

10. Restricting Access to Adult Content

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Summary

10.1 In this chapter, the ALRC recommends that content providers should take reasonable steps to restrict access to adult content they distribute to the Australian public. This is consistent with the principle that children should be protected from material likely to harm or disturb them.

10.2 ‘Adult content’ is media content that has been classified R 18+ or X 18+ and media content that would be likely to be classified R 18+ or X 18+. These classifications are high thresholds, but when the thresholds are met, the content should be restricted to adults—whether the content is a feature film, a film clip, a computer game, a magazine, a website, or any other type of media content distributed to the public. Although restricting access to this content presents difficulties online, those who provide this content should have some obligation to try to warn potential viewers and help prevent minors from accessing it, irrespective of the platform used to deliver the content.

10.3 The steps content providers should be expected to take might vary, perhaps depending on the type of content provider and the platform or delivery method. The chapter reviews various methods of restricting access, including prohibitions on sale

and hire to minors, parental locks on televisions and media devices, internet filters, warning messages and online age verification systems.

10.4 Some of these methods may only be suitable for some content providers. Simple prohibitions on sale and distribution, drawing upon common age-verification methods, will often work offline, and may be enforced. However, such methods are more problematic online.

10.5 Protecting minors from adult content relies heavily on parental supervision and the effective use of PC-based filters and parental locks. Promoting the use of these tools may be one important way that content providers can comply with their statutory obligation to take reasonable steps to restrict access to adult content.

10.6 The ALRC recommends that methods of restricting access to online and offline content should be set out in industry codes and Regulator standards, enforced by the Regulator.

Restricting access to adult content

The restrict access obligation

10.7 The ALRC recommends that the Classification of Media Content Act (the new Act) should provide that content providers should take reasonable steps to restrict access to adult content that is sold, screened, provided online, or otherwise distributed to the Australian public. This requirement should apply to all adult media content, both online and offline—not just films, television programs and computer games, but also websites, magazines, music, artworks, advertising, user-generated content and other media content. The Australian community may not expect formal advisory classification information for this content but, in the ALRC's view, content providers should take reasonable steps to restrict access, so that the content may only be accessed by adults who choose to view the content.

10.8 What these reasonable steps might be for different types of content provider is discussed later in this chapter. For some, this may mean promoting the use and understanding of voluntary parental locks and PC-based filters. The ALRC does not propose that all providers of adult content be required to verify the age of people who access their content.

10.9 Under Australia's current classification laws, certain adult content—where legal to distribute at all—must not be sold or distributed to minors. Films classified R 18+ must not be sold or hired to minors.¹ Publications classified Category 1 Restricted and Category 2 Restricted may also only be sold to adults, and some only in adult premises such as sex shops.² Even some books, such as the Bret Easton Ellis novel *American*

1 Eg, *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (NSW) s 9(2). There are similar provisions in other state and territory classification enforcement legislation.

2 *Ibid* s 21, 24(2); *Classification (Publications, Films and Computer Games) Act 1995* (SA) ss 48, 51; *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (Tas) s 15; *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* (Vic) ss 27, 29; *Classification of Publications, Films and Computer Games Act 1985* (NT) ss 56(1), 60.

Psycho, have been given a restricted classification and may only be sold in a sealed wrapper and to adults.³ Online content hosted in Australia that has been classified R 18+, or is likely to be classified R 18+, should only be accessible behind a restricted access system.⁴ Films classified X 18+ are illegal in most of Australia, but where they may be legally sold in the ACT and the NT, they may not be sold to minors.⁵ Online X 18+ content is prohibited under the *Broadcasting Services Act 1992* (Cth) (the *Broadcasting Services Act*), and subject to take-down notices if hosted in Australia.⁶ The URLs of X 18+ content hosted outside Australia may be sent to providers of voluntary internet filters.⁷

10.10 Drawing upon these existing restrictions and applying them to the internet age, the ALRC, in the Discussion Paper, proposed that the new Act provide that access to all R 18+ and X 18+ media content, online and offline, should be restricted to adults.⁸ Many stakeholders supported these proposals.⁹ Kate Gilroy from Watch on Censorship, for example, stated that distributors ‘should maintain their responsibility to ensure age appropriate restrictions’.¹⁰ Telstra also supported the proposal, provided the obligation would not be placed on those who are ‘mere conduits’ for the content, such as internet service providers (ISPs).¹¹ As discussed in Chapter 5, the ALRC agrees that internet intermediaries should be not be required to restrict access to adult content.

10.11 Others were critical of the proposals, some assuming that this would mean an expansion of the existing restricted access system obligations in the *Broadcasting Services Act*.¹² Some stakeholders stressed that restricted access systems could be easily circumvented. Civil Liberties Australia said that a ‘barely competent teenager could easily work around even the most complex restrictions’:

Unless the ALRC can actually propose a practical means of internet restriction that isn’t trivially bypassed and does not suffer from under or over blocking, it seems dangerous to make proposals suggesting that such things can simply be legislated into existence.¹³

3 *American Psycho* was classified Restricted Category 1 in 1991.

4 *Broadcasting Services Act 1992* (Cth) sch 7 cls 20, 21.

5 *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* (ACT) s 23(5); *Classification of Publications, Films and Computer Games Act 1985* (NT) s 50(1).

6 *Broadcasting Services Act 1992* (Cth) sch 7 cls 20, 21, 47.

7 *Ibid* sch 5; Internet Industry Association, *Internet Industry Code of Practice: Content Services Code for Industry Co-regulation in the Area of Content Services* (2008).

8 Australian Law Reform Commission, *National Classification Scheme Review*, ALRC Discussion Paper 77 (2011), Proposals 8–1 and 8–2.

9 Eg, Free TV Australia, *Submission CI 2519*; FamilyVoice Australia, *Submission CI 2509*; Arts Law Centre of Australia, *Submission CI 2490*; Foxtel, *Submission CI 2497*; Interactive Games and Entertainment Association, *Submission CI 2470*; Telstra, *Submission CI 2469*.

10 Watch On Censorship, *Submission CI 2472*.

11 Telstra, *Submission CI 2469*.

12 See *Broadcasting Services Act 1992* (Cth) sch 7 cls 20 and *Restricted Access System Declaration 2007* (Cth).

13 Civil Liberties Australia, *Submission CI 2466*.

10.12 Another stakeholder stressed that even those restricted access systems that require credit or debit card details do not work, because many minors can get access to credit and debit cards.¹⁴ Such restricted access systems, the ALRC was told, also discriminate against adults who do not possess credit cards, and compromise people's privacy.¹⁵ Google submitted that 'age-based restrictions are very difficult to enforce in any robust way' and they 'give rise to very real privacy considerations':

[W]e are concerned that the proposed age-based restrictions on adult content would be unworkable in practice.¹⁶

10.13 The Internet Industry Association (IIA) said it would be 'prohibitively costly for a provider of an online service to obtain evidence of the age of each individual customer', but it supported 'a requirement that the provider publish a 'click-through' acknowledgement that the viewer is 18 years old or older'.¹⁷

10.14 In the ALRC's view, the ability to circumvent access restrictions does not mean that content providers should not take reasonable steps to restrict access. That a law may not perfectly achieve its desired outcome does not mean the law serves no purpose. In any event, the ALRC does not propose that restricted access systems should be used by all providers of adult content. Furthermore, these access restrictions are also intended to apply offline. The restrictions should, for example, operate effectively in cinemas and retail outlets.

10.15 Content providers outside Australia may be unlikely to comply with Australian obligations to restrict access to adult content. As one person noted, much adult content is hosted in countries that 'simply don't care about Australian content standards—if they're even aware that they exist'.¹⁸ However, many content providers will comply with the law—particularly Australian media organisations, broadcasters, cinemas, retail outlets and others. This will mean access restrictions are in place on the platforms from which large proportions of the Australian public access media content.

10.16 Compliance by media providers with a large reach in Australia is likely to mean that large volumes of media content delivered to Australians will come with appropriate warnings and other means to help prevent minors from accessing content that is not suitable for them. Content providers may highlight these protections to promote their services. That others may not comply does not suggest access restrictions should be abandoned entirely.

10.17 The ALRC agrees that restricting access should not be prohibitively costly or burdensome. Nor should the law unnecessarily compromise people's privacy. If the obligation to restrict access is made more reasonable—that is, easier to comply with—and perhaps further simplified for providers of non-commercial content, then the

14 I Graham, *Submission CI 2507*.

15 Ibid; See also Google, *Submission CI 2512*.

16 Google, *Submission CI 2512*.

17 Internet Industry Association, *Submission CI 2528*.

18 A Hightower, *Submission CI 2511*.

ALRC recommends that the new Act should provide for such an obligation. Methods of restricting access are discussed later in this chapter.

