting is another example where laws designed to pick up one group of people (users of child pornography) are inadvertently picking up private individuals who should not be expected to know better. That is, it is unreasonable that the law even has reach into such distribution.

As a final example but raising a separate issue ... what forms of online distribution would be covered?

It would be essential to exclude party-to-party communication (for example, email), which clearly is distribution in the most general sense of the word. It is completely unreasonable, and a heinous breach of privacy, for the government to seek to have any role whatsoever in classifying or censoring such communication. There is precedent for excluding this type of communication viz. *Broadcasting Services Act* Schedule 7, Clause 2, content service, (n) et seq. However it may be better to attempt to define such communication, rather than to itemize specific known forms of such communication, by virtue of Principle 5.

The definition of "distribute" also needs to clarify that if party A provides content to party B then party A is responsible for the distribution and has the liability to comply with whatever restrictions are in place, not party B.

## **Likely to be**

Various parts of the Discussion Paper use the expression "likely to be" (or "may be") in the context of content that is "likely to be" (or "may be") classified a certain way if it were classified.

Obviously a person could object to such an arrangement on principle. It is a little bit circular and it requires a party to read the mind of the government. Putting that aside though, I believe that the distributor, creator, possessor of the content should not bear the burden and risk of guessing that content may be classified a certain way. There is always a risk of "incorrect" classification or a risk of failure to classify. It seems as if this part of the proposal violates Principle 11.

The penalty, if any, for "incorrect" classification or for failure to classify should not be so high that content creators are intimidated into not publishing or into erring on the side of caution. The penalty, if any, should be low.

Past experience suggests significant uncertainty about classification matters. It can depend on which CB member does it and perhaps on other factors. For example, in the case of the Bill Henson photos, the police were of the opinion that it was such a serious matter that a squadron marched in and confiscated all the material, presumably believing that the content "may be" RC (really, illegal), while the Prime Minister of the day declared the material "revolting", but the Classification Board decided that the content was PG!

Again, whatever problems exist with this issue regarding content that is distributed commercially are infinitely worse when applied to content that is distributed by private individuals who should not be expected to know better.

"likely to be" is an even more fraught concept when applied to live transmissions, which may occur on TV or radio, or on the internet.

In addition, "likely to be" is particularly problematic when applied to RC, where more significant consequences will presumably arise from the fact that distribution has occurred. Noone should be at risk in this way when it all depends on correctly guessing what the government will decide.

## What is the alternative?

1. Make sensible improvements to the existing classification system regarding offline content e.g. consistency across states e.g. avoid very similar content being classified twice e.g. use the same set of classifications regardless of media type - but exclude online content completely.
2. Harmonize Australia with the rest of the world regarding online content. This suggests that any change to the set of classifications should be in a direction that is more compatible with the rest of the world, rather than less. Hence, for example, RC should be abolished.
3. Relax restrictions on online content so that nothing that is legal to possess is banned (for distribution or hosting).
4. Abandon age restrictions as a requirement on online content providers. Age restriction would, at the discretion of the parent/guardian, be implemented entirely within the home. Any other voluntary restrictions would be implemented entirely within the home.
5. Use takedown and arrest as the mechanism to control the overt distribution of child pornography, to the limited extent that that occurs. (Normal law enforcement activities also deal with *covert* distribution of child pornography.)

## Response to specific items in Discussion Paper

### 1.16

While there is some overlap in the intent of 1.16(a) and principles 9 through 12 above, I am concerned that these principles will not actually be reflected in the CMCA, if existing related legislation is anything to go by.

### 1.32

Broadcast media could include "online". There can be differences between the way broadcast works online as compared with TV and radio but broadcast does exist in the online world. It is not as yet widely used but may become more so in the future. Most of the time online content is accessed in a way that is not at all like broadcast.

### 1.37

See response to Chapter 4.

### 1.44

It may be a small point but I would prefer M15+ over MA15+ for the new 'M' rating, since MA15+ has implications of legal enforcement to some people, and the legal enforcement is the significant aspect of MA15+ that has been dropped - and the meaning of the "A" has magically changed from "accompanied" to "audience".

Also, I suggest deleting the space between the letters and the digits when writing the classification in text e.g. "R18+" not "R 18+". I think this better expresses that the classification is a single, indivisible entity.

Did the ALRC have a particular reason for including the space?

## 2.8

*The Governor-General appoints all members*

We know that this is quite false. In some world it is true but in the real world the government of the day appoints the members.

*having regard to ensuring the Board 'is broadly representative of the Australian community'*

This is the current wording but it is essentially unenforceable, to the extent that it actually imposes any requirement. It does not say that the government must ensure broad community representation, only that it has to have regard to doing so. I'll be sure to have regard to paying my taxes next year.

For better protection against a deliberately unrepresentative Board, members should be selected automatically, taking account of demographics but with a random element. It should probably be the case that a Board member can only serve one, for example, 3 year term.

## 2.19

Does the ALRC's proposed new legislation address the issue that it may not be possible to determine where online content is located i.e. not possible to determine whether the online content is located in Australia or overseas? (This is not a new problem of course.)

## 2.31

In the context of online classification, the decisions are kept secret from the public and, quite possibly, from the overseas content provider. This can help to avoid controversy but at what cost?

## 2.45

*While almost all stakeholders accepted the need for an RC category*

This may be a misleading statement.

Unless someone specifically indicated that RC should remain, and indicated that they understood what RC means today, the ALRC can't infer support for RC.

Many people may have accepted the need for an RC category on the grounds that some content should be illegal to access and possess and that such content should be RC. However this is confused because some RC is illegal and some RC is legal - and the Rudd/Gillard governments have repeatedly and deliberately sought to create and sustain this confusion.

Possibly I don't count as a stakeholder but I certainly argued for the abolition of RC. I argued for the abolition of RC and for *illegal* RC content to be called what it is i.e. illegal.

## 3.18

The government, Coalition and Labor, has spent many years encouraging this trend by making life harder for anyone who wants to host or distribute content in Australia. It would seem that not much will change

in that regard.

## 4 Guiding Principles for Reform

### Principle 1. Australians should be able to read, hear, see and participate in media of their choice

Why doesn't the principle say "Australian adults"? Few if any are arguing that children have a general, unfettered right to access content.

More substantively, see comments above at "Principle 1 needs to be strengthened".

#### 4.13

And yet the ALRC is attempting to apply old media classification and censorship to the internet i.e. to apply a simple "one size fits all" rule that applies to content regardless of how it is distributed.

