

10. Refused Classification Category

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Summary

10.1 This chapter outlines the relevance of the Refused Classification (RC) category to this Inquiry and describes the legislative framework for RC content. The current scope of the category is discussed and criticisms are noted of: the breadth of the current RC category; questions relating to its purpose, including the validity of ‘community standards’ and ‘offensiveness’ as bases for refusing classification of material; and whether the scope should be narrowed by focusing on content which is illegal to create or possess, such as real depictions of actual child sexual abuse.

10.2 It is argued that the proposed Classification of Media Content Act should provide that, if content is classified RC, the classification decision should clearly state whether the content comprises real depictions of actual child sexual abuse or actual sexual violence. Identified in this way, such content may be added to any blacklist of content for the purpose of filtering at the internet service provider (ISP) level. The

chapter also discusses a pilot study being conducted by the ALRC to research community standards with regard to the current higher level classification categories—MA 15+ up to and including RC.

RC—Relevance to this review and overview of the concept

Background

10.3 When the Commonwealth, state and territory Attorneys-General and the Commonwealth Minister for Home Affairs agreed to refer the National Classification Scheme Review to the ALRC, they specifically agreed that the review would include the content of the RC category for films, computer games and publications.¹

10.4 Further, the Australian Government’s proposed mandatory ISP filtering scheme is based on the concept of an ‘RC content list’.² Given the centrality of the RC category to any form of ISP filtering, the Minister for Broadband, Communications and the Digital Economy, the Hon Senator Stephen Conroy, announced that ‘the legal obligation to commence mandatory ISP filtering will not be imposed until the review [of the RC classification] is completed’.³

The RC classification

10.5 The RC classification category is the highest classification that can be given to publications, films and computer games in Australia⁴—that is, to content the subject of the classification cooperative scheme described in Chapter 2. The classification applies to content regarded as extreme on a number of levels. It is important to distinguish between the classification category RC (the classification) and the proscription of certain activity for content that has been classified RC (the consequence). Under the classification cooperative scheme, state and territory enforcement legislation proscribes certain dealings with content that has been classified RC—such as selling, publicly exhibiting or possessing with an intention to sell.

10.6 The RC classification reflects the censorship end of the classification spectrum, as material so classified ‘is effectively banned’.⁵ However, a significant proportion of this material is not actually ‘banned’ as it is not illegal to possess a considerable amount of RC material in all parts of Australia except in Western Australia and in prescribed areas of the Northern Territory. In its 1991 report, *Censorship Procedure* (ALRC Report 55) the ALRC remarked that:

1 Standing Committee of Attorneys-General, *Communiqué 10 December 2010*, 2.

2 See Department of Broadband, Communications and the Digital Economy, *Outcome of Public Consultation on Measures to Increase Accountability and Transparency for Refused Classification Material* (2010); Department of Broadband, Communications and the Digital Economy, *Mandatory Internet Service Provider (ISP) Filtering: Measures to Increase Accountability and Transparency for Refused Classification Material—Consultation Paper* (2009).

3 S Conroy (Minister for Broadband Communications and the Digital Economy), ‘Outcome of Consultations on Transparency and Accountability for ISP Filtering of RC Content’ (Press Release, 9 July 2010).

4 *Classification (Publications, Films and Computer Games) Act 1995* (Cth) s 7.

5 D Hume and G Williams, ‘Australian Censorship Policy and the Advocacy of Terrorism’ (2009) 31 *Sydney Law Review* 381, 384–385.

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. Accordingly, an RC classification does not of itself mean a person cannot possess that material. It does mean that he or she cannot disseminate it. If the possession of material is to be banned, it should be to achieve some specific policy objective, not just because it has been declared unsuitable for commercial distribution.⁶

10.7 The RC category is also used outside the classification cooperative scheme—either expressly, as in the case of the definitions of ‘prohibited content’ or ‘potential prohibited content’ under schs 5 and 7 of the *Broadcasting Services Act 1992* (Cth); or impliedly, as in the case of certain objectionable goods under the *Customs (Prohibited Imports) Regulations 1956* (Cth) and the *Customs (Prohibited Exports) Regulations 1958* (Cth). Certain consequences under other laws may therefore flow from the classification of certain content as RC.

The legislative framework

The Classification Act framework

10.8 There are three parts of the framework for classification under the *Classification (Publications, Films and Computer Games) Act 1995* (Cth) (*Classification Act*): the Act itself; the National Classification Code (the Code); and the guidelines—that is, the *Guidelines for the Classification of Publications* and the *Guidelines for the Classification of Films and Computer Games*.

Classification Act

10.9 Section 9A(1) provides that publications, films or computer games that advocate the doing of a terrorist act must be classified RC. However, s 9 provides that in all other cases, publications, films and computer games are to be classified in accordance with the Code and the classification guidelines.

National Classification Code

10.10 As discussed in Chapter 9, cl 1 of the Code outlines a number of classification principles. It then provides that publications, films and computer games are to be classified according to the tables set out in cls 2, 3 and 4 respectively. These tables are prescriptive.⁷ Item 1 within each table describes content that is to be classified RC. For the most part, the description of RC content is identical for publications, films and computer games.⁸ That is, the Code requires that the RC classification applies to publications, films or computer games that:

- depict, express or otherwise deal with matters of sex, drug misuse or addiction, crime, cruelty, violence or revolting or abhorrent phenomena, in such a way that they offend against the standards of morality, decency and propriety generally

⁶ Australian Law Reform Commission, *Censorship Procedure*, ALRC Report 55 (1991), [5.16].

⁷ *Adultshop.Com Ltd v Members of the Classification Review Board* (2008) 169 FCR 31, [43].

⁸ Note that the table relating to publications also includes descriptions. See *National Classification Code 2005* (Cth) cl 2, item 1(a).

accepted by reasonable adults to the extent that they should not be accorded a classification other than RC—item 1(a); or

- describe or depict in a way that is likely to cause offence to a reasonable adult, a person who is, or appears to be, a child under 18 (whether the person is engaged in sexual activity or not)—item 1(b); or
- promote, incite or instruct in matters of crime or violence—item 1(c).⁹

10.11 The main difference between the current three media types to be classified RC is that the Code provides that computer games that are unsuitable for a minor to see or play are to be classified RC.¹⁰ The reason for this is the absence of an R 18+ classification for computer games. However, law ministers from all jurisdictions who together constitute the Standing Committee of Attorneys-General (SCAG) agreed in July and August 2011 to the creation of the R 18+ classification category for computer games.¹¹ At the time of writing, the Australian Government had not yet introduced a Bill to amend s 7(3) of the *Classification Act*—the relevant legislative provision that designates the classification categories for the three media types.

Classification guidelines

10.12 With respect to the RC classification, the *Guidelines for the Classification of Publications* provide that:

Publications which contain elements which exceed those set out in the above classification categories are classified ‘RC’.

...

Publications that appear to purposefully debase or abuse for the enjoyment of readers/viewers, and which lack moral, artistic or other values to the extent that they offend against generally accepted standards of morality, decency and propriety will be classified ‘RC’.

Publications will be classified ‘RC’:

- (a) if they promote or provide instruction in paedophile activity;
or if they contain:
- (b) descriptions or depictions of child sexual abuse or any other exploitative or offensive descriptions or depictions involving a person who is, or appears to be, a child under 18;
- (c) detailed instruction in:
 - (i) matters of crime or violence,
 - (ii) the use of proscribed drugs;

⁹ Ibid cl 2, item 1; cl 3, item 1; cl 4, item 1.