What is ‘adult’ content?

10.18 Adult content, in this Report, refers to media content that has been classified R 18+ or X 18+, and to unclassified media content that, if it were classified, would be likely to be classified R 18+ or X 18+. These are the strictly ‘adults only’ classifications in Australia’s current classification scheme.

10.19 Under the *Guidelines for the Classification of Films and Computer Games*, R 18+ films may have a ‘high’ impact and ‘may be offensive to sections of the adult community’. The Guidelines provide:

- There are virtually no restrictions on the treatment of themes;
- Violence is permitted. Sexual violence may be implied, if justified by context;
- Sexual activity may be realistically simulated. The general rule is ‘simulation, yes—the real thing, no’;
- There are virtually no restrictions on language;
- Drug use is permitted;
- Nudity is permitted.¹⁹

10.20 This is a high threshold. Less than 5% of films classified by the Classification Board between 2005–06 and 2010–11 were classified R 18+.²⁰

10.21 The X 18+ classification, on the other hand, is an adults-only classification for content with ‘real depictions of actual sexual intercourse and other sexual activity between consenting adults’.²¹ Classification guidelines state:

No depiction of violence, sexual violence, sexualised violence or coercion is allowed in the category. It does not allow sexually assaultive language. Nor does it allow consensual depictions which purposefully demean anyone involved in that activity for the enjoyment of viewers.

Fetishes such as body piercing, application of substances such as candle wax, ‘golden showers’, bondage, spanking or fisting are not permitted.

As the category is restricted to activity between consenting adults, it does not permit any depictions of non-adult persons, including those aged 16 or 17, nor of adult persons who look like they are under 18 years. Nor does it permit persons 18 years of age or over to be portrayed as minors.²²

19 *Guidelines for the Classification of Films and Computer Games* (Cth). See also the criteria for restricted publications in the *Guidelines for the Classification of Publications 2005* (Cth).

20 See annual reports of the Classification Board, 2005–06 to 2010–11.

21 *Guidelines for the Classification of Films and Computer Games* (Cth). Currently, only films may be classified X 18+. In Ch 9, the ALRC recommends that any media content—including computer games, magazines and websites, rather than only films—may be classified X 18+, though this does not mean they should be required to be classified.

22 Ibid.

10.22 This chapter does not review the scope of the R 18+ and X 18+ classification categories, but focuses on the legal architecture of a classification scheme, and suggests reforms consistent with the principle that some content should not be accessed by minors. However, recommendations in other chapters of this Report will require some review of the adult classification categories.²³

Scope of the obligation

Likely classification

10.23 Under the new scheme, the obligation to take reasonable steps to restrict access applies to content that includes unclassified content that is ‘likely’ to be R 18+ or X 18+. Some stakeholders expressed concern about such a provision referring to the ‘likely’ classification of content.²⁴ For reasons discussed later in this chapter and in Chapter 6, the volume of media content now available suggests it is impractical and prohibitively costly to require all adult content to be classified. Restrictions must therefore be imposed on unclassified content that can be grouped in some other way. The classification that a piece of content would be ‘likely’ to receive, if it were classified, is itself a useful way to group or categorise content. This also has the benefit of treating classified and unclassified adult content alike, for the purpose of imposing access restrictions.

Non-commercial adult content

10.24 Should there be an exception for distributing non-commercial adult content? In Chapter 6, the ALRC proposes that obligations to classify content should only apply to content made and distributed on a commercial basis. However, in the ALRC’s view, the obligation to take reasonable steps to restrict access to adult content should not be limited in this way. It is not only high-impact commercial content that adults should be warned about, and minors protected from, but all high-impact content. Accordingly, the ALRC recommends that access to adult content should be restricted, whether or not the content is produced on a commercial basis.

10.25 Methods of restricting access should, however, be appropriate to and adjusted for different types of content provider. Some will be able to do more than others. These methods are discussed later in this chapter.

Australian audience

10.26 The importance of warning people about adult content, and protecting minors from this content, suggests that the obligation to take reasonable steps to restrict access should not be limited to content likely to have a ‘significant Australian audience’.²⁵ Even small Australian audiences should be given this warning. For example, a film that

23 Ch 11 discusses the scope of the existing RC classification, and proposes that the Australian Government should consider whether some content that may now be RC should instead be classified R 18+ or X 18+. The need for research into community standards is also discussed in Ch 9.

24 Foxtel, *Submission CI 2497*; Classification Board, *Submission CI 2485*.

25 In Ch 6, the ALRC recommends that the obligation to classify certain content should only apply to content with a significant Australian audience.

will only be screened once to a niche audience may not need to be classified, but if the film has high-level violence and is likely to be R 18+, the audience should be warned beforehand, and minors should not be admitted to the cinema.

10.27 However, the new Act should focus on the distribution of adult content to the Australian public, rather than with possession or the distribution to persons outside Australia. The obligation to restrict access to adult content should therefore be confined to content that will have some Australian audience, even if this is only a small audience.

Exemptions

10.28 In Chapter 6, the ALRC recommends certain exemptions from laws mandating that some content must be classified. Should there be similar exemptions from laws that provide that adult content should be restricted to adults?

10.29 With regard to content in art galleries and cultural institutions, one stakeholder ‘strongly’ objected to a new obligation ‘to guess whether artworks are “likely to be R 18+” and if they guess so, restrict access to adults’.

What, if any, serious problem currently exists, and what, if any, legitimate public purpose is achieved by, among other things, preventing parents from taking, eg, their teenage sons and daughters, to see an art exhibition that includes so-called ‘content’ that may be likely to be classified R 18+.²⁶

10.30 The ALRC notes that one of the matters that must now be taken into account when classifying content is ‘the literary, artistic or educational merit (if any)’ of the content being classified.²⁷ However, minors are now prohibited from buying films, computer games and publications that would be classified R 18+ and X 18+, and it is an offence to admit a minor to a film classified R 18+, whether or not the minor is accompanied by a parent or guardian.²⁸ These classification categories are designed specifically to capture content that is only for adults. If they capture content that should not be restricted to adults, then the categories should be reviewed.

10.31 The ALRC does not recommend that galleries and other cultural institutions be made exempt from the requirement to take reasonable steps to restrict access to adult content, and notes that some galleries and institutions may already take such steps voluntarily. In fact, any exemptions from this obligation should be limited carefully. Some exemptions may, however, be appropriate for R 18+ news footage.

How to identify ‘adult content’

10.32 Ideally, content providers should somehow assess whether content is likely to be adult content before they distribute it. However this will often be impractical or impossible for online content providers that deal with large quantities of content, much of which is dynamic and user-generated. Requiring ‘pre-assessment’ would be almost

²⁶ I Graham, *Submission CI 2507*.

²⁷ *Classification (Publications, Films and Computer Games) Act 1995* (Cth) s 11.

²⁸ Eg, *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (NSW) ss 9, 12, 24, 30, 32.

as onerous as requiring the content to be classified, which, as discussed below, is impractical and prohibitively costly, particularly if only trained Australian assessors are qualified to make such assessments.

10.33 The ALRC does not propose that all content providers should be required to pre-assess content to determine whether it is likely to be adult content. Instead, the obligation to take reasonable steps to restrict access to adult content should include an obligation to take reasonable steps to *identify* adult content. It may be reasonable to expect some content providers, such as magazine publishers and retail outlets, to identify adult content before it is published or sold. For others, such as platforms that host millions of hours of user-generated content, it may only be reasonable to expect them to have in place processes to readily identify adult content after it has been published. Major content providers, for example, might have mechanisms that allow users to ‘flag’ content as adult or ‘inappropriate’.

10.34 Content providers who specialise in distributing adult content should find it straightforward to identify this content. Others may choose to have their content classified, to determine whether access should be restricted.

Who must restrict access?

10.35 The ALRC recommends that the obligation to take reasonable steps to restrict access should be placed primarily on ‘content providers’, including retailers of adult products, publishers and distributors of adult films and magazines, and online content platforms that provide adult content such as pornography.²⁹ Content providers will usually be best placed to take steps such as providing warnings with their content, placing their content in plastic wrappers, and checking their customers’ age in cinemas and retail outlets. However, this obligation to restrict access should generally not apply to persons uploading content, other than on a commercial basis, to a website owned and managed by others.