#### 4.16

*within the parameters of the law*

The law has to be reasonable. The law has to be just. Otherwise you are only "reading, seeing and hearing" what the government permits you to. The ICCPR quoted at 4.10 probably better captures the general exceptions, although that does not mean that I agree with all the exceptions (e.g. "public morals"). I believe that the ICCPR would have been constrained by the need to get international agreement in including expressions like "public morals".

I am almost certain that the current "parameters of the law" in Australia are not reasonable e.g. X18+ content cannot legally be distributed in any state of Australia.

About the only content where there is no disagreement voiced by any Australian that the content should be beyond freedom of expression is child pornography.

### Principle 2. Communications and media services available to Australians should broadly reflect community standards, while recognising a diversity of views, cultures and ideas in the community

There should be no requirement that content that is available reflects community standards, whatever community standards might really mean today. Diversity in the community has never been greater. Community standards should only come into play where content is made available in such a way that access of that content is unavoidable e.g. billboard.

#### 4.17

I don't have a problem with mechanisms being available by which people can protect themselves "from (inadvertent) exposure to unsolicited material that they find offensive" but a "right" not to be offended goes way beyond community standards - and is really a different thing.

Few people who *would be* offended by RC (or X) material are ever *actually* offended by it - because they wouldn't seek it out in the first place and they don't accidentally encounter it. It is really just a case of one person who is offended by something attempting to impose his or her values on another person. This cannot be justified in a free society.

## 4.18

Regarding item (a) ... Sorry, this is obsolete codswallop. I am not obligated to be decent or moral (as judged by the government or anyone else) in a private environment.

## 4.21

This is somewhat flawed because it starts out talking about "public decency" and "behaviour in public" and yet inevitably most content covered by the CMCA will be consumed in private.

## 4.24

Indeed! The diversity has never been greater.

## 4.28

"community standards" are not the law. Let's not confuse the two.

Regarding the law ... see my comments to 4.16

Noting that the ALRC has chosen to quote Bravehearts, we could imagine that they specifically intended that accessing child pornography should be illegal and few if anyone will disagree with them, but it is not good enough simply to add "within the bounds of the law".

See my comments to Proposal 9-5, which also discuss this question.

Regarding community standards ...

I see no need for a rationale for abandoning restrictions on content based on community standards. Those restrictions should have been abandoned long before the internet.

The internet should however be a catalyst for revisiting this question since

- a) the internet allows a person to access content that is acceptable in *other* communities, anywhere in the world, if not in his/her own community,
- b) the internet makes new communities, not defined by national boundaries, and
- c) the internet makes any restrictions unenforceable, except in very limited circumstances.

### **Principle 3. Children should be protected from material likely to harm or disturb them**

It depends on "by whom" and "at what cost" (in lost rights e.g. privacy - for adults and children and e.g. freedom of expression - for adults and even children). The use of the terms "harm" and "disturb" are likely to be controversial. Perhaps better would be:

A parent should protect a child from material that the parent judges to be inappropriate for the child, taking into account the maturity and personality of the child, and the values of the parent.

Beyond that, should the law (the government) have a role in it? I remain to be convinced based on proposals so far from the Rudd/Gillard governments.

One concern that arises is that this principle may eventually be enshrined in law, taking away the right of

parents to parent. We have already seen [this story](#).

#### 4.31

While I don't have a problem with protecting "children from exposure to internet content that is unsuitable for children", it is not clear that the *Broadcasting Services Act* should be putting that burden on content providers, and very doubtful indeed that it should be putting that burden on access providers (ISPs). Responsibility for this should rest solely with the parent.

#### 4.35

Whether they are conflicting principles depends on the approach taken. The Rudd/Gillard governments have spent 4 years (so far) focussing exclusively on restricting adults while using protecting children as a smokescreen. In practice therefore these principles are in conflict.

Forcing ISPs to block certain content is completely unnecessary to protect children from being exposed to adult content and completely necessary if the government wants to attempt to prevent adults accessing adult content.

In addition, the "end-user focus" should mean that any restrictions are implemented in the end-user's PC, while the Rudd/Gillard governments have spent 4 years (so far) attempting to put the restrictions within the ISP, where they will apply to *all* Australians.

**Principle 4. The national classification scheme needs to provide consumer information in a timely and clear manner, and to provide a responsive and effective means of addressing community concerns, including complaints**

In the case of online content, it is unlikely that the classification scheme can provide consumer information in a timely manner, where the content is hosted overseas.

"Community concerns" is often code for "noisy minorities trying to prevent access by all to content that *they* find offensive".

#### 4.36

This item does not seem to address how this information will be provided in an online scenario.

**Principle 5. The regulatory and classification framework needs to be responsive to technological change and adaptive to new technologies, platforms and services**

From a legal perspective this is a laudable goal. From a practical perspective it is extremely difficult. If anyone tells you that they can accurately forecast what the future will look like in, say, 20 years time, they are lying.

There is the risk that the legislation ends up being some kind of blank cheque or antique relic, subject to the vagaries of a judge, trying to interpret analogue legislation in a digital world. For example, as a thought experiment, imagine that the *Telecommunications Act* had been written to deal *only* with telephone services but yet was written to be independent of technology. Think how a judge might struggle to interpret it in the context of the internet. There is something to be said for admitting that the world changes and that parliament will have to consider the changed world and decide whether and what legislative changes are required.

Another challenge is that even if the law is written so as to be independent of technology, that doesn't

mean that it is enforceable on new technology. Thus you can forbid access to a particular movie, whether it is on DVD or downloaded on the internet, but you will have a fair bit more success preventing its sale or importation on DVD as compared with its sale or "importation" online.

## **6. The classification framework should not impede competition and innovation, and not disadvantage Australian media content and service providers in international markets**

I agree absolutely. However the current legislation is already doing it (impeding innovation and disadvantaging Australia providers), and it can only get worse if the government gets its way.

The only innovation that I see occurring in Australia in the near future is innovation that the government won't want to see. (-:

### **4.50**

Australia is already at something of a disadvantage. In the worst case scenario the entire Australian X18+ video industry could be wiped out, with all the content being procured by end-users from overseas. Even in the best case scenario overseas providers will in practice have less hassle from government and incur less cost.

### **4.52**

I don't see how parity of treatment will be achieved in practice. Overseas online content providers will always be more free. They are under no legal obligation to comply with any laws except those where their content is hosted. It is not practical for them to comply with laws where all their consumers are located.

### **4.55**

It is possible that this is pointing in the right direction but the ALRC seems to be going in the opposite direction.

Is achieving consistency *within* Australia more important than achieving relevance for Australia in the global online world?

## **7. Classification regulation should be kept to the minimum needed to achieve a clear public purpose, should be clear in its scope and application**

The purpose should be justified, not just clear.