¹⁰ Ibid cl 4(1)(d).

¹¹ See Standing Committee of Attorneys-General, *Communique 21 & 22 July 2011*; B O’Connor (Minister for Home Affairs and Justice), ‘NSW Agrees to R 18+ Classification for Computer Games’ (Press Release, 10 August 2011)..

- (d) realistic depictions of bestiality;
or if they contain gratuitous, exploitative or offensive descriptions or depictions of:
- (e) violence with a very high degree of impact which are excessively frequent, emphasised or detailed;
- (f) cruelty or real violence which are very detailed or which have a high impact;
- (g) sexual violence;
- (h) sexualised nudity involving minors;
- (i) sexual activity involving minors;
or of they contain exploitative descriptions of:
- (j) violence in a sexual context;
- (k) sexual activity accompanied by fetishes or practices which are revolting or abhorrent;
- (l) incest fantasies or other fantasies which are offensive or revolting or abhorrent.¹²

10.13 The *Guidelines for the Classification of Films and Computer Games* relevantly provide that:

Films that exceed the R 18+ and X 18+ classification categories will be [RC].
Computer games that exceed the MA 15+ classification category will be [RC].

Films and computer games will be refused classification if they include or contain any of the following:

CRIME OR VIOLENCE

Detailed instruction or promotion in matters of crime or violence.

The promotion or provision of instruction in paedophile activity.

Descriptions or depictions of child sexual abuse or any other exploitative or offensive descriptions or depictions involving a person who is, or appears to be, a child under 18 years.

Gratuitous, exploitative or offensive depictions of:

- (i) violence with a very high degree of impact or which are excessively frequent, prolonged or detailed;
- (ii) cruelty or real violence which are very detailed or which have a high impact;
- (iii) sexual violence.

SEX

Depictions of practices such as bestiality.

¹² A large number of these terms are defined in the relevant glossary.

Gratuitous, exploitative or offensive depictions of:

- (i) sexual activity accompanied by fetishes or practices which are offensive or abhorrent;
- (ii) incest fantasies or other fantasies which are offensive and abhorrent.

DRUG USE

Detailed instruction in the use of proscribed drugs.

Material promoting or encouraging proscribed drug use.¹³

The Customs Regulations framework

10.14 The *Customs (Prohibited Imports) Regulations 1956* (Cth) (the import regulations) and the *Customs (Prohibited Exports) Regulations 1958* (Cth) (the export regulations) provide, respectively, that the importation and exportation of ‘objectionable goods’¹⁴ are prohibited unless the Attorney-General for Australia or an authorised person has given written permission.¹⁵ This means that the importation or exportation of these goods is controlled—in that specific conditions must be complied with—in contrast to being absolutely prohibited.¹⁶ The Australian Customs and Border Protection Service (Customs) is empowered to identify and confiscate such objectionable goods at Australia’s borders. Further, with respect to the importation of objectionable material, there is a tiered penalty regime.¹⁷

10.15 ‘Objectionable goods’ are largely tangible items related to the ‘offline’ world: publications, films, computer games, computer generated images, and interactive games.¹⁸ Neither the import regulations nor the export regulations specifically use the term ‘RC’ or otherwise refer to the classification in the provisions relating to ‘objectionable goods’. As Customs has explained, the import regulations are a dedicated border control, so reg 4A ‘operates under its own power and does not reference classification legislation’.¹⁹ However, the Australian Government’s intention

13 Again, some terms are defined in the relevant glossary. The relevant ‘List of Terms’ explains that undefined terms are to take their usual dictionary meaning.

14 This term is used in the headings of both regulations. See *Customs (Prohibited Imports) Regulations 1956* (Cth) reg 4A; *Customs (Prohibited Exports) Regulations 1958* (Cth) reg 3.

15 *Customs (Prohibited Imports) Regulations 1956* (Cth) reg 4A(2A); *Customs (Prohibited Exports) Regulations 1958* (Cth) reg 3(4). Note that the export regulations specifically provide that the Attorney-General may appoint the Director or Deputy Director of the Classification Board to be such an authorised person: *Customs (Prohibited Exports) Regulations 1958* (Cth) reg 3(3).

16 See *Customs Act 1901* (Cth) s 50(2) (imported goods); s 112(2) (exported goods).

17 See Australian Customs and Border Protection Service, *Submission to Senate Legal and Constitutional Affairs References Committee Inquiry into the Australian Film and Literature Classification Scheme*, 25 February 2011.

18 Each of these terms is defined. See *Customs (Prohibited Imports) Regulations 1956* (Cth) reg 4A(1); *Customs (Prohibited Exports) Regulations 1958* (Cth) reg 3(1).

19 Australian Customs and Border Protection Service, *Submission to Senate Legal and Constitutional Affairs References Committee Inquiry into the Australian Film and Literature Classification Scheme*, 25 February 2011. For an explanation of the history of reg 4A see D Hume and G Williams, ‘Australian Censorship Policy and the Advocacy of Terrorism’ (2009) 31 *Sydney Law Review* 381, 388.

was to align the scope of ‘objectionable goods’ with the RC category used for classification.²⁰

10.16 Customs has advised that

[i]f 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] to ensure that the controls at the border are consistent with the domestic controls.²¹

10.17 This demonstrates that, while classification and consequence are conceptually distinct, at the higher end of classification there is a clear nexus between them.

The *Broadcasting Services Act* framework

10.18 Aspects of the *Broadcasting Services Act* framework that are relevant to this Inquiry are outlined in Chapter 2. The co-regulatory scheme for online content in schs 5 and 7, ‘aims to address community concerns about offensive and illegal material online and, in particular, to protect children from exposure to material that is unsuitable for them’.²² For the purpose of this chapter, it is important to note that the terms ‘prohibited content’ and ‘potential prohibited content’ refer to wider categories of media content than RC—although content that has been classified RC or would be substantially likely to be classified RC is certainly captured by the terms.²³

The current scope of RC content

10.19 The *Classification Act*, the Code and the relevant guidelines together outline whether certain content is to be classified RC. Some examples of RC content are discussed below. A number of RC classification decisions have been tested in litigation.

Item 1(a) content—certain matters presented in an offensive way

10.20 The idea of certain content being ‘offensive’ to community standards underpins some of the rationales for the RC classification. In *NSW Council for Civil Liberties Inc v Classification Review Board*, the Attorney-General for Australia submitted that

in imposing an ‘effect’ requirement in [item 1] (a) ... the legislature has recognised that while the content specified in th[at] paragraph ... may be offensive to some segments of the community, it may not be to others. In that situation, assessing the content in accordance with the standards and sensibilities of reasonable adults will

20 See Explanatory Statement, Customs (Prohibited Imports) Regulations (Amendment) 1995 (Cth) 1; Explanatory Statement, Customs (Prohibited Exports) Regulations (Amendment) 1997 (Cth) 1; Explanatory Statement, Customs (Prohibited Exports) Amendment Regulations 2007 (No 4) (Cth) 1; Explanatory Statement, Customs (Prohibited Imports) Amendment Regulations 2007 (No 5) (Cth) 1.

21 Australian Customs and Border Protection Service, *Submission to Senate Legal and Constitutional Affairs References Committee Inquiry into the Australian Film and Literature Classification Scheme*, 25 February 2011.

22 Australian Communications and Media Authority, *Online Regulation* <http://www.acma.gov.au/scripts/nc.dll?WEB/STANDARD/1001/pc=PC_90169> at 11 September 2011.