10.36 In Chapter 5, the ALRC recommends that obligations to take reasonable steps to restrict access to adult content online should apply to any content with an appropriate Australian link, including content hosted in Australia, controlled by an Australian content provider, or directed to an Australian audience.³⁰

10.37 The ALRC does not recommend that ISPs and other internet intermediaries should be required to restrict access to adult content that is provided by others. However, this does not mean that ISPs should have no obligations with respect to this content. ISPs should, for example, continue to provide and promote internet ‘family friendly’ filters, as this is currently provided for under the *Internet Industry Code of Practice*.³¹

29 See Ch 5.

30 Rec 5–9.

31 Internet Industry Association, *Internet Industry Code of Practice: Content Services Code for Industry Co-regulation in the Area of Content Services* (2008).

Restrict access notices

10.38 The ALRC considers that if the Regulator, perhaps after receiving a complaint, considers that a piece of content is adult content, the Regulator should be able to issue a notice to the content provider requiring it to take reasonable steps to restrict access to the content. This notice might be called a ‘restrict access notice’.

10.39 The new Act should not provide an offence for simply publishing adult content without restricting access—a law that hosts of large quantities of user-created content may be unable to comply with—but rather should provide for an offence of failing to comply with a restrict access notice. Such notices might be issued in respect of a specified piece of content, or a general class of content. Content providers may provide reasons why they believe the content is not adult content. The Act should provide for criminal offences and civil penalties for failing to comply with these notices.

10.40 The Act might also provide for criminal offences and civil penalties for failing to take reasonable steps to restrict access to this content, where the content provider is reckless as to whether the content is adult content. In deciding whether to issue this notice, the Regulator should have regard to relevant enforcement guidelines.³² Naturally, these guidelines should encourage the Regulator to focus attention on the most serious content, and the content likely to have the largest Australian audience.

Recommendation 10–1 The Classification of Media Content Act should provide that content providers should take reasonable steps to restrict access to adult content that is sold, screened, provided online or otherwise distributed to the Australian public. Adult content is:

- (a) content that has been classified R 18+ or X 18+; or
- (b) unclassified content that, if classified, would be likely to be classified R 18+ or X 18+.

The Classification of Media Content Act should not mandate that all adult content must be classified.

Recommendation 10–2 The Classification of Media Content Act should provide the Regulator with the power to issue ‘restrict access notices’ to providers of adult content. For the purpose of issuing these notices, the Regulator should be empowered to determine whether the content is adult content.

Should all adult content be classified?

10.41 In Chapter 6, the ALRC argued that, under the new scheme, only a limited range of content should be required to be formally classified.³³ However, the need for classification may appear more pressing when dealing with content that may harm or distress children. In the ALRC's view, requiring all adult content to be formally classified by Australian classifiers is not the solution to this problem. Current laws that provide that some adult content must be classified on some platforms before being sold in some jurisdictions (for example, pornography on DVDs in the ACT and NT) should be replaced with media-neutral laws that mandate access restrictions on all adult content distributed in Australia. The new Act should not, however, provide that this content must be classified.

10.42 In the Discussion Paper, the ALRC presented a different view with respect to X 18+ content, and proposed that, if the sale of some X 18+ content were made legal in Australia, the content should be required to be classified.³⁴ Even if it is unlikely that most adult content will be classified, the ALRC argued, by insisting that it should be, the law makes clear Australia's standard on what may be acceptable to display in sexually explicit content. Although some submissions supported the proposal,³⁵ many were critical, some suggesting that requiring distributors to have this content classified is absurd. For example, one person submitted that the vast majority of this content would be online content originating overseas:

Almost none of the millions of providers of this content will even attempt to have the material classified. As the providers are outside Australian jurisdiction, the law cannot be enforced. A law that cannot be enforced is a thoroughly bad law and only serves to bring the law into disrepute.³⁶

10.43 Civil Liberties Australia argued that this proposal would mean that Australia is enacting legislation that 'has no teeth, cannot be enforced in any practical sense, and will be ignored by consumers and producers alike'.³⁷ The Australian Communications and Media Authority (the ACMA) also submitted that enacting a law

where it is acknowledged that it cannot be complied with, or effectively enforced, is likely to lead to a low regard for such a law and, as a consequence, a significantly diminished culture of compliance. This would significantly undermine the law's overall purpose.³⁸

33 Classified essentially means classified by the Classification Board or an authorised industry classifier, applying statutory classification criteria.

34 Australian Law Reform Commission, *National Classification Scheme Review*, ALRC Discussion Paper 77 (2011), Proposal 6–4.

35 See, eg, Arts Law Centre of Australia, *Submission CI 2490*; Interactive Games and Entertainment Association, *Submission CI 2470*; D Mitchell, *Submission CI 2461*.

36 J Denham, *Submission CI 2464*.

37 Civil Liberties Australia, *Submission CI 2466*.

38 Australian Communications and Media Authority, *Submission CI 2489*.

10.44 One person said that a law requiring Australian adult websites to be classified would ‘make for a nice law’ that

will sit on the books and be admired as some kind of moral victory, but in reality it won’t make a shred of difference to how things work on the internet. Any Australian website that is still hosted here (and there are very few of them anyway) will simply shift offshore to the US where freedom of speech is guaranteed in the constitution.³⁹

10.45 Many providers of adult content, particularly those outside Australia, are highly unlikely to comply with a law requiring them to classify their content. Unclassified adult content is rife on the internet and sold in sex shops throughout the country. Many providers of this content do not comply with existing Australian laws, and are unlikely to comply with even more stringent and costly laws.

10.46 Requiring Australian classifiers to watch and classify all R 18+ and X 18+ content is not an effective or viable means of regulating adult content. Existing laws in the ACT and the NT that provide that pornography may be sold if classified by the Classification Board cannot be practically applied online. It is not feasible to require all pornography available in Australia to be watched and evaluated by Australian classifiers. There is a vast quantity of this content, and much of it is dynamic, widely dispersed, and user-generated. The pre-classification model of content regulation is not suited to the regulation of pornography, particularly online pornography—and as argued throughout this Report, regulating content sold on some platforms, but not others, is fast becoming unworkable. The ALRC considers that there should not be one set of laws for pornography on the internet, and another for pornography on DVDs and magazines.

10.47 In the ALRC’s view, if reasonable steps are taken to restrict access to adult content, there is no need to impose an obligation that the content also be classified. Imposing a classification requirement that will be widely ignored, and would in any event have a very limited effect on content hosted outside Australia, may lower respect for the law, and waste limited regulatory resources. This Report emphasises the importance of an effective and pragmatic regulatory response to adult content that accounts for the realities of the existing media environment.

10.48 It might be argued that classifying all pornography will help prevent the distribution of Prohibited content, much of which is sexually explicit. If publishers of adult content have trained classifiers review their content against criteria that prohibits certain depictions (for example, of sexual violence), then they may be less likely to sell films with Prohibited content. However, in the ALRC’s view, laws designed to stop the distribution of Prohibited content should target the Prohibited content itself, rather than X 18+ content.⁴⁰

10.49 Some providers of X 18+ content, on some platforms (principally DVDs), continue to have their content classified before offering it for sale in the ACT and parts of the NT, despite the fact that the same type of content is widely available online and

39 Confidential, *Submission CI 2496*.

40 Prohibited content is discussed in Chs 11 and 12.

illegally sold, often unclassified, in the Australian states. Publishers of some adult magazines also comply with requirements to have their content classified. Under the scheme recommended in this Report, providers of this content should be free to classify their material voluntarily, using either the Classification Board or authorised industry classifiers.⁴¹

If X 18+ content must be classified, who should classify it?

10.50 The ALRC considers that X 18+ content should generally not be required to be classified, but regulation should instead focus on protecting minors from this content, and on ensuring that all Australians are equipped to avoid this content if they choose to. However, if the Australian Government determines that this content must be classified, then the ALRC suggests that authorised industry classifiers should be able to classify this content, rather than only the Classification Board.⁴² This idea was broadly supported by a number of stakeholders.⁴³

10.51 Some stakeholders argued that only the Classification Board should classify this content. FamilyVoice Australia, for example, said the pornography industry did not comply with existing laws and had proved itself untrustworthy.

This is illustrated by the failure by distributors of pornographic magazines and films to comply with call-in notices and the number of breaches of serial classifications ... [It] is naive to propose that the pornography industry could be trusted to appropriately classify its own product.⁴⁴

10.52 The volume of this content alone suggests it is not possible for the Classification Board to classify all pornography on the internet, even if content providers were likely to submit it to the Board and pay for it to be classified. Any significant increase in the amount of X 18+ content going to the Classification Board would also mean Board members would have to spend a disturbingly large percentage of their working days watching pornography. This would not only be a health concern for Board members, but would also make it difficult to maintain a Board that was broadly representative of the Australian people.