As an illustration, it makes sense to have the same classification applied to a film in South Australia as the film would have in, say, Victoria - that is a clear purpose - but if the classification is RC then it may not be a justified purpose.

## **8. Classification regulation should be focused upon content rather than platform or means of delivery**

Platform neutrality is simplistic. There are numerous scenarios in which the same content would be treated differently depending on the delivery mechanism. Quite apart from that, there are major practical difficulties with classification of online content. Some examples are covered in my submission.

The ALRC has made enough exceptions anyway to undermine this principle e.g. a movie shown at a film festival is exempt but the exact same movie shown at the cinema, or purchased to be shown at home is not, or e.g. a movie that is a recording of a live transmission may require classification while the original

live transmission does not.

#### **4.61**

How is the proposal addressing the fact that a video on DVD will have its classification made public while the exact same video available online will have its classification kept secret (assuming that the classification is a restricted one)? Or is the ALRC proposing to make classification of online content no longer secret? Or is the ALRC proposing to make all classification secret?

#### **4.68**

Curiously though, the lack of an R18+ rating for games has theoretically no impact on children, only an impact on adults. So the concern about "young minds" actually led to restrictions on adults! This is instructive. It has taken 17 years (and counting) and much campaigning to fix this.

This illustrates why Australian adults are rightly concerned about any changes by government to the classification and censorship regime. Whatever additional restrictions the ALRC's new regime imposes on Australian adults, will it take 17 years to fix those too?

#### **5.12**

I think it's an improvement that ages are given.

#### **5.25**

I predict that access to overseas-hosted online content will not be restricted in compliance with the current definition of a RAS unless Australia substantially relaxes the requirements of a RAS.

#### **5.27**

Is the ALRC saying that the other Acts, or relevant parts thereof, will be repealed? This is an important question to have clarity over, regarding the resulting regulatory environment. Will providers have to comply with both the old regime *and* the new regime or will the old regime be entirely removed by repealing relevant legislation?

### **Proposal 5-4**

See comments in earlier sections regarding the scope for 'media content' and 'media content provider' to include private communications and to include private individuals.

#### **6.1**

Is the ALRC aware of how much media content "likely to be" X18+ is available online? Close to 100% of it is hosted overseas. How does the ALRC imagine any of it will be classified?

#### **6.48**

I don't know why Bravehearts would argue that. Child pornography is and will remain illegal to access,

whether accessed in private or public.

## 6.58

Can the ALRC provide guidance as to where the boundary (presumably measured by running time) between "feature length" and not "feature length" is?

## 6.59

The success of YouTube, and other similar sites, suggests that user-generated content is a non-trivial and growing part of the entertainment landscape.

## 6.65

Is bullet point 3 intended to be "live transmissions"? Anything live cannot, by definition, be classified before being made available, but a recording of a live performance certainly could be classified. Why make an exception for a *recording* of a live performance?

## Proposal 6-1

Why does *produced* on a commercial basis come into it? What if something that was not produced on a commercial basis suddenly becomes wildly popular and is then distributed commercially? It seems to me that it is the commercial distribution that should trigger classification, not the commercial production.

## Proposal 6-2

Games should not be required to be classified.

There are three fundamental difficulties with classifying games.

- Games are active, dynamic content. In fact even the creator of the game may not be able to anticipate all the situations that may arise.
- Games can update themselves by downloading newer versions online.
- Games may involve online interaction i.e. depend on the actions of other players of the game. (Hence for example it is impossible to limit the "language" that may be used by other players and hence impossible to provide consumer advice for language use elements. Communication from other players may arrive as text or as sound, or possibly even still or moving images.)

A game distributor could choose to have a game classified. The game distributor particularly might want to do this if claiming that the game is suitable for children (i.e. persons under the age of 18). In other words, I am to some extent advocating the exact opposite of what the ALRC is. The ALRC is saying classify if MA15+ or higher. I am saying classify if MA15+ or lower.

If a game distributor chooses to have a game classified then the game distributor should have an onus to convey the classification accurately and to certify that reasonable efforts have been made to inform the classifier of all possible content and that any future newer versions will be consistent with the original. (I don't know that much at all can be done about the third bullet point above, other than to specify that a game involving online interaction is by definition unsuitable for children.)

Note that if game classification is done under compulsion, the results are likely to be less satisfactory.

## Proposal 6-3

By capturing traditional exemptions, the ALRC is preserving the status quo. This is somewhat at odds with fundamental reform. Perhaps traditional exemptions should have to be justified.

### 6.72

*Unclassified adult content is rife on the internet*

The conclusion that should be drawn from this is that the traditional approach to classification is not suited to the internet. I see no sign that the ALRC has accepted this and I doubt that this realization will willingly be accepted by government.

For online content ...

- Classification for the purposes of prohibition should be abandoned.
- Classification for the purposes of age restriction, consumer advice and avoiding offensive content should be implemented in the home.

### 6.73

*Even if it is highly unlikely that most adult content will be classified, by insisting that it should be, the law makes clear Australia's standard on what may be acceptable to display in sexually explicit content.*

I think we all agree that "highly unlikely" is absolutely correct. See also my comments at "Pushing business off-shore" and "Role of ISPs".

This point says it all about why the ALRC should proposed to exclude online content completely from this change and go away and think about it some more. There is still much good that could come from the proposed changes as they apply domestically to offline content.

It is completely unnecessary to require X18+ content to be classified in order to achieve the stated goal of making clear what is acceptable in sexually explicit content. The legislation by itself can achieve that goal - or indeed any suitable public statement by the government.

In reality, the only overseas online content providers who will become aware of what Australia regards as acceptable will be those who are doing the "right" thing. The vast majority would not have the resources to examine every country's legislation and will never look at Australia's legislation.

Requiring X18+ online content to be classified probably has little real benefit in regards to the stated goal because the vast majority of sexually explicit content online would likely be X18+.

This seems like a truly heroic act of defiance, perhaps like this submission.

*if the sale of some X 18+ content is legal in Australia*

If X18+ is not legal for distribution in Australia, what then does the ALRC expect a law-abiding overseas publisher to do? Shouldn't the content be required to be classified anyway? Otherwise how does anyone know that it is X18+ and hence not legal? And if not then does this mean that all such content is RC (which would still theoretically require classification)? That would make RC an *enormous* category. It would be good to see an estimate of the size of X18+ and RC together versus the size of RC alone, for online content.