23 See *Broadcasting Services Act 1992* (Cth); *Classification (Publications, Films and Computer Games) Act 1995* (Cth) sch 7 cls 20, 21.

strike an appropriate balance between the general principle that adults should be able to read, hear and see what they want, and the competing community concerns about such matters as drug misuse or addiction, crime, cruelty or violence.²⁴

10.21 In ALRC Report 55, the ALRC observed that ‘[c]urrent policy sees “offensiveness” mainly in terms of sex and violence and, particularly, any combination of the two’.²⁵

Fetish activity

10.22 The guidelines pertaining to RC in the *Guidelines for the Classification of Films and Computer Games* specifically provide that ‘[g]ratuitous, exploitative or offensive depictions of sexual activity accompanied by fetishes or practices which are offensive or abhorrent’²⁶ are to be classified RC.

10.23 These Guidelines provide that the X 18+ classification for films and computer games cannot accommodate fetishes such as:

- body piercing;
- application of substances such as candle wax;
- ‘golden showers’;
- bondage;
- spanking; and
- fisting.

10.24 Adult entertainment films depicting sexual activity between consenting adults have been classified RC for containing live portrayals of such fetishes.²⁷

10.25 If a fetish is not on this list, it does not necessarily mean that a live portrayal of it will not be classified RC. Other fetishes that have been depicted in an adult entertainment film and described in a fictional text have been classified RC.²⁸

10.26 It should be noted that the *Guidelines for the Classification of Publications* differ from those for film. Descriptions and depictions of ‘stronger fetishes’—defined as including bondage and discipline—are permitted in publications that would currently be classified as Category 2 restricted publications. Only publications which describe and depict fetishes where it is apparent that there is no consent or where there is physical harm would constitute RC content.

24 *NSW Council for Civil Liberties Inc v Classification Review Board* (2007) 159 FCR 108, [59].

25 Australian Law Reform Commission, *Censorship Procedure*, ALRC Report 55 (1991), [2.2].

26 *Guidelines for the Classification of Films and Computer Games* (Cth).

27 For example, Classification Board, *Decision on Elexis Unleashed Vol 2* (2011) which was refused classification because of depictions of the application of candle wax. Another example is Classification Board, *Decision on Rough Sex 2* (2011). However, this film was refused classification because the film depicted bondage and asphyxiation.

28 See Classification Board, *Decision on Abstrakte Dimensionen* (2011); Classification Board, *Decision on ACMA 2011000017 Item 1* (2011). The text the subject of the latter decision had appeared on a website and so was classified as a film. The fetishes depicted or described are urolagnia, erotic asphyxiation, masochism, sadism, coprophilia and forced paraphilic infantilism.

Item 1(b) content—offensive depictions or descriptions of children

10.27 The word offensive is defined in both sets of the guidelines as ‘material which causes outrage or extreme disgust’. The phrase, ‘likely to cause offence to a reasonable adult’, appears in item 1(b) of the tables and in other parts of the Code.²⁹ The phrase has been subject to judicial consideration in respect of the X 18+ category for films.³⁰ In that context, the Federal Court determined that the so-called ‘offensiveness’ test ‘is not determined by a mechanistic majoritarian approach. Rather, it calls for a judgment about the reaction of a reasonable adult in a diverse Australian society.’³¹

Child sexual abuse

10.28 Child sexual abuse is a form of child abuse. Bravehearts Inc, a group of child protection advocates, has argued that ‘child sexual assault’ should be distinguished from ‘child abuse and neglect’, as they are different and require different responses.³² However, as one commentator has observed, ‘it is generally accepted that children are harmed whenever child pornography is created, disseminated and viewed’.³³

10.29 The ALRC has elected not to use the term ‘child pornography’ in this Discussion Paper unless quoting from those who do. The Internet Watch Foundation (IWF) cogently explained the importance of refraining from using such terminology:

The IWF uses the term **child sexual abuse** content to accurately reflect the gravity of the images we deal with. ... **[C]hild pornography, child porn and kiddie porn** are not acceptable terms. The use of such language acts to legitimise images which are not pornography, rather, they are permanent records of children being sexually exploited and as such should be referred to as **child sexual abuse images**.³⁴

10.30 Child sexual abuse need not be depicted for the media content to be classified RC. It may be so classified if it is a verbal description.³⁵

Sexual nudity involving minors

10.31 The *Guidelines for the Classification of Publications* define ‘sexualised nudity’ as including ‘poses, props, text and backgrounds that are sexually suggestive’.

Sexual activity involving minors

10.32 Any representation of persons less than 18 years of age involved in consensual sexual activity could potentially be RC, even though they may be legally permitted to consent to sexual activity. For example, ‘sexting’, which refers to ‘sending sexually

29 *National Classification Code 2005* (Cth) cl 2, 2(a) and cl 3(2)(a).

30 *Adultshop.Com Ltd v Members of the Classification Review Board* (2007) 243 ALR 752; *Adultshop.Com Ltd v Members of the Classification Review Board* (2008) 169 FCR 31.

31 *Adultshop.Com Ltd v Members of the Classification Review Board* (2007) 243 ALR 752, [170].

32 See Bravehearts Inc, *Submission CI 1175*, 15 July 2011.

33 L Bennett Moses, ‘Creating Parallels in the Regulation of Content: Moving from Offline to Online’ (2010) 33 *University of New South Wales Law Journal* 581, 588.

34 Internet Watch Foundation, *Remit, Vision and Mission* <<http://www.iwf.org.uk/about-iwf/remmit-vision-and-mission>> at 11 August 2011.

35 Classification Board, *Decision on ACMA 2011001035 Item 3* (2011).

explicit or sexually suggestive text messages’ as well as ‘the electronic transfer of nude and semi-nude images via mobile phone’.³⁶

10.33 Further, the depiction of sexual activity involving a minor need not be ‘real’: the Classification Review Board determined that a Japanese animé film should be classified RC because

the impact of the sex scenes involving the blonde novice [that is, a holy virgin] are exploitative and as she is depicted as a child under 18 years ... [T]he depictions are likely to cause offence to a reasonable adult.³⁷

Item 1(c) content—promoting, inciting or instructing in certain matters

10.34 This category encompasses content promoting, inciting or instructing in matters of crime or violence. The legislative history of the relevant provision of the *Classification of Publications Ordinance 1983* (ACT)—upon which item 1(c) of the Code was based—shows that the original expression was ‘promotes, incites or encourages terrorism’.³⁸ However, in 1989 the ACT Government amended the relevant provision to ‘promotes, incites or instructs in matters of crime or violence’, because it determined that it needed to delete the term ‘terrorism’ from the Ordinance.³⁹ While the explanatory statement suggests why the reference to ‘terrorism’ needed to be deleted, it does not explain why the new expression was chosen as a replacement.⁴⁰

10.35 Judicial consideration of item 1(c) content has focused on matters of crime. Perhaps this is because, as Merkel J remarked, ‘violent conduct will often involve criminal conduct’.⁴¹ The Federal Court of Australia has expressly rejected the contention that the crime must be a serious one.⁴² As Merkel J observed, ‘what may be a less or more serious crime may often be a matter in the mind of the beholder’.⁴³

10.36 The phrase ‘matters of violence’ in item 1(c) of the tables in the Code has not yet been subject to detailed judicial interpretation.

Content instructing how to commit crime

10.37 The Full Court of the Federal Court has held that, in order for material to instruct in matters of crime, first, it must impart or teach the information as to how the

36 For example, see K Albury, N Funnell and E Noonan, ‘The Politics of Sexting: Young People, Self-representation and Citizenship’ (Paper presented at Australian and New Zealand Communication Association Conference: ‘Media, Democracy and Change’, Canberra, 7 July 2010) 2.