10.53 However, industry classification would not mean that the adult industry will be self-regulated. As proposed in Chapter 7, industry decisions would be monitored and audited by the Regulator and reviewed by the Board. Industry classifiers would be trained, and have to be authorised by the Regulator. Additionally, classifiers who wrongly classify sexually explicit content could have their authorisations revoked and other sanctions could apply.

41 Ch 7 recommends the introduction of authorised industry classifiers.

42 Industry classifiers are discussed in Ch 7.

43 See I Graham, *Submission CI 2507*; J Trevaskis, *Submission CI 2493*; Arts Law Centre of Australia, *Submission CI 2490*; Classification Board, *Submission CI 2485*; Interactive Games and Entertainment Association, *Submission CI 2470*; in response to the question ‘Should the new Act provide that all media content likely to be X 18+ may be classified by either the Classification Board or an authorised industry classifier?’: Australian Law Reform Commission, *National Classification Scheme Review*, ALRC Discussion Paper 77 (2011), Question 7–1.

44 FamilyVoice Australia, *Submission CI 2509*.

Should the sale and distribution of X 18+ content be prohibited entirely?

10.54 The sale and distribution of X 18+ films is currently illegal in most of Australia.⁴⁵ Only in the ACT and the NT may X 18+ films be legally sold to adults. X 18+ content is also ‘prohibited content’ under the *Broadcasting Services Act*.⁴⁶ Sexually explicit publications, however, may be sold in most of Australia.

10.55 Sexually explicit material is widely available and viewed by a large number of Australians. In 2001–02, research involving 20,000 Australians reportedly found that 25% had watched an adult film in the past 12 months.⁴⁷ The proliferation of adult and specialist sex retail shops indicates there is considerable demand for sexually explicit content. There is also a vast amount of pornography available on the internet.

10.56 Many stakeholders called for the legalisation of the sale and distribution of X 18+ content, some arguing that the existing prohibitions were ineffective and widely ignored.⁴⁸ Some argued that prohibiting the distribution of pornography conflicts with the principle that Australians ‘should be able to read, hear, see and participate in media of their choice’.⁴⁹ For example, one person said the ALRC should recommend that X 18+ material should be lawfully available in all states and territories because most of the content would not be RC and this ‘would allow better regulation and reduced costs in law enforcement’.⁵⁰

10.57 Others, however, such as FamilyVoice Australia, called for ‘a comprehensive ban on the production, sale or exhibition of X 18+ films’, in part because this content was said to play a role in the premature sexualisation and sexual abuse of children, particularly Indigenous children.⁵¹

The ACT government inherited permissive legislation on X 18+ films when it attained self-government. Sadly it has not followed the lead set by all six States in prohibiting the production and sale of X 18+ films. This has meant that despite State bans on the sale of X 18+ films anyone in Australia can purchase X 18+ films by mail order from the ACT. The Commonwealth, which retains ultimate responsibility under the territories power, ought to act to remedy this problem.⁵²

45 Eg, in NSW, ‘A person must not sell or publicly exhibit a film classified RC or X 18+’: *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (NSW) s 6.

46 *Broadcasting Services Act 1992* (Cth) sch 7 cl 20.

47 Eros Association, *Submission CI 1856*.

48 Eg, A Hightower, *Submission CI 2511*; Confidential, *Submission CI 2496*; Civil Liberties Australia, *Submission CI 2466*; Eros Association, *Submission CI 1856*. Some submissions that argued the scope of the RC classification was too broad also suggested that sexually explicit adult content should not be prohibited: see Ch 11.

49 Eg, A Hightower, *Submission CI 2511*; J Trevaskis, *Submission CI 2493*. A similar principle is also currently enshrined in the National Classification Code.

50 D Henselin, *Submission CI 2473*.

51 FamilyVoice Australia, *Submission CI 2509*.

52 Ibid.

10.58 Likewise, the Senate Legal and Constitutional Affairs Committee recently recommended that ‘the exhibition, sale, possession and supply of X 18+ films should be prohibited in all Australian jurisdictions’.⁵³

10.59 The ALRC recognises that there are strongly held views on the nature of sexually explicit material.⁵⁴ Gareth Griffith’s 2003 briefing paper, *X Rated Films and the Regulation of Sexually Explicit Material*, reviews the history of regulating pornography in Australia, and the arguments about whether the distribution of this content should be legal. The paper begins with a useful overview of the two broad views in debates about pornography:

For some, such material is exploitative, demeaning and degrading of participants and viewers alike; they argue its harmful effects, for individuals, families and the community at large, are apparent enough, even if these effects cannot be established with scientific certainty. From this perspective, sexually explicit material should be regulated out of existence.

Others are less censorious, perhaps sharing certain residual concerns about high levels of exposure to sexually explicit material, especially where the young are involved, yet protective of the right of adults to read, see and hear what they want. For them, the purpose of regulation is not to prohibit sexually explicit material, but to ensure that certain conditions as to content, production and distribution are enforced, in particular that the product on offer is non-violent in content, that it is produced by fully consenting adults and that its mode of distribution facilitates informed choice and minimises any risk to children.⁵⁵

10.60 Mr Griffith’s paper notes the longstanding complaint that prohibitions on the sale of X 18+ films in the states are widely ignored and rarely enforced, and canvasses the possibility of NSW adopting a licensing scheme:

Whether a licensing scheme would prove as effective in Sydney as in the less complex market place of Canberra, where the sale of X films is restricted to designated non-residential areas, is open to debate. What can be said, based on evidence from the ACT, is that the adult film industry in Australia is a lawful, mainstream enterprise, with a vested interest in maintaining the legitimacy and effectiveness of any regulatory scheme that permits its legal operation.⁵⁶

10.61 However, licensing schemes and classification requirements appear somewhat anachronistic in light of the volume of this content that is now available in most Australian homes through the internet. Unless ISPs are required to block pornography, prohibitions on the sale of pornography in retail outlets may be largely symbolic, and have little practical effect.

10.62 The ALRC therefore considers that it is most appropriate and more effective to focus regulatory efforts on restricting the access of minors to this content, by encouraging parental supervision, by promoting—and requiring content providers to

53 Senate Legal and Constitutional Affairs References Committee, *Review of the National Classification Scheme: Achieving the Right Balance* (2011), Rec 13.

54 See K Albury, C Lumby and A McKee, *The Porn Report* (2008); and M Tankard Reist and A Bray (eds), *Big Porn inc.: Exposing the Harms of the Global Pornography Industry* (2011).

55 G Griffith, *X Rated Films and the Regulation of Sexually Explicit Material* (2002), 1.

56 Ibid, 57.

promote—the use and understanding of parental locks, internet filters, and other devices, and requiring content providers to take other reasonable steps to restrict access to the content. This is a more achievable regulatory outcome than the formal classification of all pornography, and providers of adult content may be more likely to comply with an obligation to take reasonable steps to restrict access, than with laws that entirely prohibit the distribution of their content.

Reasonable steps to restrict access

10.63 This section provides an overview of some of the key methods of restricting access, online and offline, to adult content.⁵⁷ While the new Act should provide for essential requirements for restricting access, the various ‘reasonable steps’ that different types of content provider might be expected to take should be prescribed in industry codes, approved and enforced by the Regulator, and in standards, issued and enforced by the Regulator.

10.64 These codes and declarations might be developed for different types of content, content providers and industries, but could include:

- how and where to advertise, package and display hardcopy adult content;
- the promotion of parental locks and user-based computer filters;
- how to confirm the age of persons accessing adult content online; and
- how to provide warnings online.

Industry codes or legislation?

10.65 The ALRC recommends that methods of restricting access to adult content should be set out in industry codes, rather than in the new Act. One stakeholder expressed concern that providing for access restrictions in industry codes may mean the codes serve the interests of industry, and not the Australian 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.⁵⁸

10.66 However, most stakeholders who addressed this point agreed that industry codes were the appropriate mechanism.⁵⁹ Methods of restricting access have a number of commercial and technical complexities. New technologies to restrict access without compromising privacy or safety may also be developed in time. Free TV Australia submitted that industry codes are the appropriate mechanism for restricting access to adult media content:

57 As noted above, in this chapter, ‘adult content’ is media content that has been classified R 18+ or X 18+, and unclassified media content that, if it were classified, would be likely to be classified R 18+ or X 18+.