I feel that it would be courageous but appropriate for the ALRC simply to recommend that X18+ content be legal to distribute in Australia. While I understand that the ALRC may not wish to comment on what should and should not be legal, if X18+ content were not legal to distribute then this would have a substantial impact on the classification regime as a whole (at least as it applies to online content).

### **Proposal 6-4**

As it stands today, the majority of adult Australians can in practice freely purchase X18+ DVDs, albeit that they are forced to do so by mail order. If the states agreed to refer their powers in this general area to the Commonwealth, on condition that existing theoretical restrictions on X18+ content be retained and now be strictly implemented then this would be hugely regressive. It would be like winding the clock back 40 years. It would mean that the principle that adults "should be able to read, hear, see and participate in media of their choice" would be empty words. We are after all here talking about *any* depiction of actual sexual activity.

Why hasn't the Australian government given an indication of what it intends? Is it so lacking in guiding principles that it can't say what it would like to be the case?

### **Proposal 6-5**

RC should be abolished. No legal material should be banned. In addition the existence of RC makes it harder to get standardization between countries.

If RC is not abolished then, seriously, the ALRC needs to find a more sensible name for it. How about B for Banned?

### **Proposal 6-6**

If RC is not abolished then I would suggest that "dealing with content that is likely to be RC" is far too general.

"Dealing with" is vague and "likely to be" is unreasonable, as discussed above in my opening remarks.

### **6.88**

What if the mod is released by a non-commercial third party? It is not reasonable to expect non-commercial entities to have lawyers and/or pay for classification.

This kind of "plug-in" architecture is becoming increasingly common and indeed contributes to the success of a product. The more successful products are likely to have a plethora of "plug-ins" and many plug-ins will be created within the user base.

### **6.93**

Overseas online content providers are however unlikely to use an *Australian* authorized classification instrument, and less likely still to use an authorized industry classifier. In fact, the content provider may simply use its own classifications i.e. that have no legal standing whatsoever - as this is far more convenient than classifying the content 200 times, once for each jurisdiction. That can still meet consumer requirements.

## 7.2

Given concerns among the citizenry that the new classification regime will be abused by government, I would like to see justification of why the Minister or any government agency can submit content for classification. I can quite see that law enforcement agencies may have a need but what is stated here is much broader than that.

## 7.6

It is not entirely realistic to say that the CB is independent of government. Everyone on the CB was appointed by the government.

I am in no way intending to impugn the reputation of current or past members of the CB. I am merely pointing out that the current system is open to abuse by a future government - and that nothing is likely to change in that regard under the ALRC's proposals.

During their time in opposition the Labor Party has criticized appointments made to the CB (on the grounds that the person being appointed is too closely tied to the then Coalition government). See, for example,

<http://www.theage.com.au/news/national/censure-as-pms-pal-turns-censor/2007/04/13/1175971353181.html>

[Hansard link](#)

It seems unlikely that any of the rather weak provisions that currently exist regarding CB appointments are really enforceable.

## 7.38

"Discrete and distinct group" is not achieved though. By including anything that is "likely to be" rated in some way, the group is by its very definition indistinct, and somewhat circular.

## 7.47

I would question whether it is really appropriate that the CB classifies child sexual abuse material. Since such material is illegal to access (or possess or distribute ...), and the CB is not part of the judiciary, the final decision regarding child sexual abuse material should be left to a court. In essence the court is interpreting the *Criminal Code Act*, not the hypothetical CMCA.

## 7.58

Seriously, guys, it's the existence of RC that causes the problem here. I think anyone can recognize when content is X rather than R and it isn't too much of a problem if something that could be R is misclassified as X. If not for the existence of RC, the adult entertainment industry wouldn't need to pay classifiers at all. They could just slap an X on it and move on.

## 7.60

The language in this item seems too harsh. It perhaps should say "could have their authorizations revoked" rather than "should have" and likewise rather than "strong penalties would apply" it perhaps

should say "a scale of penalties would apply" depending on whether the misclassification was deliberate or reckless or just "wrong".

Taking this item at face value, at the first mistake the classifier is out of a job and facing twenty lashes. Before long there are no industry classifiers left and it's back to the current situation where it would all be up to the CB.

Too harsh a regime would likely lead to erring on the side of caution i.e. classifying higher than is really appropriate (unless the ALRC intended wrongly classified to include wrongly classified in either direction). In addition, we should not pretend that there is an objective standard to use in classification decisions. There will always be room for opinion. To think that someone else's opinion differing from yours could get you the sack would make "industry classifier" a thankless task.

Possibly 7.102 et seq soften and clarify the language.

**Question 7–1 Should the Classification of Media Content Act provide that all media content likely to be X 18+ may be classified by either the Classification Board or an authorized industry classifier? In Chapter 6, the ALRC proposes that all content likely to be X 18+ must be classified.**

X18+ content should be allowed to be classified by an authorized industry classifier. However the law needs to provide that it can alternatively be done by the CB. This is because there is a vast amount of overseas-hosted X18+ content that will not be classified unless it is classified by the CB. This presumably should only occur if the content comes to the attention of the government, otherwise the CB will be tied up classifying overseas-hosted X18+ content until the end of time.

This should apply only to commercial content. A couple's amorous home videos should not require to be classified.

## **7.65**

The question arises as to who can use such an online questionnaire i.e. what relationship the user of the questionnaire must have to the content. It would, for example, be inappropriate to allow extremist Christian groups to be filling in questionnaires about overseas-hosted X18+ content.

## **7.91**

Yes, there is indeed a concern. Surely it falls well short of best practice, with the arrangement chosen for largely pragmatic reasons, at the expense of robustness.

## **7.92**

Even with separate subsets of the CB making the original and review decision, the requirement to work together (generally, and on future decisions) may create a bias.

Furthermore the need for such subsets works against a competing requirement, namely to have the widest range of views for contentious decisions. I have submitted previously that for a CB decision to classify as RC (if RC is not abolished), there must be a legislated requirement for a minimum number on the panel and there perhaps should be a requirement for unanimity on the panel. However the more are involved in the original decision, the less are available to review the decision.

## 7.95

*a 'person aggrieved' by the decision*

In reality review is prohibitively expensive, particularly for non-commercial distribution. There is at least the potential for violation of Principles 11 and 12 if the regime deliberately sets out to deter review.

## 7.101

It is far from obvious what this means in the situation that an overseas online content provider is non-compliant. Whom should a consumer complain to? There is surely no point complaining to the content provider, but equally there is no point complaining to the ISP. Presumably a complaint, if any, would have to be directed to the government.

## Proposal 8-1

Noone has ever explained how this will work in an online environment, with overseas content providers. Will ISPs be held liable on behalf of overseas content providers that are non-compliant?