37 Classification Review Board, *Decision on Holy Virgins* (2008) 5. This is not the only such case. See Classification Board, *Decision on ACMA 2011000559 Item 1* (2011). However, it should be noted that this animated content (hentai) was also refused classification on the basis of item 1(a) of the films table in the Code.

38 *Classification of Publications Ordinance 1983* (ACT) s 19(4)(b) (emphasis added).

39 *Classification of Publications (Amendment) Ordinance 1989* (ACT) cl 4(d); Explanatory Statement, *Classification of Publications (Amendment) Ordinance 1989* (ACT) 2.

40 Explanatory Statement, *Classification of Publications (Amendment) Ordinance 1989* (ACT) 2.

41 *Brown v Members of the Classification Review Board of the Office of Film & Literature Classification* (1997) 145 ALR 464, 478.

42 *Ibid*, 478.

43 *Ibid*, 478.

crime can be committed,⁴⁴ and, secondly, there must be ‘some element of encouraging or exhorting the commission of crime’.⁴⁵ An objective test is used to determine whether the second element is met.⁴⁶ Accordingly, the actual intent of the author or publisher is not relevant.⁴⁷ Further, the Full Federal Court has determined that it is not necessary to show that the material was, in fact, likely to result in the commissioning of a crime.⁴⁸

10.38 A broad range of behaviour may constitute a crime. For example, an article entitled ‘The Art of Shoplifting’ in the university student newspaper *Rabelais*, was classified RC on the basis that it ‘instruct[ed] in methods of shoplifting and associated fraud’.⁴⁹ The decision was confirmed by the Classification Review Board.⁵⁰ Both the Federal Court and the Full Federal Court dismissed the editors’ applications for judicial review of the Classification Review Board’s decision—including the submission that the relevant decision breached the editors’ implied constitutional right to freedom of political discussion and communication.⁵¹

10.39 Another classification decision illustrative of the current breadth of item 1(c) of the Code is the Classification Review Board’s decision in respect of Dr Philip Nitschke and Dr Fiona Stewart’s book, *The Peaceful Pill Handbook*. This publication relates to assisted suicide and voluntary euthanasia and was ‘intended for seriously ill and suffering people for whom there is little hope that their quality of life will ever recover to a level that is satisfactory to them’.⁵² The Classification Review Board classified it as RC because it found that ‘it instructs in matters of crime relating to the manufacture of a proscribed drug (barbiturates)’, amongst other things.⁵³

Drug use

10.40 The *Guidelines for the Classification of Publications* provide that publications that contain detailed instruction in the use of proscribed drugs are to be classified RC. The *Guidelines for the Classification of Films and Computer Games* contain a similar provision but they also go further and provide that films and computer games that contain material promoting or encouraging proscribed drug use are also to be classified RC. The Classification Board has classified online content as RC because the text

44 *Brown v Members of the Classification Review Board of the Office of Film & Literature Classification* (1998) 82 FCR 225, 239, 242, 257.

45 *Ibid*, 242.

46 *Ibid*, 239, 242, 257.

47 *Ibid*, 242.

48 *Ibid*, 240, 241–242, 256–257.

49 Decision of the Chief Censor quoted in *Brown v Members of the Classification Review Board of the Office of Film & Literature Classification* (1997) 145 ALR 464, 466.

50 Decision of the Classification Review Board quoted in *Brown v Members of the Classification Review Board of the Office of Film & Literature Classification* (1997) 145 ALR 464, 469.

51 *Brown v Members of the Classification Review Board of the Office of Film & Literature Classification* (1997) 145 ALR 464; *Brown v Members of the Classification Review Board of the Office of Film & Literature Classification* (1998) 82 FCR 225.

52 Preface to *The Peaceful Pill Handbook* cited in Classification Review Board, *Decision on The Peaceful Pill Handbook* (2007), [5].

53 *Ibid*, [1].

constituted detailed instruction in ‘recreational’ drug use and also promoted such drug use.⁵⁴

Content promoting or inciting crime

10.41 The Federal Court has expressly rejected the argument that the words ‘promote’ and ‘incite’ contain a requirement to look to the effect or likely effect of the action.⁵⁵

10.42 In 2006, the Attorney-General for Australia applied to the Classification Review Board for classification of one film and eight publications that some considered incited terrorism. The Classification Board decided that none should be classified RC, but the Classification Review Board classified two of the publications RC on the basis of item 1(c) of the Code. The New South Wales Council for Civil Liberties Inc sought judicial review of the latter two decisions,⁵⁶ but the application was dismissed.⁵⁷

Section 9A content—advocating a terrorist act

10.43 When judgment was reserved in this case brought by the NSW Council for Civil Liberties,⁵⁸ the Australian Government released a discussion paper about material that advocates terrorist acts. The discussion paper stated:

There are community concerns about the public availability of material that advocates people commit terrorist acts. It is not certain that the national classification scheme adequately captures such material.⁵⁹

10.44 The Australian Government had hoped that agreement could be achieved through the SCAG to amend the Code and guidelines as they pertain to RC in this respect.⁶⁰ However, the required unanimous support was not forthcoming,⁶¹ so the Parliament of Australia amended the *Classification Act* by inserting s 9A.⁶² The Act adopted the same use of the terms ‘advocates’ and ‘terrorist act’ that are used in the

54 Classification Board, *Decision on ACMA 2011000128 Item 2* (2011); Classification Board, *Decision on ACMA 2011000127 Item 1* (2011). The latter case only concerned the promotion or encouragement of proscribed drug use.

55 *NSW Council for Civil Liberties Inc v Classification Review Board* (2007) 159 FCR 108, [67].

56 Classification Review Board, *Decision on Defence of the Muslim Lands* (2006); Classification Review Board, *Decision on Join the Caravan* (2006).

57 *NSW Council for Civil Liberties Inc v Classification Review Board* (2007) 159 FCR 108.

58 D Hume and G Williams, ‘Australian Censorship Policy and the Advocacy of Terrorism’ (2009) 31 *Sydney Law Review* 381, 393.

59 Australian Government Attorney-General’s Department, *Material That Advocates Terrorist Acts: Discussion Paper* (2007) 1.

60 Commonwealth, *Parliamentary Debates*, House of Representatives, 15 August 2007, 18 (P Ruddock—Attorney-General) 18.

61 *Ibid.*, 18–19.

62 *Classification (Publications, Films and Computer Games) Amendment (Terrorist Material) Act 2007* (Cth); Explanatory Memorandum, *Classification (Publications, Films and Computer Games) Amendment (Terrorist Material) Bill 2007* (Cth); Commonwealth, *Parliamentary Debates*, House of Representatives, 15 August 2007, 18 (P Ruddock—Attorney-General).

Criminal Code (Cth).⁶³ The Classification Board has classified some online content as RC on the basis of s 9A of the *Classification Act*.⁶⁴

Computer games that are unsuitable for minors

10.45 As there is currently no R 18+ classification category for computer games—although this position is soon to change—computer game content that is unsuitable for a minor to see or play must be classified RC. The relevant guidelines provide that ‘[c]omputer games that exceed the MA 15+ classification category will be [RC]’.⁶⁵

10.46 On this basis, in March 2011 the Classification Review Board classified the computer game, *Mortal Kombat*, as RC on the basis of the violence it contained.⁶⁶ By contrast, the Classification Board classified the game, *The Witcher 2: Assassins of Kings*, as RC because it ‘contains sexual activity related to incentives and rewards’.⁶⁷

Criticisms of the current scope of RC

10.47 A number of criticisms have been made of aspects of the RC classification in the academic literature—for example, in respect of the ambiguity of the terms and concepts used;⁶⁸ concerns about the community standards basis;⁶⁹ as well as concerns about overly restricting speech⁷⁰ (including in respect of the proposed mandatory internet service level filter);⁷¹ and particular concerns about s 9A.⁷² A number of submissions to this Inquiry made similar criticisms.