58 J Trevaskis, *Submission CI 2493*.

59 Free TV Australia, *Submission CI 2519*; Foxtel, *Submission CI 2497*; National Association for the Visual Arts, *Submission CI 2471*; Telstra, *Submission CI 2469*.

Such a system has worked effectively in the commercial television free-to-air industry. The inclusion of such matters in industry codes means that each industry can apply the relevant high level principles in a way that is practical, effective and commercially viable.

10.67 Accordingly, the ALRC recommends that methods of restricting access are best placed in industry codes, approved and enforced by the Regulator, and standards, issued and enforced by the Regulator. These should be regularly reviewed and updated to account for developments in technology.⁶⁰

Restricting access offline

10.68 State and territory laws provide that it is an offence to sell or hire adult films and publications to minors. There are also laws relating to how this content—particularly sexually explicit magazines—may be packaged and displayed. For example, in NSW, a publication classified Category 2 Restricted must not be:

- (a) displayed except in a restricted publications area, or
- (b) delivered to a person who has not made a direct request for the publication, or
- (c) delivered to a person unless it is contained in a package made of opaque material, or
- (d) published unless it displays the determined markings.⁶¹

10.69 Further, at each entrance to the premises of a ‘restricted publications area’, there must be prominently displayed a notice that reads:

RESTRICTED PUBLICATIONS AREA—PERSONS UNDER 18 MAY NOT ENTER. MEMBERS OF THE PUBLIC ARE WARNED THAT SOME MATERIAL DISPLAYED IN THIS AREA MAY CAUSE OFFENCE.⁶²

10.70 In submissions to this Inquiry, some stakeholders expressed surprise that there is concern about the offline sale and display of this content at all, considering how widely and freely much of the content may be found online, where digital offerings are ‘cheaper, more varied and subject to fewer restrictions’.⁶³ Civil Liberties Australia, for example, submitted that it ‘is hardly clear that this should be a pressing concern’, considering ‘most sexually explicit content is now accessed online’:

This ‘problem’ will almost certainly go away by itself over the next few years anyway. ... As for other offline content, it is unclear what more can be done. Australians seem generally happy in this regard.⁶⁴

10.71 The Pirate Party Australia submitted that:

The current system of sealed magazines and restricted premises is adequate to regulate sexually explicit content offline. Legal, unclassified material should be restricted, not banned.⁶⁵

60 Industry codes are discussed more fully in Ch 13.

61 *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (NSW) s 21(1).

62 *Ibid* s 49. (Upper case in original.)

63 A Hightower and Others, *Submission CI 2159*.

64 Civil Liberties Australia, *Submission CI 1143*.

65 Pirate Party Australia, *Submission CI 1588*.

10.72 Others submitted that greater restrictions should be imposed. The child protection association, Bravehearts, argued that restricted offline material, such as sexually explicit magazines and DVDs, should be ‘out of sight and out of reach of children’.⁶⁶ Media Standards Australia stated that:

All material with an R 18+ classification should be in an isolated, restricted area, and removed from all other material. This includes magazines and videos. ... Children should not be confronted by adult content images as they browse shelves in a store, whether it be for computer games, DVDs, books or magazines.⁶⁷

10.73 Another stakeholder suggested that the display and sale of content, such as sexually explicit magazines, should be prohibited entirely in ‘physical environments to which children have access’.⁶⁸

10.74 ACP Magazines submitted that ‘access restrictions should appropriately recognise the context in which consumers view and purchase magazines’ and that this

is more likely to be achieved through a consultative process that involves relevant industry participants throughout the magazine supply chain than through the imposition of a broad, statutory regime.⁶⁹

10.75 In the ALRC’s view, existing state prohibitions on the sale of R 18+ films and restricted magazines to minors are adequate. The new scheme should provide for similar restrictions, although some details should be in industry codes or Regulator standards, rather than the new Act.

10.76 However, restricting access to sexually explicit adult content offline may be achieved more consistently and effectively under the scheme recommended in this Report. The rules regarding where it may be sold and how it should be packaged and displayed should be simplified and uniform. Rather than focusing on whether magazines are properly classified or not, Regulatory activity should instead address community concerns about children’s access to this content.

Restricting access online

10.77 Many stakeholders suggested that restricting access online is very costly and almost impossible in practice. Civil Liberties Australia submitted:

there are simply no effective methods to control access to online content anything like the manner sought by most advocates. What is possible is to restrict access to some small subset of particular copies of restricted online content, and then only in particular controlled environments. The real question is whether the costs of such limited controls are worth the relatively minor, and largely symbolic, benefits.⁷⁰

10.78 The Australian Independent Record Labels Association agreed that high impact music ‘should not be available to minors for purchase online’ but submitted that labelling guidelines would be sufficient as it is not ‘practicable to deny consumer

66 Bravehearts Inc, *Submission CI 1175*.

67 Media Standards Australia Inc, *Submission CI 1104*.

68 NSW Council of Churches, *Submission CI 2162*.

69 ACP Magazines, *Submission CI 2520*.

70 Civil Liberties Australia, *Submission CI 1143*.

access to content, offensive or not, through firewalls, passwords, blacklists or any other means'.⁷¹

10.79 The Australian Recording Industry Association and the Australian Music Retailers Association also pointed to the 'inherent difficulties in controlling access to online content', difficulties replicated in relation to illegal file sharing and peer-to-peer networks. Access to physical products can be restricted, but 'the issue of controlling access to online content is fraught and will require cooperation that spans multiple industries, territories and international jurisdictions'.⁷²

10.80 Some submissions opposed any mandatory regulation of internet content. One person, reflecting a common sentiment in submissions, argued that there 'should be no restricted access to online content':

Online content cannot be completely enforced or policed. Parents should take responsibility for their child's online presence. Adults should be able to control their own access to online content.⁷³

Parental supervision

10.81 The importance of parental supervision in protecting children from adult content online was stressed in many submissions to this Inquiry. In response to the question, 'What are the most effective methods of controlling access to online content?',⁷⁴ many people essentially replied: education and parental supervision. One person stated 'I think that monitoring all media available on the internet is impossible and that providing guidelines for parents would be an easier way to help prevent minors accessing disturbing media'.⁷⁵ Another said: 'Education and parental supervision. Put the computer in the family room. Enable the existing parental access system in your devices'.⁷⁶ 'It comes down to parental supervision,' another person submitted:

If a child was to use a computer to search for pornographic or unacceptable material then it is, and always will be, up to the parents to supervise and prevent this from happening. And many advances in technology have made it easy for parents to limit and restrict what their children view on the internet.⁷⁷

10.82 Another stakeholder said that attempting to classify and restrict the internet is 'a colossal waste of time and the onus should be on parents, teachers and child carers to provide the supervision necessary to prevent their children accessing such content'.⁷⁸ FamilyVoice Australia said that 'parents are primarily responsible for monitoring their

71 Australian Independent Record Labels Association, *Submission CI 2058*.

72 The Australian Recording Industry Association Ltd and Australian Music Retailers' Association, *Submission CI 1237*.

73 Double Loop, *Submission CI 1124*.

74 Australian Law Reform Commission, *National Classification Scheme Review*, ALRC Issues Paper 40 (2011), Question 12.

75 N Smyth, *Submission CI 772*.

76 K Nicholson, *Submission CI 260*.

77 V MacDonald, *Submission CI 889*.

78 N Zeitoune, *Submission CI 1566*.

children's use of media', but emphasised that parents are 'entitled to expect appropriate help from the broader society, including the legal system'.⁷⁹

10.83 The notion that parents play a vital role in protecting their children from harmful online content has been echoed overseas. The United Kingdom's 2008 Byron Review investigated the impact of new technologies on children in response to growing concern about internet and computer game use. The review recognised that 'it is very difficult for national Governments to reduce the availability of harmful and inappropriate material' and emphasised that parents play a 'key role in managing children's access to such material'.⁸⁰ Additionally, the review recommended that parents should encourage children to develop 'the confidence and skills to navigate these new media waters safely', much as parents aid children to learn skills for safety in the offline environment, such as how to cross the road.⁸¹

10.84 For many, the difficulties of successfully controlling online content at the content provider end mean that it is necessary to shift at least part of the responsibility to protect minors to parents and guardians who are at the 'receiving end' of media content.⁸²

10.85 Peter Coroneos, former CEO of the Internet Industry Association, has advocated 'industry facilitated user empowerment':

This term recognises that end-users are ultimately in the best position, given the nature of the internet, to control what content they are able to access online. However, the internet industry does not abrogate all responsibility here—there are things that can be done to enhance the ability of end-users to assume control, specifically through the provision of information and tools to end-users.⁸³

10.86 The ALRC also envisages an important role for content providers in helping users—and parents and guardians in particular—to understand and use the tools that can enable them to better control the media content that comes into their homes.