## Proposal 8-2

In the context of online content this really just continues the current untenable situation.

## 8.26

Having to provide credit card details is in any case completely unreasonable where the consumer is not ready to transact or indeed the content is provided on a non-commercial basis.

It's also a bit of a rip-off if a charge is actually made to the card just for the purposes of verifying it. (If no charge is made then it's trivial for little Johnny simply to supply all the required card details from someone else's card without the cardholder's knowledge.)

## 8.27

Unless Telstra has some other mechanism for verifying age there is no basis for the assertion that it "constitutes verification that they are at least 18 years of age".

In fact experiments have been conducted to verify that it is definitely possible for someone as young as 12 to obtain a pre-paid credit card at an Australian outlet and then for that card to be used (by an adult) to sign up to various overseas adult web sites.

## 8.35

No doubt the ACL would have the adult contact his or her ISP, supply a bond of \$20,000, run 100 metres in under 11 seconds, and achieve a score of 95% or higher in a test of bible knowledge - before being permitted to access adult content.

## 8.36

This statement certainly appears in Telstra's submission but Telstra's conclusion is not justified on the basis of the simulation that they conducted - and that's *without* taking into account underblocking caused by the user doing circumvention.

In addition, if the scope of the blacklist were to include all X18+ content then Telstra's limit of 10,000 URLs would be looking very anaemic.

## 8.51

This is a slightly flawed argument. Yes, it's true that the logic of convergence, taken as far as it can go, would lead to the conclusion that all legal content could be broadcast on free-to-air TV - and it's almost certainly true that our wowsery government, and some citizens, would not stomach that. However we are under no obligation to take the logic of convergence as far as it can go. We could adopt just one piece of the logic of convergence i.e. for free-to-air TV we could relax the time-of-day restrictions but keep the classification restrictions.

In my own view the time-of-day restrictions can remain, even though time-shifting means that they are not effective and even though they create an unlevel playing field for free-to-air TV. The playing field is so unlevel that the time-of-day restrictions hardly matter.

I also see free-to-air TV as being somewhat public, in the sense that there are relatively few channels, all of which are beamed into your home whether you ask for it or not. As such it is reasonable to apply more restrictions than would apply to a mechanism where there are millions of channels, you have to ask for any channels at all to come into your home and you have to request a specific channel out of the millions.

I would mention in passing that there are other countries where (at least) R18+ content is broadcast on free-to-air TV. Are Australians really less able to deal with such content?

## 8.52

Such a public education campaign has already started.

Refer to FreeTV Australia's [media release](#) and the related Community Service Announcements that you will see aired from time to time.

## 8.53

There is already ample evidence that no RAS exists for online content that meets everyone's requirements. At the very least the ALRC should propose whether the new Act will include substantially the same provisions as listed in 8.24, which have already been found to be a failure.

Overseas web sites will simply not use any RAS beyond the basic "warning adult content - click to confirm over 18 and enter" while Australian-hosted web sites will be tied up in bureaucracy, assuming that the provisions in 8.24 are substantially carried over. This is the clearest case where Principle 6 is violated.

Online access restriction would be far better implemented at home. I don't understand why the ALRC doesn't simply tell the government that.

## Proposal 8-4

There is an underlying assumption here that an "industry" is involved. I realise that this proposal is only saying that such a code *may be* created.

I have a general objection to a separate industry code. A code is often created without publicity or scrutiny, scrutiny by the public or scrutiny by the parliament. The code may serve the interests of the industry, in complying with the law, when in fact neither the law nor the code serves the interests of the people. Whereas people can attempt to influence the law, there may be little or no means of influencing industry participants. The process of public debate is far better developed in the political sphere than in the commercial sphere.

Consultation is all very well but when the party is completely free to ignore the results of the consultation what is the point?

I did note 11-3(c).

Example: Under the current regime, takedown notices go to the content hosting provider, not the content provider. So the business process is slanted towards making the problem go away rather than respecting the rights of the content provider.

## 8.54

I don't know whether that is true. Reading the entirety of the Discussion Paper, one could easily come to the conclusion that the primary purpose of classification is restriction.

### **Question 8-1 Should Australian content providers—particularly broadcast television—continue to be subject to time-zone restrictions that prohibit screening certain media content at particular times of the day?**

You would like to think that parents, not parental locks, would be used to restrict what children access.

If the parents really pay very little attention to what their kids watch then most likely a kid could record a program at 9 pm and then watch it at 4 pm the next day i.e. through time-shifting, the restriction on time-of-day is less effective than it used to be.

With the advent of TV that is delivered via the network (whether internet or otherwise) "time of day" doesn't mean as much as it used to. That is, for a content provider to implement "time of day", the content provider has to know where the viewer is, what time it is where the viewer is and has to be able to restrict selectively, any of which may not be technically possible, and the content provider has to care.

Ultimately I think the free-to-air TV players are big enough to argue their own case for being freed from restrictions.

See also 8.51 above.

## Proposal 8-5

*The Classification of Media Content Act should provide that, for media content that must be classified and has been classified, content providers must display a suitable classification marking.*

Perhaps it is obvious but the opposite should also apply. Content that has not been classified (either by an industry classifier or by the CB) must not display an Australian classification marking.

## 9.33

It has been said already but unfortunately our government will use classification for censorship and therefore the two cannot be separated.

### Proposal 9-1

My immediate reaction was ... too many classifications. For classification to be useful for consumer advice purposes, it has to be understood by the consumer. I suppose people may get used to it.

The distinction between T13+ and MA15+ must surely be fairly fine. Are people going to be held legally accountable for being unable to decide whether a child should be 13 or 15 to access certain content, and unable to second guess the CB correctly? It is entirely possible that the "average" girl of 13 is as emotionally mature as the "average" boy of 15.

### Proposal 9-2

What does "made specifically for children" mean, particularly when the parliament attempts to codify that in law?

I acknowledge that at 9.22 you provide the criteria for a C rating as currently used by TV. However bullet point 1 is then circular, and the ALRC doesn't appear to make an explicit recommendation as to whether these criteria should be adopted.

I am doubtful that it is helpful to have judges pontificating on whether some content was made specifically for children, or whether it has a high standard of e.g. direction.

### Proposal 9-3

I object to the exclusion of RC. If the government is going to ban something then that is the *most* important time that it has to be able to justify why the content is banned. I realise that that is not "consumer advice" as such, since theoretically noone will be able to consume, but in practice the justification for banning is the same as consumer advice i.e. it provides additional information about the reasons for the classification.

It cannot be argued in this case, at least, that censorship is separate from classification. There is no doubt whatsoever that a classification of RC means censorship.