10.48 In the Issues Paper the ALRC asked:

- what content, if any, should be entirely prohibited online;⁷³ and
- whether the current scope of the RC category reflects the content that should be prohibited online.⁷⁴

63 Explanatory Memorandum, Classification (Publications, Films and Computer Games) Amendment (Terrorist Material) Bill 2007 (Cth) 2–3.

64 For example, see Classification Board, *Decision on ACMA 2011003487 Item 7* (2011). Note that this content was also classified RC because of items 1(a) and 1(c) of the Code.

65 *Guidelines for the Classification of Films and Computer Games* (Cth).

66 Classification Review Board, *Decision on Mortal Kombat* (2011) 6.

67 Classification Board, *Decision on The Witcher 2 Assassins of Kings* (2011) 1.

68 For example, see M Ramaraj Dunstan, ‘Australia’s National Classification System for Publications, Films and Computer Games: Its Operation and Potential Susceptibility to Political Influence in Classification Decisions’ (2009) 37 *Federal Law Review* 133, 148.

69 B Harris, ‘Censorship: A Comparative Approach Offering a New Theoretical Basis for Classification in Australia’ (2005) 8 *Canberra Law Review* 25.

70 D Hume and G Williams, ‘Advocating Terrorist Acts and Australian Censorship Law’ (2009) 20 *Public Law Review* 37; B Kumar, ‘*Brown v The Classification Review Board*: Robin Hood or Rebel without a Cause?’ (1999) 21 *Sydney Law Review* 294.

71 C Govey, ‘“Won’t Somebody Please Think of the Children”: Would a Mandatory ISP-level Filter of Internet Content Raise Freedom of Communication Issues?’ (2010) 28(4) *Communications Law Bulletin* 14.

72 D Hume and G Williams, ‘Australian Censorship Policy and the Advocacy of Terrorism’ (2009) 31 *Sydney Law Review* 381.

73 Australian Law Reform Commission, *National Classification Scheme Review*, ALRC Issues Paper 40 (2011), Question 24.

74 *Ibid*, Question 25.

10.49 These questions were directed to consideration of what content should be the subject of the Government's proposed mandatory ISP-level filter. Submissions diverged in respect of the first question. Some submissions responded that no content should be censored online by way of a classification system⁷⁵ and, rather, that individuals, including parents, should decide what media content they and their children consume. However, there were also many submissions that accepted the need for a classification such as RC to encompass certain content such as child sexual abuse content, as many considered that such content should be prohibited online.⁷⁶

10.50 It should be noted that many submissions responding to these two questions commented on the current scope of RC in general, not simply in respect to whether such material should be prohibited online. Comments directed to the RC category more broadly are also discussed in this chapter. In part this is because a number of submissions argued for parity of treatment—that is, platform neutrality—between the classification category online and offline.⁷⁷

10.51 Some submissions supported the scope of the current RC category. However, there were many submissions that were critical of the scope; some even suggested abolishing the category.⁷⁸ A number of submissions considered that the current criteria for RC are broad⁷⁹ and/or ambiguous.⁸⁰ Some thought it was unclear whom the classification is protecting, from what, and why.⁸¹ Finally, a number expressed specific concerns about the current scope. For example, a very large number of submissions called for the introduction of an R 18+ classification for computer games. Generally the discussion of the scope of the RC category in most of these submissions was focused solely on the fact that the absence of an R 18+ classification for computer games meant that a number of games are being classified RC that should be accessible to adult gamers.

The breadth of the current scope of RC

10.52 There were a number of submissions that suggested that the current scope of RC was appropriate because the content currently within the scope of the RC classification should be entirely prohibited online.⁸² For example, the Uniting Church in Australia's

75 For example Electronic Frontiers Australia, *Submission CI 2194*, 15 July 2011; The Herb Cottage Partners, *Submission CI 1626*, 13 July 2011; Access, *Submission CI 1172*, 16 July 2011.

76 For example P Papadopoulos, *Submission CI 1321*, 12 July 2011; Media Standards Australia Inc, *Submission CI 1104*, 15 July 2011; D Hames, *Submission CI 895*, 11 July 2011; L Hewitt, *Submission CI 23*, 23 May 2011.

77 For example NSW Council of Churches, *Submission CI 2162*, 15 July 2011; Communications Law Centre, *Submission CI 1230*, 15 July 2011; M Taylor, *Submission CI 632*, 9 July 2011.

78 For example Pirate Party Australia, *Submission CI 1588*, 15 July 2011; I Graham, *Submission CI 1244*, 17 July 2011.

79 For example A Hightower and Others, *Submission CI 2159*, 15 July 2011; K Weatherall, *Submission CI 2155*, 15 July 2011; N Suzor, *Submission CI 1233*, 15 July 2011.

80 For example The Arts Law Centre of Australia, *Submission CI 1299*, 19 July 2011.

81 For example I Graham, *Submission CI 1244*, 17 July 2011; Australian Society of Authors, *Submission CI 1157*, 15 July 2011.

82 For example National Civic Council, *Submission CI 2226*, 15 July 2011; NSW Council of Churches, *Submission CI 2162*, 15 July 2011; Australian Christian Lobby, *Submission CI 2024*, 21 July 2011; Uniting Church in Australia, *Submission CI 1245*, 18 July 2011; Australian Council on Children and the

Justice and International Mission Unit commented that it ‘supports the existing definition of RC as adequately setting boundaries around what content should be entirely prohibited online’.⁸³

10.53 Some thought that more than RC content should be prohibited online.⁸⁴ For example, the Family Council of Victoria Inc thought that ‘[a]ll content in today’s X18+ category for films and above’ should be prohibited online.⁸⁵

10.54 Overall however, most submissions to the Inquiry remarked on the breadth of the current scope of RC, with some remarking that it is overly broad.⁸⁶ For example, Kimberlee Weatherall, from the TC Beirne School of Law of the University of Queensland, submitted:

[T]he material [that] could feasibly be deemed RC includes material that may have social value, and which ought to be protected as free expression (in some cases political expression)

- A site devoted to debating the merits of euthanasia in which some participants exchanged information about actual euthanasia practices.
- A site set up by a community organisation to promote harm minimisation in recreational drug use.
- A site designed to give a safe space for young gay and lesbians to meet and discuss their sexuality in which some members of the community narrated explicit sexual experiences.
- A site that included dialogue and excerpts from literary classic[s] such as Nabokov’s *Lolita* or sociological studies into sexual experiences, such as Dr Alfred Kinsey’s famous *Adult Sexual Behaviour in the Human Male*.
- A site devoted to discussing the geo-political causes of terrorism that published material outlining the views of terrorist organisations as reference material.⁸⁷

The purpose of classification

10.55 In 1991, the ALRC stated that classification is done for the purpose of controlling dissemination—not for the purpose of controlling what a person may possess in their home.⁸⁸ The New South Wales Council for Civil Liberties observed that:

Media, *Submission CI 1236*, 15 July 2011; Bravehearts Inc, *Submission CI 1175*, 15 July 2011; Australian Family Association of WA, *Submission CI 918*, 12 July 2011. However, it should be noted that Bravehearts made its comment noting that it was not specialised in the area.