Education and cyber-safety

10.87 Many stakeholders observed that the education of parents and consumers is one of the most important means of regulating access to online content. Some have spoken of a 'generational digital divide' between parents and their children, which may limit some parents' ability to use tools such as parental locks and internet filters.⁸⁴

10.88 Many submissions focused on education of parents as a key priority, both in terms of 'educating parents and guardians about how to use parental locks and restricted access systems',⁸⁵ and also more generalised education as to the 'dangers and

79 FamilyVoice Australia, *Submission CI 2509*.

80 T Byron, *Safer Children in a Digital World: The Report of the Byron Review (UK)* (2008), 5.

81 *Ibid.*, 4, 5.

82 P Hettich, 'YouTube to be Regulated? The FCC Sits Tight, While European Broadcast Regulators Make the Grab for the Internet' (2008) 82 *St John's Law Review* 1447, 1483.

83 P Coroneos, 'Internet Content Control in Australia: Attempting the Impossible?' (2000) 23(1) *University of New South Wales Law Journal* 238.

84 T Byron, *Safer Children in a Digital World: The Report of the Byron Review (UK)* (2008), 7.

85 Interactive Games and Entertainment Association, *Submission CI 1101*.

potential consequences of online activities’.⁸⁶ The Australian Mobile Telecommunications Association, for example, submitted that the most effective method of controlling access to online content

lies in empowering and educating consumers so that they can exercise their own controls over the content they choose to access and/or restrict their children from accessing online.⁸⁷

10.89 The NSW Council of Churches submitted that children’s access to potentially inappropriate content may be better controlled online by ‘funding effective education strategies including advertisements, parental education and child education including in all public schools’.⁸⁸ Likewise, Bravehearts submitted that online safety should be ‘part of the personal safety curriculum taught to children in schools’:

Components of cyber-safety curriculum should include: Unwanted contact; Inappropriate content; Safe behaviour online and protecting personal identity information; Cyberbullying.⁸⁹

10.90 SBS submitted that ‘consumer education (including media literacy education in school curricula)’ and ‘the availability of tools such as parental locks and filtering software in conjunction with a consistent classification marking scheme should be relied on to control access to content’.⁹⁰

ISP-level filters

10.91 A number of ISPs offer an internet service filtered at the ISP level. End users do not need to install additional software on their personal computers. Though some ISP-level filters offer a single ‘clean-feed’, which screens the same content for all users, many allow users to tailor the level of filtering based on content categories.

10.92 Index-based filtering and analysis-based filtering are the two primary technologies.⁹¹ Index-based filtering operates from a categorised index of URLs that is created either manually, through human searches and analysis of content, or through analysis-based filtering. Filtering can be based on ‘white lists’—exclusively permitting specific content while blocking all other content; or ‘blacklists’—exclusively denying specific content while permitting all other content.⁹²

10.93 Index-based filtering is often used in conjunction with analysis-based filtering, which employs key word, image analysis, file type, link analysis, reputation, and deep

86 National Civic Council, *Submission CI 2226*.

87 Australian Mobile Telecommunications Association, *Submission CI 1190*.

88 NSW Council of Churches, *Submission CI 2162*.

89 Bravehearts Inc, *Submission CI 1175*.

90 SBS, *Submission CI 1833*.

91 Australian Communications and Media Authority, *Closed Environment Testing of IP-Level Internet Content Filtering* (2008), 12–14.

92 *Ibid*, 13.

packet inspection criteria to analyse content offline or in real-time.⁹³ Improvements in filtering technology have been widely documented.⁹⁴

10.94 Although generally considered to be more difficult to circumvent than PC-based filters, ISP-level filters remain relatively easy for tech-savvy users to circumvent.⁹⁵

Home filters and parental locks

10.95 PC-based content filters rely on software installed on a user's personal computer. PC-based content filters employ technology similar to that used by ISP-level filters, often utilizing a combination of index- and analysis-based filtering methods. Many allow for content tracking and reporting, and allow users to tailor the content filtered across multiple categories for several different users.⁹⁶

10.96 In 2007, the Australian Government announced the 'NetAlert' program, which offered free PC-based filters to Australian families. The program was discontinued in 2009, but PC-based filters are still widely available in Australia. The IIA Code of Practice requires that ISPs provide an optional content filter to users.⁹⁷

10.97 Many submitted that filtering software and parental locks were the best means of controlling minor's access to adult content. Dr Gregor Urbas and Tristan Kelly, for example, submitted:

Dynamic filters may be of some use to users, including parents, who wish to voluntarily filter material. In particular, PC-based filters provide parents with the best option to control and monitor their children's browsing habits.⁹⁸

10.98 Another stakeholder commented that 'optional filters on client-side computers are a more efficient way of controlling online access, without blocking any adult's right to view what they wish to'.⁹⁹ The Arts Law Centre of Australia likewise submitted that resources should be dedicated to

providing [filtering] software to those who would like it and educating the community about the best ways to take responsibility for themselves and their children.¹⁰⁰

93 Ibid, 14.

94 See, eg, European Union Safer Internet Plus Programme, *Safer Internet: Test and benchmark of products and services to voluntarily filter Internet content for children between 6 and 16 years*, Synthesis Report (2008).

95 See Enex Test Lab, *ISP Content Filtering Pilot Report* (October 2009). See also G Urbas and T Kelly, *Submission CI 1151*.

96 Australian Communications and Media Authority, *Filtering Software* <www.acma.gov.au/WEB/STANDARD/pc=PC_90167> at 30 January 2012.

97 Internet Industry Association, *Internet Industry Code of Practice: Content Services Code for Industry Co-regulation in the Area of Content Services* (2008) cl 19. Filters must be provided free of charge or sold on a cost-recovery basis. Eight filters are currently approved by the IIA, with prices ranging from free to \$70 per year: Internet Industry Association, *Family Friendly Filters 2011* <<http://www.iaa.net.au>> at 30 January 2012.

98 G Urbas and T Kelly, *Submission CI 1151*.

99 S Gillespie, *Submission CI 191*.

100 The Arts Law Centre of Australia, *Submission CI 1299*.

10.99 Parental locks may also be used to block certain television content. Since February 2011, all televisions sold in Australia must have parental lock capabilities.¹⁰¹ Free TV Australia noted that most digital televisions and digital set-top-boxes have a parental lock function.

Parental Locks allow you to block programs based on their classification (for example, G, PG, M or MA), or in some cases block whole channels, via the use of a PIN (personal identification number). Once the function is activated, only those with access to the PIN can view the blocked programming or channel.¹⁰²

10.100 The ALRC considers that content providers should have an obligation to take steps to restrict access to adult content. Content providers will usually not be in the business of providing parental lock technology or internet filters. However, content providers should have a role in the promotion of the use of parental locks and internet filters. If such technology is the best way to prevent minors from accessing adult content, then providers of adult content—particularly commercial providers—should have a responsibility to promote the use of these tools. For some content providers, promoting these tools may be a reasonable step to restricting access to adult content. Whether this will be sufficient for any particular content provider may depend, in part, on how widely the technologies are in fact understood and used in the Australian community.

Regulator notices to providers of filters

10.101 Currently, upon receipt of a complaint about certain higher-level online content hosted outside Australia (essentially, RC and X 18+ content, and MA 15+ and R 18+ content not behind a restricted access system), and after investigating that complaint, the ACMA is required to notify providers of family friendly filters, so that the content is added to the list of URLs that may be filtered.¹⁰³

10.102 In the ALRC's view, there is no need for a Regulator to notify filter providers of MA 15+, R 18+ and X 18+ online content. There are many highly sophisticated commercial internet filters that index, and allow users to block, millions of URLs and other digital content from their home computers. Such filters do not rely on a regulator's lists of a few thousand URLs that have been the subject of complaints. Maintaining such lists appears to be a costly and unnecessary regulatory activity that should be abandoned.

10.103 The ALRC suggests that the new Act should not require the Regulator to notify internet filter providers about adult content.

Restricted access systems

10.104 Restricted access systems or access control systems have been used to help prevent minors from accessing certain content online, essentially by seeking to verify

101 *Broadcasting Services Act 1992* (Cth) s 130B; *Broadcasting and Datacasting Services (Parental Lock) Technical Standard 2010* (Cth).