## 9.63

Flexibility is a good thing but, inevitably, allowing change by the government without parliamentary debate and without parliamentary approval will lead to greater restriction, and lead to the changes being made as quietly as possible.

## 9.64

Consultation with key stakeholders and the broader community is meaningless if

- the government consults but ignores (and just does what it wanted to do all along), or
- the government gets to choose who the stakeholders are.

Even assuming that those two concerns were addressed, if there is no legislated requirement for consultation, this is a system open to abuse.

## **Proposal 9-5**

I have grave reservations about the part of this that applies to RC.

So what if 80% of the community think that some content is sufficiently offensive that it should be classified Refused Classification? Democracy is not tyranny of the majority. It has been said that the measure of a democracy is in the rights that it affords to the minority.

More generally, see, for example, <http://www.democracyweb.org/majority/principles.php>

Outright banning, which is what RC theoretically is, should be based solely on harm to others. It should only be influenced by community standards to the extent that it is reflected in laws that make access to certain content illegal, at which point the content should now be "outside" the classification system and a matter for the justice system. Those laws must of course be reasonable, justified on the basis of harm to others.

Is the ALRC seriously suggesting that if, for example, 80% of those surveyed said that homosexuality was abhorrent and hence that gay porn should be classified Refused Classification then gay porn would get banned? I am sure that if and when the CMCA comes out, it would give the government of the day enough wiggle room to swing an elephant and hence the government could simply ignore community standards but that in itself would be a curious outcome.

To a large extent the right to access content should come neither from the community nor from the government. It is inalienable and inherent in our humanity. I realise that no such right exists in law.

I don't have a problem with using rigorous methodologies to ensure that the dividing lines between the other classifications are being drawn in accordance with community standards, particularly as it relates to content that is deemed suitable for children i.e. anything below R.

## **10.1**

Yes, the scope should be narrowed to illegal content only - and then renamed from Refused Classification to Illegal. If RC were illegal content only then Illegal would far better describe the content.

If RC is not so narrowed then illegal content should be moved out into a classification of its own. This would avoid confusion about what is legal content and what is illegal content.

## **10.5**

Again, I would object to the separation of classification and consequence. It is just not realistic - particularly not in a chapter devoted to RC. If RC content were not banned then the RC classification would not need to exist (even in the ALRC's view).

Likewise if a proposal to narrow RC to illegal content only were adopted, there can be no separation i.e. the consequence defines the classification.

In a sense the ALRC acknowledges these points at 10.17.

## 10.6

*The RC classification reflects the censorship end of the classification spectrum, as material so classified 'is effectively banned'.*

Only if X18+ is legal to distribute, which is not currently the case. That is, as it stands today, RC and X18+ together are the censorship end of the spectrum.

Technically R18+ is also part of the censorship end of the spectrum as it is banned on free-to-air TV.

*Classification is done for the purpose of controlling dissemination. It is not done for the purpose of controlling what a person is able to have in his or her own home.*

But can this distinction (between dissemination and possession) be logically supported? Possession can only come about through dissemination. Furthermore, in the online world, controlling dissemination is essentially impossible.

In my view, any content that is legal to possess should be legal to disseminate.

It is noted also that the quote changes without explanation from "dissemination" to "commercial distribution". I have argued in this submission that controls on "distribution" should be limited to controls on "commercial distribution".

## 10.16

*if any recommendation is considered to alter the guidelines to what is deemed to be Refused Classification material, equivalent amendments are required to the import regulations*

Wouldn't it make more sense to fix that? That is, shouldn't Customs simply work to the same one set of rules as far as content goes? So the term "objectionable material" would be replaced with a reference to one or more classifications (presumably just RC) and the definition of those classifications would be precisely as defined elsewhere for all types of content.

That is not to say that I support the idea that Customs should prevent RC content coming in to the country (because I don't support the existence of RC as a classification at all).

## 10.27

"offensive" should be removed from relevance. Then Australia wouldn't need an offensiveness test.

*'material which causes outrage or extreme disgust'*

But RC content does not actually cause outrage or extreme disgust. The people for whom RC content *would* cause outrage or extreme disgust do not encounter it. This entire concept is theoretical. If I choose to access RC content in the privacy of my own home, the "outraged" will never know that and will never themselves access that content. So their outrage is entirely theoretical. I fail to see how someone else's theoretical outrage should limit my actual freedom.

NB: I am talking here about offensive but legal content.

## 10.28

*children are harmed whenever child pornography is created*

Under Australia's very broad definition of child pornography it is certainly *not* the case that children are necessarily harmed when child pornography is created. However with a more sane definition of child pornography the statement could be true.

Arguing about whether a child is harmed when child pornography is *disseminated* is too Zen for me. [http://en.wikipedia.org/wiki/If\\_a\\_tree\\_falls\\_in\\_a\\_forest](http://en.wikipedia.org/wiki/If_a_tree_falls_in_a_forest)

## 10.29

*they are permanent records of children being sexually exploited*

As per the previous point, Australian's definition of child pornography is broad enough that the statement by IWF is simply false in Australia. The IWF is a UK-based organization. Perhaps their statement is true under UK law. The ALRC is seemingly acknowledging this point at 10.33.

If any further illustration of this point were needed, look no further than 10.30. A textual description could be entirely fictional. It would be difficult to determine whether a child was involved as part of the creation of the textual description. (In my previous submission I suggested that textual descriptions be removed from the definition in the *Criminal Code Act*.)

Thus there is a meaningful distinction between child sexual abuse content and child pornography. If Australia were to bring its definition into line with the rest of the world, which would be useful for a number of reasons anyway, then the term child pornography could be phased out.

## 10.30

I think "textual description" would be better than "verbal description".

## 10.47

See also my comment on Appendix 2 Item 5

## 10.58

MLCS Management's submission gives a reason why illegal content should not be within the classification system. In answer to Question 1 they point out that

*was also sometimes due to the response of magistrates in accepting a Classification Certificate as evidence – with magistrates preferring to make their own assessments by viewing material. I have no opinion on what is the correct way to proceed with this type of legal matter, but some consistency would be useful to all parties. And the elimination of double handling makes sense.*

It seems very problematic that the power of the court to make its own decision (e.g. to interpret the *Criminal Code Act* in respect of child pornography) could or should be taken away. However to eliminate double handling only one entity should make that determination.

I am therefore proposing that only a court can make a determination of illegality and that all illegal content be dealt with entirely outside the classification system. Illegal content can then formally be given a classification of 'I' for illegal.

It is arguable that once illegal content is removed from RC there is nothing left to be in RC.