83 Uniting Church in Australia, *Submission CI 1245*, 18 July 2011;

84 For example Family Council of Victoria Inc, *Submission CI 1139*, 14 July 2001. Australian Family Association Victoria, *Submission CI 2279*, 15 July 2011 and National Civic Council, *Submission CI 2226*, 15 July 2011 also appear to be of this view.

85 Family Council of Victoria Inc, *Submission CI 1139*, 14 July 2001.

86 For example see A Hightower and Others, *Submission CI 2159*, 15 July 2011; K Weatherall, *Submission CI 2155*, 15 July 2011; N Suzor, *Submission CI 1233*, 15 July 2011.

87 K Weatherall, *Submission CI 2155*, 15 July 2011 citing C Lumby, L Green and J Hartley, *Untangling the Net: The Scope of Content Caught by Mandatory Internet Filtering* (2009) iii.

88 Australian Law Reform Commission, *Censorship Procedure*, ALRC Report 55 (1991).

The current classification system requires that items are classified first, and then distribution is done appropriately to the level of classification. The mindset which led to this approach is ill-suited to the Internet.⁸⁹

10.56 Similarly, Chris Berg and Tim Wilson of the Institute of Public Affairs remarked that '[t]echnological developments have already undermined the basis of classification in Australia'.⁹⁰

10.57 Indeed, there appears to have been a shift in the rationale for classification since the ALRC's 1991 report. For example, in early 2011 the Attorney-General's Department stated that '[t]he aim of the classification process is to assist consumers to make informed choices'.⁹¹ Many submissions responded to the questions about the RC classification by commenting that the purpose of classification is to assist consumers to make informed choices about consumption of media content—not to censor.⁹² For example, Dr Cathy Cupitt, Jess Bridges and Elaine Kemp commented:

Protecting the community from offensive content should not come at the expense of censoring valuable works and already marginalised voices. Our objective should be to give people the information they need in order to choose online content safely, rather than focusing on censorship.⁹³

Prohibit what is 'illegal to create or possess'

10.58 MLCS Management submitted that the interface between entertainment and criminal law 'is a major flaw' of the present classification cooperative scheme as

one of the reasons for banning content (refusing classification) is because it not only offends reasonable adults, but because it may in some way break the law. However, the prime reason for the NCS is to advise consumers about product suitability. There must be very clear and consistent linkages between any classification framework and other legislative schemes, such as criminal codes and customs regulations.⁹⁴

10.59 Dr Lyria Bennett Moses also commented on the problematic nature of the current RC classification in this respect, noting:

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.

89 New South Wales Council for Civil Liberties, *Submission CI 2120*, 29 July 2011.

90 Institute of Public Affairs, *Submission CI 1737*, 20 July 2011.

91 Australian Government Attorney-General's Department, *Submission to Senate Legal and Constitutional Affairs References Committee Inquiry into the Australian Film and Literature Classification Scheme*, 4 March 2011.

92 For example New South Wales Council for Civil Liberties, *Submission CI 2120*, 29 July 2011; Pirate Party Australia, *Submission CI 1588*, 15 July 2011; MLCS Management, *Submission CI 1241*, 16 July 2011; C Cupitt, J Bridges and E Kemp, *Submission CI 1220*, 15 July 2011; Civil Liberties Australia, *Submission CI 1143*, 15 July 2011.

93 C Cupitt, J Bridges and E Kemp, *Submission CI 1220*, 15 July 2011.

94 MLCS Management, *Submission CI 1241*, 16 July 2011.

Unlike RC1 content, RC2 content can be legally possessed in Australia ... (except in Western Australia).⁹⁵

10.60 She submitted that ‘by giving RC1 material and RC2 material separate labels, censorship regulations can be better targeted’.⁹⁶

10.61 A number of submissions that argued for narrowing the scope of RC in general—not just online—relied upon the distinction between acts which are prima facie ‘legal’ and ‘illegal’,⁹⁷ although it was not always clear what was meant by the distinction. However, some submissions were quite clear: content depicting real acts that are legal to do should not be prohibited whereas content depicting real—as opposed to fictional—acts that are illegal to do should be prohibited, unless part of an educational or news report.⁹⁸ A number of respondents argued that to warrant prohibition online or an RC classification, the content must cause harm.⁹⁹

10.62 Dr Nicolas Suzor was of the view that ‘[o]nly material that is illegal to possess should be entirely prohibited online’.¹⁰⁰ Other submissions explained that the content which should be entirely prohibited online should be that which is ‘illegal to create or possess’—child sexual abuse material being an often-mentioned example.¹⁰¹ Amy Hightower and others submitted:

The only content that should be entirely prohibited online is those that required the commission of certain illegal acts to produce, such as child abuse material, and do not have any artistic, literary, academic, historic or newsworthiness value.¹⁰²

10.63 Google also acknowledged that

government intervention is appropriate when it comes to the prevention of child abuse material, primarily through direct law enforcement action and by working co-operatively with industry and governments in other jurisdictions to eradicate this material. Google agrees that there is an in-principle justification for government prohibition of this kind of material (subject to an effective safe harbour for network and platform providers). Google has a global all-product ban on child pornography, which is illegal in almost every country.¹⁰³

95 L Bennett Moses, *Submission CI 2126*, 15 July 2011.

96 Ibid.

97 For example Eros Association, *Submission CI 1856*, 20 July 2011; Pirate Party Australia, *Submission CI 1588*, 15 July 2011; N Suzor, *Submission CI 1233*, 15 July 2011; Civil Liberties Australia, *Submission CI 1143*, 15 July 2011.

98 Eros Association, *Submission CI 1856*, 20 July 2011.

99 For example New South Wales Council for Civil Liberties, *Submission CI 2120*, 29 July 2011; G Urbas and T Kelly, *Submission CI 1151*, 15 July 2011; Civil Liberties Australia, *Submission CI 1143*, 15 July 2011.

100 N Suzor, *Submission CI 1233*, 15 July 2011.

101 For example Google, *Submission CI 2336*, 22 July 2011; I Graham, *Submission CI 1244*, 17 July 2011; A Hightower and Others, *Submission CI 2159*, 15 July 2011.

102 A Hightower and Others, *Submission CI 2159*, 15 July 2011.

103 Google, *Submission CI 2336*, 22 July 2011.

10.64 However, some submissions queried the utility of prohibiting such online content by way of ISP-level filters,¹⁰⁴ or even a classification system.¹⁰⁵ For example, while Irene Graham considered that child sexual abuse material should be entirely prohibited online, she submitted that

there is a difference between what content should be illegal to make available and/or access online, and what content should be on a secret blacklist and ‘blocked’ by ISPs ... [N]o government can be trusted not to abuse secret censorship powers and secret censorship is incompatible with democracy.¹⁰⁶

10.65 Amy Hightower and others argued that ‘media classification is not the appropriate tool for prohibition; such material is better handled through law enforcement agencies than media classifiers’.¹⁰⁷ Some submissions instead called for appropriate resourcing of the enforcement of such criminal laws.¹⁰⁸

General and specific concerns about the current scope of RC

10.66 A number of submissions expressed concern about aspects of the scope of the RC classification. Some of these comments were aimed at specific elements, for example items 1(c) and (d), as well as s 9A. Other comments were aimed at the problematic concept of community standards and offensiveness; that is, impliedly directed at item 1(a). Some comments cannot be so easily assigned to a respective item of the Code tables. For example, the Internet Industry Association’s comment was directed to reform of the scope more broadly:

the refused classification category should be reviewed to ensure that educational, news, scientific medical and political material is not included. We think this is important to the proper flow of information in our society and to ensure that free speech is possible online without risk of restriction.¹⁰⁹