102 Free TV Australia, *How does the Parental Lock work?* <http://www.freetv.com.au/content_common/pg-how-does-the-parental-lock-work.seo> at 9 September 2011.

103 *Broadcasting Services Act 1992* (Cth) sch 5 s 40.

the age of persons trying to access content. Although they may be a suitable means of restricting access for some content providers, others should not be required to use such systems.

10.105 Schedule 7 of the *Broadcasting Services Act* provides that certain content online must only be provided behind a restricted access system.¹⁰⁴ Under the *Restricted Access System Declaration 2007* (Cth), for R 18+ content, an access-control system must:

- require an application for access to the content; and
- require proof of age that the applicant is over 18 years of age; and
- include a risk analysis of the kind of proof of age submitted; and
- verify the proof of age by applying the risk analysis; and
- provide warnings as to the nature of the content; and
- provide safety information for parents and guardians on how to control access to the content; and
- limit access to the content by the use of a PIN or some other means; and
- include relevant quality assurance measures; and
- retain records of age verification for a period of 2 years after which the records are to be destroyed.¹⁰⁵

10.106 Under the *Broadcasting Services Act*, X 18+ content, and what is currently Category 1 and Category 2 Restricted content, is prohibited whether or not it is subject to a restricted access system.

10.107 Some content providers report that they have successfully used restricted access systems. Telstra submitted that to access some of its website content, customers must provide their credit card details, which ‘constitutes verification that they are at least 18 years of age and allows them to access age-restricted content’.¹⁰⁶

10.108 Many stakeholders and comments on the ALRC’s online forum about this topic were strongly critical of restricted access systems. The NSW Council for Civil Liberties has also said that methods of restricted access systems—PINs, passwords, etc—are ‘ineffective, intrusive and encourage identity theft’.¹⁰⁷ Such systems were said to be a considerable burden on content providers, particularly non-commercial content providers. If content providers chose to take down their content entirely, rather than go to the expense of setting up an age-verification system, the law would effectively censor this content.

104 Ibid sch 7 cl 14.

105 Australian Communications and Media Authority, *Explanatory Statement, Restricted Access Systems Declaration 2007*.

106 Telstra, *Submission CI 1184*.

107 New South Wales Council for Civil Liberties, *Submission on the ACMA Restricted Access System Declaration* (2007), 3.

10.109 The IIA described the *Restricted Access System Declaration* as ‘unworkable to the extent that it requires an online service provider to obtain evidence that a customer is 18’:

In contrast, currently under the IIA’s industry code, use of a credit card is regarded as sufficient evidence that a customer is over 18 years of age. This is the case, notwithstanding that it is impossible for online service providers to know whether the card provided is a debit or a credit card and/or whether the person holding the card is in fact 18 years or older. Indeed, it would be prohibitively costly for a provider of an online service to obtain evidence of the age of each individual customer. ... Consequently, in our view, the requirements set out in the RAS should be replaced with a requirement that the provider publish a ‘click-through’ acknowledgement that the viewer is 18 years or older.¹⁰⁸

10.110 In the ALRC’s view, it is not a strong criticism of restricted access systems that some minors—particularly older teens—can get around the systems, or that the systems do not operate perfectly. Like restrictions on the sale of liquor and cigarettes, online age verification systems may provide a useful warning and prevent many minors from accessing the content, even if the systems are not impenetrable.

10.111 Although this Inquiry does not review the merits of such technologies in detail, the ALRC shares many of the concerns raised about online age-verification systems, particularly those concerns about privacy and the cost burdens they may place on non-commercial content providers.

10.112 It may be unreasonable and ineffective to require all providers of online adult content to verify the age of persons who attempt to access their content. By recommending a platform-neutral law that requires content providers to take reasonable steps to restrict access to adult content, the ALRC does not suggest that content providers must use age-verification tools—particularly if the cost of such tools is out of proportion to their effectiveness. However, such tools may be useful and appropriate for some content providers.

Warnings

10.113 Adults and minors who do not wish to view adult content may be assisted by suitable warnings—perhaps on a website or at the start of an online film clip. The effectiveness of warnings about online content are also limited by the fact that, as one person wrote on the ALRC’s online forum, a website ‘isn’t like a building, with a nice front door for the public to come through. Every page is likely to be directly accessible’.¹⁰⁹ Furthermore, such warnings may not deter, much less prevent, persons from accessing content that they would like to access. However, warnings may serve a useful function for those who do not wish to see the content, and for parents and guardians who supervise children’s access to the internet.

108 Internet Industry Association, *Submission CI 2528*.

109 Australian Law Reform Commission, *Classification Discussion Forum* <www.alrc.gov.au/public-forum/classification-forum> at 15 December 2011.

Restrictions on broadcasting

10.114 Sometimes content not suitable for minors is prohibited on a specific platform, in part because minors are thought to have more ready access to that platform. For example, the *Broadcasting Services Act* prohibits commercial free to air television from broadcasting R 18+ content at any time of the day.¹¹⁰ Subscription broadcast television channels are also prohibited from broadcasting R 18+ content.¹¹¹ Subscription narrowcast television channels may broadcast R 18+ content, if the content is restricted to people with ‘appropriate disabling devices’.¹¹² X 18+ films, of course, may not be broadcast even in the ACT and NT, where they are largely legal to sell.¹¹³

10.115 Platform-neutral media regulation may suggest that, in time, these laws should also be reconsidered. However, few stakeholders commented on these specific prohibitions, and in the ALRC’s view, such laws should not be relaxed without research into the availability, use and community understanding of parental locks.

10.116 As noted in Chapter 8, the European Union’s Audio-visual Media Services Directive, which extends regulation of television broadcasting to online and other forms of audiovisual media, distinguishes between linear and non-linear services. On linear services, member States must ensure that broadcasters do not include programs which ‘might seriously impair the physical, mental or moral development of minors, in particular programmes that involve pornography or gratuitous violence’.¹¹⁴ It remains to be seen whether this distinction between linear and non-linear services will continue to be relevant.

Recommendation 10–3 The Classification of Media Content Act should provide that the reasonable steps that content providers must take to restrict access to adult content may be set out in:

- (a) industry codes, approved and enforced by the Regulator; and
- (b) standards, issued and enforced by the Regulator.

These codes and declarations may be developed for different types of content, content providers and industries, but could include:

110 *Broadcasting Services Act 1992* (Cth) sch 2 cls 7(1)(ga), 9(1)(ga), 11(3)(b).

111 *Ibid* sch 2 cls 10(g).

112 ASTRA, *Codes of Practice 2007: Subscription Narrowcast Television* (2007), Code 3 ‘Classification and Placement of Programming’ cl 3.4. ‘Material classified R 18+ can only be broadcast by a subscription narrowcasting service, and only where access to that material is restricted’: ASTRA Subscription Television Australia, *Submission CI 1223*.

113 *Broadcasting Services Act 1992* (Cth) sch 2 cls 7(1)(g), 9(1)(g), 10(f), 11(3)(a).

114 Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) (‘AVMS Directive’) art 27(1).

- (a) how and where to advertise, package and display hardcopy adult content;
- (b) the promotion of parental locks and user-based computer filters;
- (c) how to confirm the age of persons accessing adult content online; and
- (d) how to provide warnings online.

Removing mandatory restrictions on MA 15+ content

10.117 The ALRC recommends that mandatory access restrictions should no longer apply to content that has been, or is likely to be, classified MA 15+. Currently, MA 15+ is a classification to which certain restrictions apply, but restrictions vary considerably between platforms and jurisdictions. For example:

- MA 15+ television programs may only be shown on commercial free-to-air television after 9pm, but may be shown on subscription television at any time;¹¹⁵
- MA 15+ films and computer games may not be sold or hired to persons under 15, unless the minor is accompanied by a parent or guardian;¹¹⁶
- MA 15+ content online and hosted in Australia must generally be subject to a restricted access system if it is provided by a commercial or mobile premium service;¹¹⁷ and
- cinemas must not permit persons under 15 to watch an MA 15+ film unless the minor is with a parent or guardian (precise restrictions vary between states).¹¹⁸

10.118 With respect to MA 15+ material, the Guidelines for the Classification of Films and Computer Games state the following:

- The impact of material classified MA 15+ should be no higher than strong.
- Material classified MA 15+ is considered unsuitable for persons under 15 years of age. It is a legally restricted category.
- The treatment of strong themes should be justified by context.
- Violence should be justified by context.
- Sexual violence may be implied, if justified by context.
- Sexual activity may be implied.
- Strong coarse language may be used.

115 *Broadcasting Services Act 1992* (Cth) s 123(3A).