## 10.77

This is a difficult area. Instructions for ending one's life are as useful to a young person suffering from depression but otherwise healthy as they are to an old person in pain, with numerous health problems, no prospect of recovery, and getting no quality of life.

I'm quite sure that euthanasia law reform is outside the scope of this review but if the Australian government would put in place a regime, with appropriate checks and balances, whereby the latter person could choose to die with dignity then books like *The Peaceful Pill Handbook* would not need to exist, in Australia at least.

## 10.82

I was one of the few who favoured the abolition of the RC classification, for numerous reasons, some of which have been restated here. In particular, I wanted illegal content to move into a more honest category of Illegal and for the rest of RC to be scrapped. Perhaps the test is not how many wanted to keep RC but the persuasiveness of their arguments.

Child pornography is already illegal (to possess or access or anything else). It is not logical to say that "this *necessitates* the filtering of such content so that it is not accessible" (my emphasis). That something is illegal to access is a separate consideration from whether the government would proactively seek to prevent the crime of access. In a free society this kind of proactivity would set a dangerous precedent. It is very close to a presumption of guilt, very close to "thought crime". In general, people are free to decide to commit crimes and free to decide not to commit crimes. The government generally trusts that most of the time most of the people make the right decision - and indeed the people generally do. Only when a person does (decide to) commit a crime, does the government become involved.

The only reason that I can see that the government would want to make an exception in this case is the flawed perception by government that internet censorship would actually be possible. Firstly, it is well known that internet censorship is easy to circumvent (and likely to become easier if internet censorship is actually implemented). Secondly, given that access to child pornography is illegal and subject to significant punishment by the justice system and even more significant punishment by society, it is hard to imagine that a person seeking to access child pornography would be deterred by internet censorship. Thirdly, it is well known that the majority of child pornography is exchanged via mechanisms other than those that would be covered by internet censorship. (Well, the law enforcement agencies know this.)

Quite apart from the above considerations, experience overseas demonstrates that once internet censorship is introduced, under the pretext of blocking access to child pornography, it *will* be pressed into service to block access to other content. Example [here](#).

Once the infrastructure is in place, Pandora's Box will have been opened. Does the ALRC want to be the one to open that box? The story of Pandora's Box is perhaps also apt as a metaphor, with fire replaced by the internet and the people being punished for their trickery in inventing it. (-:

The ease of circumvention implies that internet censorship must take place in secret, which in turn makes this infrastructure even more dangerous.

No credible proposals have been put forward for independent oversight. Oversight by someone appointed by the government is not independent oversight. No matter how saintly the reputation of any actual individual appointed by the government, the *system* would be flawed. It is doubtful also that the system would be designed to ensure that the individual had *full* oversight - because the government will not want such oversight. (For example, an annual review of everything on the blacklist falls well short of full oversight.)

Taking the secrecy a step further, some have even advocated that when online content is blocked, this fact

not be revealed to the person requesting access. (For example, a misleading error message might be presented to the user - or no response at all.) So an unwitting consumer might not even have the chance to complain to the government and/or get a judicial review.

It is likely also that internet censorship would violate Principles 9 and 12. The government would secretly require ISPs to block access to some content immediately, without notifying the site operator or, if the site operator is notified, before giving the site operator the opportunity to contest in court - and if anyone discovers this blocking, it will be prohibitively expensive to get it reversed.

There are geopolitical considerations too. Free societies like ours may seek to pressure dictatorships like China or Iran to dismantle their own internet censorship regimes and loosen their iron grip. We simply have no credibility in applying this pressure while we are at the same time proposing to or actually introducing internet censorship ourselves. This is one practical reason (i.e. over and above the fundamental desires of a free society) that the United States would prefer that Australia not implement internet censorship. Link [here](#).

Given the ineffectiveness of internet censorship in combating child pornography, or in any case, I believe that the interests of society are best served by not introducing internet censorship in the first place, not ever.

*It is no longer possible to quarantine the 'online' world from that of other media platforms.*

Noone is asking for the illegality of access to be any different on the internet. However the ALRC should note that by doing internet censorship, the internet would actually be *more* tightly restricted. No other delivery mechanism would have the government proactively seeking to prevent distribution. The operator of a bricks and mortar DVD shop is free to sell a DVD in violation of whatever censorship is in place - and face the consequences if caught. The government would not be posting a guard in every DVD shop checking each sale to make sure that it is compliant.

As a final observation about internet censorship, the ALRC should clarify whether internet censorship will be an alternative available to government where the content is hosted domestically. It cannot be justified in law to do so - since the government has ample power to enforce compliance on any domestic content provider through due process in the justice system - but just sending it off to the ISPs for blocking will be oh so much more convenient, in violation of Principles 9 and 11.

### **10.83**

As already mentioned, I see no reason to limit to certain RC content only that the reason for classification RC is given. The government should be obligated to state a reason for banning in *all* circumstances. This for example would ensure that a right of appeal is meaningful.

### **10.85**

Indeed.

It warrants a *different* regulatory response. It should not be blocked. It should be removed (and prosecution undertaken). As it is internationally condemned there should be no problem making this happen. If there are problems (for example, in international cooperation and lines of communication between the respective law enforcement agencies) then the government should focus on addressing those problems.

However if the government limits RC to illegal content only, and removal and prosecution is the path taken in respect of child pornography, there is essentially no content left to ban and block online.

Current legislation even has provisions to *prevent blocking* online - because to block access would impede law enforcement, for example, by alerting potential accessors that law enforcement has become aware of the content.

## **Proposal 10-1**

To some extent this contradicts 9-3, which says that RC does not have consumer advice i.e. an indication of what elements led to the classification.

This proposal does not seem to align with current law - unless the ALRC is implying other changes to law.

Child pornography includes both "real depictions of actual child sexual abuse" and a range of other content involving a child in a sexual context (e.g. fictional or computer-generated content or e.g. simulated content such as a real adult pretending to be a child). So shouldn't there be a description for this other type of child pornography? (In reality though this second kind of content is hard to justify as illegal and is out of step with many other countries. Being out of step with other countries has implications for the effectiveness of the classification of online content.)

All that said, I see no reason why the CB shouldn't be obliged to say in all cases of RC what aspects have led to the classification.

Regarding sexual violence, I would like to see evidence that there is merit in banning depictions of it. This would have to address both depictions of real sexual violence and fictional or fantasy depictions - and whether such content is even at all prevalent. This category also sits oddly with child pornography in the classification system because, as far as I know, content containing sexual violence is not illegal to possess or access. The reader could think that this was an attempt to broaden the range of illegal content, either with or without explicit legislation.]