Community standards and offensiveness

10.67 A number of submissions expressed concern about the notion that media content may offend community standards.¹¹⁰ Some submissions were concerned about the subjective nature of determining a ‘community standard’¹¹¹ and noted that such standards will vary across communities¹¹² (including online communities)¹¹³ and,

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- 104 For example I Graham, *Submission CI 1244*, 17 July 2011; J Symon, *Submission CI 1570*, 13 July 2011.
 105 For example Electronic Frontiers Australia, *Submission CI 2194*, 15 July 2011; A Hightower and Others, *Submission CI 2159*, 15 July 2011; N Suzor, *Submission CI 1233*, 15 July 2011.
 106 I Graham, *Submission CI 1244*, 17 July 2011.
 107 A Hightower and Others, *Submission CI 2159*, 15 July 2011.
 108 For example Electronic Frontiers Australia, *Submission CI 2194*, 15 July 2011; Artsource, *Submission CI 1880*, 14 July 2011.
 109 Internet Industry Association, *Submission CI 2445*, 28 July 2011.
 110 For example New South Wales Council for Civil Liberties, *Submission CI 2120*, 29 July 2011; The Arts Law Centre of Australia, *Submission CI 1299*, 19 July 2011; I Graham, *Submission CI 1244*, 17 July 2011; N Suzor, *Submission CI 1233*, 15 July 2011.
 111 For example The Arts Law Centre of Australia, *Submission CI 1299*, 19 July 2011; G Urbas and T Kelly, *Submission CI 1151*, 15 July 2011.
 112 For example The Arts Law Centre of Australia, *Submission CI 1299*, 19 July 2011; G Urbas and T Kelly, *Submission CI 1151*, 15 July 2011.
 113 Google, *Submission CI 2336*, 22 July 2011.

further, are likely to change over time.¹¹⁴ For example, the Arts Law Centre of Australia commented that:

The difficulty for many people in the arts and broader community is not with the prohibition on material which is illegal under the criminal laws, but the much broader category of ‘offensive’ materials. An agreed upon ‘community standard of morality, decency and propriety’ is inherently subjective and will differ enormously across communities.¹¹⁵

10.68 Some respondents submitted that the current standards that are determined to be reflective of the community may be unduly narrow.¹¹⁶ For example, Pirate Party Australia submitted that ‘[t]he current scope of RC does not reflect the attitudes and morals of today’s society’.¹¹⁷ It argued that

the ban on bondage (BDSM) pornography, between willing participants, does not match community standards, where there are shops, groups and even night-clubs that cater to people who enjoy BDSM as part of their sex life.¹¹⁸

10.69 A number of submissions were directed at the propriety of one group’s views being able to trump those of others. While some questioned the propriety of media content being ‘banned’ because a majority determined it to be offensive (even though an individual’s access would have no adverse impact on the rest of the community;¹¹⁹ so, item 1(b) is clearly excluded), others advocated a community standard of public decency.¹²⁰

10.70 Another point to arise was possible censorship—in a political sense—which is not warranted. The NSW Council for Civil Liberties warned:

Governments should not misuse classification to focus on areas which clamorous minorities consider dangerous, but where there is no proof, or which in fact are not.¹²¹

10.71 Given the number of submissions that expressed concern about whether the classification criteria for RC accurately reflect current community standards, it is apt to recall that earlier in this Discussion Paper, at Proposal 9–5, the ALRC proposed that a comprehensive review of community standards in Australia towards media content should be commissioned, combining both quantitative and qualitative methodologies, and with a broad reach across the Australian community. The ALRC proposed that such a review should be undertaken at least every five years.

114 For example N Suzor, *Submission CI 1233*, 15 July 2011; G Urbas and T Kelly, *Submission CI 1151*, 15 July 2011.

115 The Arts Law Centre of Australia, *Submission CI 1299*, 19 July 2011.

116 For example Pirate Party Australia, *Submission CI 1588*, 15 July 2011; MLCS Management, *Submission CI 1241*, 16 July 2011; N Suzor, *Submission CI 1233*, 15 July 2011.

117 Pirate Party Australia, *Submission CI 1588*, 15 July 2011.

118 Ibid.

119 For example New South Wales Council for Civil Liberties, *Submission CI 2120*, 29 July 2011; N Suzor, *Submission CI 1233*, 15 July 2011.

120 For example Australian Council on Children and the Media, *Submission CI 1236*, 15 July 2011; Communications Law Centre, *Submission CI 1230*, 15 July 2011.

121 New South Wales Council for Civil Liberties, *Submission CI 2120*, 29 July 2011. Some other submissions suggested that this might already have occurred. See I Graham, *Submission CI 1244*, 17 July 2011; MLCS Management, *Submission CI 1241*, 16 July 2011.

Criticisms of item 1(c) content

10.72 A number of submissions were critical of the current breadth of item 1(c) of the Code.¹²² For example, Weatherall noted that there is an ‘extraordinary range of activities that are proscribed by criminal provisions in Australian law’ so the content that may come within item 1(c) is ‘potentially extremely broad’.¹²³

10.73 Graham submitted that item 1(c) had been used to make ‘highly publicly controversial RC decisions’ and referred to the decisions noted above in respect of the edition of *Rabelais, The Peaceful Pill Handbook*, as well as a decision on a computer game entitled *Marc Ecko’s Getting Up: Contents Under Pressure*—which ‘provided elements of promotion of the crime of graffiti’.¹²⁴

10.74 Some submissions were critical of item 1(c) of the Code as it relates to drug use.¹²⁵ The National Drug Research Institute, Curtin University for example called for consideration of the scope of RC from a public health perspective: ‘specifically, to reconsider the rationale behind including “detailed instruction in drug use” in the definition of refused classification’.¹²⁶ It explained that almost all of the respondents in one of its studies had participated in online drug discussion for the purpose of reducing the risks of drug use and preventing harmful outcomes.¹²⁷ It observed that the most popular drug websites were not hosted in, or otherwise connected with, Australia, so were ‘not currently affected by Australia’s classification system’ but would be likely to be refused classification under the proposed mandatory ISP-level filter.¹²⁸ It concluded:

Blocking websites where people discuss drug use in detail will ... hamper the efforts of health, social and law enforcement officers to monitor drug users and to produce interventions that are responsive to new drug trends. ...

Simply refusing classification of sites which contain ‘detailed instruction in drug use’ will ignore the complexity of balancing the potential negative and positive consequences of such websites. ...

It would be unfortunate if well-intentioned policy changes inadvertently increased harm by decreasing access to websites that may assist in reducing harm for individuals and the whole community.¹²⁹

10.75 Google also expressed concern about the prohibition of this content:

When it comes to a broader class of controversial material, such as material dealing with safer drug use or material dealing with euthanasia, which is not universally recognised as illegal, Google submits that government prohibition is inappropriate.¹³⁰

122 For example K Weatherall, *Submission CI 2155*, 15 July 2011; I Graham, *Submission CI 1244*, 17 July 2011; National Drug Research Institute, *Submission CI 1186*, 15 July 2011.

123 K Weatherall, *Submission CI 2155*, 15 July 2011.

124 I Graham, *Submission CI 1244*, 17 July 2011. See Classification Review Board, *Decision on Marc Ecko’s Getting Up: Contents Under Pressure* (2006).