116 Eg, *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (NSW) ss 9(4), 30(2); *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* (Vic) ss 20(5), 42(2).

117 *Broadcasting Services Act 1992* (Cth) sch 7 s 20.

118 Eg, *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (NSW) s 13(1); *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* (Vic) s 14(1).

- Aggressive or very strong coarse language should be infrequent.
- Drug use should be justified by context.
- Nudity should be justified by context.¹¹⁹

10.119 Preventing persons under the age of 15 from accessing MA 15+ films and computer games is problematic offline and near impossible online. The existing laws that endeavour to restrict online access to MA 15+ content are widely seen as ineffective and unenforceable.¹²⁰ The classification symbols and warnings may serve a useful purpose as consumer advice, but arguably there is little or no further practical benefit in legal access restrictions for this content, particularly online. Few countries impose mandatory access restrictions on content at the MA 15+ level.

10.120 The ALRC's proposal to remove mandatory access restrictions on MA 15+ media content¹²¹ received broad support.¹²² However, some were opposed to the proposal. The Classification Board stressed that the impact of MA 15+ content is strong and not suitable for persons under 15 years of age:

How is the proposed change to remove mandatory access restrictions to MA 15+ content reconciled under the Guiding Principle of 'Children should be protected from material likely to harm or disturb them?', and would this meet community expectations?¹²³

10.121 FamilyVoice Australia said that such a change would be a 'significant reduction in the protection of children aged less than 15 from unsuitable material':

The current National Classification Scheme recognises that there is a development in children's capacity to appropriately deal with exposure to media content with elements such as sex, violence, drug use and adult themes. ... Removing these legal restrictions would mean that children of any age could legally be sold videos or computer games classified MA15+ without any parental involvement.¹²⁴

10.122 The Australian Children's Commissioners and Guardians (ACCG) was also 'concerned that the impact of content classified within the current MA 15+ guidelines may warrant legal restrictions on access'. The ACCG also submitted that the R 18+ classification is a high threshold, and there is 'a considerable amount of content with strong themes not appropriate for children in categories below the R 18+ classification'. Voluntary restrictions are 'potentially unrealistic and unworkable in the long term', and if mandatory access restrictions on MA 15+ content are removed, then

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

120 Eg, I Graham, *Submission CI 1244*.

121 Proposed in the Discussion Paper: Australian Law Reform Commission, *National Classification Scheme Review*, ALRC Discussion Paper 77 (2011), Proposal 8–3.

122 Eg, Motion Picture Distributors Association of Australia, *Submission CI 2513*; National Association of Cinema Operators - Australasia, *Submission CI 2514*; Google, *Submission CI 2512*; Arts Law Centre of Australia, *Submission CI 2490*; Foxtel, *Submission CI 2497*; J Denham, *Submission CI 2464*; Interactive Games and Entertainment Association, *Submission CI 2470*; Telstra, *Submission CI 2469*; D Henselin, *Submission CI 2473*.

123 Classification Board, *Submission CI 2485*.

124 FamilyVoice Australia, *Submission CI 2509*.

the classification guidelines should be reviewed, so that some content now classified MA 15+ would instead be classified R 18+.¹²⁵

10.123 Stakeholders held differing views on whether the effectiveness of restricting access on one platform should affect whether access should be restricted on other platforms. The Motion Picture Distributors Association of Australia submitted that ‘restrictions which are unenforceable in other environments should not be imposed on cinema management and staff’.¹²⁶ On the other hand, it was argued that the ineffectiveness of restrictions online does not justify removing access restrictions that work in ‘cinemas and shops in the streets who can see their customers and estimate the age of unaccompanied children’.¹²⁷

10.124 The ALRC’s recommendation on this point does not imply that MA 15+ content is suitable for persons under 15. In fact, in the ALRC’s view, some content providers should continue to refuse to sell these films and computer games to young unaccompanied minors, even if they are not required by law to do so. Voluntary restrictions on MA 15+ content may be set out in industry codes of practice. There are also arguments for imposing time-zone restrictions on the delivery of MA 15+ content.¹²⁸

10.125 It might also be noted that if it is too difficult or costly for content providers to take steps to restrict access to strong content to persons over the age of 15, but it is possible to take steps to restrict access to persons over 18, then perhaps rather than remove restrictions entirely from MA 15+ content, the content should be restricted to persons over 18. This would involve reviewing classification criteria to consider whether some content that would now be MA 15+ should instead be R 18+.

Recommendation 10–4 The Classification of Media Content Act should not require access restrictions on MA 15+ media content. Voluntary access restrictions on MA 15+ content should be developed under industry codes, for example, for cinemas and retail outlets.

Young people and cyber-safety

10.126 There will always be challenges in protecting children from material likely to harm or disturb them, particularly in the online environment. The nature of the risks is varied and changeable, and classifying content or restricting access can never be the only response to these challenges. As the Joint Select Committee on Cyber-Safety observed in its interim report, *High-Wire Act: Cyber-Safety and the Young*:

The benefits of online applications for young people in our society are accompanied by exposure to a range of potential dangers. Some of the most obvious include cyber-

125 Australian Children’s Commissioners and Guardians, *Submission CI 2499*.

126 Motion Picture Distributors Association of Australia, *Submission CI 2513*.

127 I Graham, *Submission CI 2507*.

128 Time-zone restrictions are discussed in Ch 8.

bullying, access to or accessing illegal and prohibited material, online abuse, inappropriate social and health environments, identity theft, and breaches of privacy.¹²⁹

10.127 A recent survey was conducted of 400 young Australians and their families, *AU Kids Online*.¹³⁰ This was conducted in parallel with a survey of 25 European nations, carried out by *EU Kids Online*. The Australian study found that Australian children aged 9–16 are very active users of the internet, with more children in the Australian survey going online at school than the EU average (96% : 63%), at home (96% : 87%), and when ‘out and about’ (31% : 9%). The study found that they were almost four times more likely than the EU average to be accessing the internet from a handheld device (46% : 12%).

10.128 The risks that were identified by the Australian 11–16 year olds surveyed included: exposure to sexual images online (encountered by 28%); bullying on the internet (13%); receiving sexual messages, or ‘sexting’ (15%); and seeing ‘harmful’ user-generated content (34%)—the latter included hate messages, self-harm, drug experiences, ‘ways to be very thin’ and suicide sites.¹³¹

10.129 The likelihood of viewing sexual images online varied substantially by age. While 27% of both boys and girls aged 9–12 had seen sexual images in the last 12 months, and 16% had seen them on websites, 58% of boys aged 13–16 had seen sexual images and 45% had viewed them online, while 61% of girls aged 13–16 had seen sexual images and 39% had viewed them online. The likelihood of seeing images of people having sex, as compared to viewing nudity, was five times greater for those aged 15–16 as compared to those aged 11–12.

10.130 The survey found that 70% of Australian parents engaged in active mediation strategies concerning their children’s internet use that ranged from talking to children about their internet use, setting rules for internet use, and blocking or filtering websites on the home computer. For Australian children, the primary source of internet safety advice was teachers (83% of those surveyed), then parents (75%), then peers (32%).

10.131 Such findings draw attention to the multi-faceted nature of risk and cyber-safety issues for children online, and the need for responses that incorporate public education and support for parents and guardians. In this respect, initiatives such as the ACMA’s *Cybersmart* program play an important role in informing, educating and empowering parents, children and teachers as key parts of a successful cyber-safety strategy.¹³²

129 Parliament of Australia, Joint Select Committee on Cyber-Safety, *High-Wire Act: Cyber-Safety and the Young*, Interim Report, June 2011, 6.

130 L. Green, D. Brady, K. Olafsson, J. Hartley, C. Lumby, *Risks and Safety for Australian Children on the Internet*, ARC Centre of Excellence for Creative Industries and Innovation (2011). See also L. Green and Others, *Submission CI 2522*.

131 *Ibid.*, 9.

132 Australian Communications and Media Authority, *About Cybersmart*, <<http://www.cybersmart.gov.au/About.aspx>> at 22 February 2012. See also Department of the Prime Minister and Cabinet, *Connecting with Confidence: Optimising Australia’s Digital Future: Public Discussion Paper* (2011).

10.132 Research that actively engages young people as well as organisations addressing their health and well-being, such as that being undertaken through the Young and Well Cooperative Research Centre, will also continue to play a key role in addressing these ongoing issues relating to young people and convergent media.¹³³

133 Young and Well Cooperative Research Centre <<http://www.yawcrc.org.au/about>> at 22 February 2011.