Given the apparent distinction between one part of RC and the rest of RC, why not split it into two classifications?

## **10.88**

What number of people, consulted every 5 years would be considered sufficient to avoid 5 year periods of unusually liberal classification and 5 year periods of unusually uptight classification caused by statistical variation? I realise that what the ALRC conducted was only a pilot but a mere 30 adult Australians wouldn't fill me with confidence.

See also my comments at Proposal 9-5.

## **10.91**

Unfortunately it would seem that the results will not be available before the deadline for public comment on the Discussion Paper.

I've read all of Chapter 10 and, unless I missed it, I don't see where the ALRC makes any recommendation about the scope of RC. While 10.85 suggests that only a subset of RC must be blocked by ISPs, that still leaves open the question of what will be banned. What happens to the rest of RC?

## 11.2

The Regulator should not have power to enforce compliance with the code. The Regulator should only have power to enforce compliance with the law.

Since the Regulator also has the power to determine the code, effectively this is just a whole body of law that is never debated by the parliament, let alone passed by the parliament.

The government should not be in the business of telling industry participants *how* to implement classification and censorship, merely specifying the standards of *what* is to be achieved.

## 11.3

In the context of online regulation I wonder whether the ALRC is proposing a new form of regulation viz. someone-else-regulation. I say this because indications are that ISPs will be held responsible for regulating overseas online content providers that are non-compliant. This is quite different from the situation with self-regulation where the content provider can consider the trade-offs involved in self-regulation versus the other forms of regulation that bring in the government more directly.

### Proposal 11-3

The wording in 11-3 (b) is not ideal in the case of ISPs because they are not a media content industry. I am assuming that the intention is to apply all this to ISPs on behalf of overseas online content providers that are non-compliant, in addition to any actual content providers.

This proposal doesn't spell out when the Regulator is empowered *not* to approve a code i.e. to decline to approve. Is the Regulator obligated to approve provided that the three conditions are all met?

Regarding 11-3(c), consultation is meaningless when the party is free to ignore the results of that consultation.

### Proposal 11-4

It is unclear what this is saying.

Is it saying that where an industry participant consents to being considered a member of "a particular section of the relevant media content industry" (text from 11-3(b)), the Regulator can enforce compliance with the code? If so, I don't have a problem with that other than the general objections noted at 11.2.

Is it saying that where a particular section of the relevant media content industry has a code, the Regulator can deem that a particular industry participant is a member of that section of the relevant media content industry, and is bound by the code and the Regulator can enforce it. If so, this provision needs caution.

It allows, for example, the dominant players in an industry to design a code that serves their interests to the detriment of smaller players. (For example, we have seen allegations of this in connection with the "mining tax".) More generally, it allows some industry participants to pursue an agenda against other industry participants, and to use the classification system as a weapon in that pursuit. It should be borne in mind that every industry participant is ostensibly in competition with every other industry participant.

That is, there should not be a requirement for a single industry-wide code.

In the context of internet censorship, even the government seems to recognize that smaller ISPs would have different considerations in attempting to implement internet censorship as compared with larger

ISPs.

## 12.3

For an entity that is supposed to regulate *all* types of content via *all* delivery mechanisms, sticking it in ACMA seems a bit odd. A new unit in the AG's department makes more sense to me. There is a lot that ACMA does that is nothing to do with classification or censorship.

## 12.33

I don't see the Regulator as having a role in investigating online child pornography. The matter should be referred very swiftly to the relevant law enforcement agency.

### Question 12-1

It is likely that one can't enforce that complaints are not made directly to the Regulator, if there is any mechanism at all for complaints to the Regulator.

I think it may be counterproductive to refuse to accept a complaint that should have been directed to an industry complaints-handling scheme. Why not have the Regulator forward the complaint? The Regulator is better able to know where the complaint should have been directed than the complainant.

Complaints will be particularly troublesome for overseas online content providers. It is even more unreasonable to expect an ISP to deal with such a complaint but obviously the content provider will not have a complaints-handling scheme in place. It seems likely that the Regulator will remain the destination for such complaints i.e. as now.

## 13.33

Indeed. Worse still they may broadly agree to the new classification system but still want to reserve the right to a) override individual classification decisions b) determine penalties for violations, in the limited scenarios where the states can do this - thereby undermining one of the goals of this change.

## 14.27

I would argue that the timing relating to some of these offences (e.g. must act by 6 pm on the next business day) is absurd. It's not like "little Johnny might see some porn" is a national emergency. *Broadcasting Services Act* Sch 7 S 53 (1). This is also an example where Principle 9 is violated.

Perhaps a bit more sanity and reason in any new legislation.

## 14.38

*"However, arguably, in 'today's digital media landscape, the concept of state boundaries is no longer applicable'"*

That applies to countries as well i.e. applies to state in the general sense of the word.

SBS almost certainly intended "state" to mean "state of Australia" but as their primary or sole focus is within Australia, they would say that. They, and the ALRC, should look at it from the perspective of the

consumer.

#### **14.47**

*it has been suggested that any new intergovernmental agreement should provide only that amendments require the support of the Australian Government and six other parties, including the ACT.*

Not well worded and not exactly the same as what Irene Graham wrote.

Singling out the ACT makes sense today but does not make sense forever (if states retain their rights to have inconsistencies).

An alternative might be:

- unanimity is required to *increase* restrictions, but
- some specified lesser majority is sufficient to *decrease* restrictions.

That does raise questions as to whether it will always be possible to determine whether a particular change is increasing or decreasing restrictions. If it is possible to make this determination then it is assumed that any change that does both must be split into two changes and voted on separately.

#### **14.48**

To some extent though the ALRC can't pretend that classification and consequence are separate (e.g. at 10.5) and purport to make no comment on "consequence" - but then propose including offences and penalties in the act - unless those offences pertain only to the mechanics of classification and do not pertain to consequence.

#### **14.52**

Paying a penalty to avoid prosecution violates Principles 9, 11 and 12. There is plenty of precedent for it in other areas of law but that doesn't make it right.

### **Proposal 14-3**

Notwithstanding that the ALRC is likely to recommend that ISPs have a legal obligation on behalf of overseas online content providers that are non-compliant, it should be enshrined in law that an ISP is not legally responsible in any way for content that merely flows through its network.

## **Appendix 1**

See opening comments regarding the set of organizations and individuals consulted.

## **Appendix 2 Item 5**

I note with some irony that anyone who wanted to research whether there really was any connection between the Oslo shootings and violent video games would theoretically be stymied by the ALRC's proposed new classification system because Breivik's manifesto would be classified Refused Classification and blocked.