125 For example Google, *Submission CI 2336*, 22 July 2011; National Drug Research Institute, *Submission CI 1186*, 15 July 2011; M Lindfield, *Submission CI 2164*, 15 July 2011.

126 National Drug Research Institute, *Submission CI 1186*, 15 July 2011.

127 Ibid.

128 Ibid.

129 Ibid.

10.76 It observed that:

in July 2008, the print edition of *The Peaceful Pill Handbook* by Dr Philip Nitschke was listed No 66 on the Amazon.com global Bestseller List. This same edition is banned in Australia. A censored version of the book was approved for publication in New Zealand in June 2008.¹³¹

10.77 Other submissions were also critical of the prohibition of media content relating to euthanasia.¹³² However, some submissions considered that media content which promotes or provides instruction in suicide should be prohibited.¹³³ For example, the Hunter Institute of Mental Health submitted:

Given the potential risks to those who are vulnerable, we believe that any material (online or otherwise) that is explicitly pro-suicide and provides information or access to means of suicide should be prohibited. While some may conceive this as a restriction of freedom of speech, it does pose a real risk to those who are vulnerable and desperate.¹³⁴

Criticism of s 9A

10.78 While the Music Council of Australia noted the debate about a chilling effect that accompanied ‘Anti-Terrorism legislation’,¹³⁵ other submissions were more vocal in their criticism of s 9A of the *Classification Act*.¹³⁶ For example, the Australian Society of Authors submitted that the provision should be repealed,

because it fails the most elementary test of censorship—certainty of application. Because no one knows precisely what it prohibits, it inescapably catches material that is beyond the ambit of censorship.¹³⁷

Criticism of item 1(d)

10.79 As noted, a large number of submissions criticised 1(d) of the Code table relating to computer games. As SCAG ministers have recently agreed to introduce an R 18+ classification for computer games it is unnecessary to describe the criticism of item 1(d) in this chapter.

ALRC’s views

10.80 The ALRC is mindful that the Australian Government’s proposed mandatory ISP filtering scheme is based upon an ‘RC content list’ and that the Government is waiting for the outcome of the ALRC’s review of the RC classification before implementing the scheme. Accordingly, the questions about RC in the Issues Paper were directed at eliciting responses about the media content that should be prohibited online. The ALRC makes no comment about the merits or otherwise of such a filter.

130 Google, *Submission CI 2336*, 22 July 2011.

131 Ibid.

132 For example Eros Association, *Submission CI 1856*, 20 July 2011.

133 For example Hunter Institute of Mental Health, *Submission CI 2136*, 15 July 2011; Australian Christian Lobby, *Submission CI 2024*, 21 July 2011.

134 Hunter Institute of Mental Health, *Submission CI 2136*, 15 July 2011.

135 Music Council of Australia, *Submission CI 2086*, 21 July 2011.

136 For example I Graham, *Submission CI 1244*, 17 July 2011; Australian Society of Authors, *Submission CI 1157*, 15 July 2011.

137 Australian Society of Authors, *Submission CI 1157*, 15 July 2011.

10.81 Submissions to this Inquiry expressed divergent views about the scope of RC—both offline and online. In light of this, and consistent with promoting platform neutrality,¹³⁸ any reform of the RC classification needs to consider more than just what media content should be entirely prohibited online.

10.82 As noted above, most respondents to the Issues Paper who addressed the issue considered the RC category to be too broad to be applied effectively in a convergent media environment. At the same time, very few submissions favoured the abolition of an RC category—most of those who considered the category to be too broad, as currently constituted, nonetheless were of the view that some material, particularly real depictions of actual child sexual abuse or actual sexual violence, is so contrary to both criminal law and community standards that it should be banned outright. In a convergent media environment, this necessitates the filtering of such content so that it is not accessible from personal electronic devices such as computers and mobile phones. It is no longer possible to quarantine the ‘online’ world from that of other media platforms.

10.83 The ALRC has responded to these interlinked issues as follows. First, the ALRC makes a proposal for certain RC content to be specifically stated in the classification decision so that it may assist the implementation of any ISP filtering. Secondly, the ALRC has commissioned a pilot study to research community standards in regard to the current higher level classification categories (MA 15+ up to and including RC).

Certain RC content to be specified in the classification decision

10.84 The ALRC proposes that the Classification of Media Content Act should provide that, if content is classified RC, the classification decision should state whether the content comprises real depictions of actual child sexual abuse or actual sexual violence. This content may then be added to any blacklist of content that must be filtered at the ISP level.

10.85 The ALRC has proposed this sub-set of content within the current RC category as content that could be filtered at the ISP level within Australia for a number of reasons. As Dr Lyria Bennett Moses, from the Faculty of Law of the University of New South Wales, noted in respect of ‘child pornography’:

- this material is internationally condemned;
- the censorship is based on different goals and purposes to some other RC material, for example, it ‘is rightly treated as falling outside even a broad notion of freedom of speech’;
- it may warrant a different regulatory response to other RC material, for example, ‘[t]he community expects an active police response ... including the prosecution of those responsible for its production’; and

138 See Chapter 4, Principle 8.

- there are avenues for regulating access to this material that do not exist with other RC material, for example, by way of international co-operation.¹³⁹

10.86 Finally, a number of submissions identified real depictions of actual child sexual abuse and actual sexual violence, such as rape, as content that should be entirely prohibited—both online and offline.

Proposal 10–1 The Classification of Media Content Act should provide that, if content is classified RC, the classification decision should state whether the content comprises real depictions of actual child sexual abuse or actual sexual violence. This content could be added to any blacklist of content that must be filtered at the internet service provider level.

Researching community standards and RC content

10.87 In Chapter 2, the ALRC proposed a guiding principle for reform that communications and media services available to Australians should broadly reflect community standards, while recognising a diversity of views, cultures and ideas in the community.¹⁴⁰ The ALRC is mindful that gauging community standards from the views of those who submit comments to a public consultation may not adequately represent the diversity of opinions in the community as a whole. Moreover, such views may not have been derived from consideration of actual media content in the higher level categories.

10.88 In light of this question, the ALRC has commissioned a pilot study to consider the current higher level classification categories, from MA 15+ up to and including RC, for the purpose of assessing what content may or may not be applicable in these categories. The ALRC has been developing this pilot study in collaboration with the Australian Government Attorney-General's Department and the Department of Broadband, Communications and the Digital Economy. The study is being conducted by consultants Urbis Keys Young.

10.89 The pilot study involves bringing together a representative group of members of the community to view classifiable content that causes concern to people, and to consider the weighting of elements applied in the current Code as well as other possible elements, in order to advise on classification against current and proposed classification categories. The material may be violent, offensive and confronting, and participants have been advised of the nature of the material to be shown. The representative group is being recruited through advertisements in print and online media throughout Australia, as well as through the ALRC's website.

10.90 In addition to the public participants in the pilot study, a control group has been established comprised of people with prior experience of, and/or publicly stated opinions on, the current classification guidelines. The intention is to be able to check

139 L Bennett Moses, *Submission CI 2126*, 15 July 2011.

140 See Chapter 4, Principle 2.

community views against those of people who regularly engage with debates about, or otherwise interact with, Australia's classification scheme.

10.91 The pilot study will be conducted over October–November 2011, and results will be made available to the ALRC in advance of the release of the Final Report. Findings from the pilot study may inform recommendations on the RC category, as well as providing a possible methodology for ongoing research into the classification categories.¹⁴¹

141 See Proposal 9–5.