

11. The Scope of Prohibited Content

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Summary

11.1 This chapter discusses the scope of the current Refused Classification (RC) category and the legislative framework defining RC content. Under the current framework, RC content is essentially banned, and its sale and distribution is prohibited by Commonwealth, state and territory enforcement legislation. The ALRC recommends that, under the Classification of Media Content Act, the RC category should be named ‘Prohibited’ to better reflect the nature of the category.

11.2 The RC category has been criticised for being overly broad in various ways, including by covering content that depicts or describes particular sexual fetishes, which are legal between consenting adults, or instructs in matters of crime or violence.

11.3 The ALRC recommends that the Classification of Media Content Act should frame the ‘Prohibited’ category more narrowly than the current ‘Refused Classification’ category. In particular, the Australian Government should review current prohibitions in relation to:

- the depiction of sexual fetishes in films; and
- ‘detailed instruction in the use of proscribed drugs’.

The Government should also consider confining the prohibition on content that ‘promotes, incites or instructs in matters of crime’ to ‘serious crime’.

Overview of the RC category

Legal basis

11.4 The RC classification category is the highest classification that can be given to media content in Australia.¹ The framework under which content may be classified as RC contains three elements: the *Classification (Publications, Films and Computer Games) Act 1995* (Cth) (*Classification Act*); the National Classification Code (the Code); and the *Guidelines for the Classification of Publications* and *Guidelines for the Classification of Films and Computer Games* (together referred to as the Guidelines).

Classification Act

11.5 The *Classification Act* provides that publications, films or computer games that advocate the doing of a terrorist act must be classified RC. However, in all other cases, publications, films and computer games are to be classified in accordance with the Code and the Guidelines.²

Classification Code

11.6 The Code provides that publications, films and computer games are to be classified according to separate tables set out in relation to publications, films and computer games respectively.³ These tables are prescriptive.⁴

11.7 Item 1 within each table describes content that is to be classified RC. The description of RC content is identical in all relevant respects.⁵ 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 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 18⁶ (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).

11.8 The main difference between types of media content that may be classified RC is that computer games determined to be unsuitable for a minor to see or play are to be

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

2 *Classification (Publications, Films and Computer Games) Regulations 2005* (Cth) ss 9, 9A.

3 *National Classification Code 2005* (Cth) cls 1–4.

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

5 However, note that the table relating to publications also includes descriptions.

6 The Code as originally enacted referred to a ‘child under 16’.

classified RC because there is currently no R 18+ classification for computer games.⁷ However, on 15 February 2012 the Australian Government introduced a Bill⁸ to amend the *Classification Act* to introduce an R 18+ classification category for computer games (along with necessary consequential amendments to the *Broadcasting Services Act 1992* (Cth)).⁹

Classification guidelines

11.9 With respect to the RC classification, the *Guidelines for the Classification of Films and Computer Games* provide that:

Films that exceed the R 18+ and X 18+ classification categories will be Refused Classification. Computer games that exceed the MA 15+ classification category will be Refused Classification.

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.

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.

⁷ *National Classification Code 2005* (Cth) cl 4(1)(d). See Chs 2, 9.

⁸ Classification (Publications, Films and Computer Games) Amendment (R 18+ Computer Games) Bill 2012 (Cth).

⁹ See also Explanatory Memorandum, Classification (Publications, Films and Computer Games) Amendment (R 18+ Computer Games) Bill 2012 (Cth).

11.10 The *Guidelines for the Classification of Publications* contain similar provisions, with a few significant differences, which are highlighted where relevant.

The current scope of RC content

11.11 Some examples of RC content are discussed below. Given that content classified RC results in that content being banned for sale or distribution in Australia, it is perhaps unsurprising that a number of RC classification decisions have been tested in litigation.

Certain matters presented in an offensive way—Code item 1(a)

11.12 The idea of certain content being ‘offensive’ to community standards underpins some of the rationale for the RC classification, with its origins in the reform of Australian censorship laws undertaken in the 1970s. For example, item 1(a) of the Code tables refers to content that offends against the standards of morality, decency and propriety generally accepted by reasonable adults; and item 1(b) refers to content causing offence to a reasonable adult. Further, some parts of the Guidelines also refer to offensiveness.

11.13 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 [that] 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 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.¹⁰

Fetish activity

11.14 The *Guidelines for the Classification of Films and Computer Games* specifically provide that ‘gratuitous, exploitative or offensive depictions of sexual activity accompanied by fetishes or practices which are offensive or abhorrent’¹¹ are to be classified RC.

11.15 These Guidelines also provide that the X 18+ classification for films cannot accommodate fetishes such as body piercing; application of substances such as candle wax; ‘golden showers’; bondage; spanking; or fisting.

11.16 The listing of these fetishes first appeared in the *Guidelines for the Classification of Films and Videotapes* in 2000. Before then, guidelines expressly provided that the X 18+ classification could accommodate ‘real depictions of sexual intercourse and other sexual activity between consenting adults, including mild

¹⁰ *NSW Council for Civil Liberties Inc v Classification Review Board* (2007) 159 FCR 108, [59].

¹¹ *Guidelines for the Classification of Films and Computer Games* (Cth).

fetishes'.¹² However, no depiction of 'offensive fetishes' was permitted.¹³ The guidelines at that time defined 'fetish' as:

An object, an action, or a non-sexual part of the body which gives sexual gratification. Fetishes range from mild to offensive. An example of a **mild fetish** is rubber wear. **Offensive fetishes** include abhorrent phenomena such as coprophilia.¹⁴

11.17 At that time, films and videos that contained elements beyond those permitted in the X 18+ classification—for example, offensive fetishes—were to be classified RC.¹⁵

11.18 The inclusion of the above-mentioned six fetishes in the *Guidelines for the Classification of Films and Videotapes*, as well as other amendments, including changing the definition of 'fetish' so only the first sentence above remained, served to 'further restrict the content of the material permitted in the X classification'.¹⁶

11.19 This change arose in the context of the Australian Government's proposal for the abolition of the X 18+ classification and for the establishment of a new classification category, NVE (non-violent erotica), and the Government's eventual decision to 'retain the X classification for sexually explicit videos but with a more restricted content'.¹⁷ Since the listing of the fetishes in the relevant Guidelines, adult entertainment films depicting sexual activity between consenting adults have been classified RC for containing live portrayals of such fetishes.¹⁸

11.20 If a fetish is not given as an example in the Guidelines, 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.¹⁹

11.21 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. Only publications which describe and depict fetishes where it is apparent that there is no consent or where there is physical harm, or which contain exploitative descriptions or depictions of sexual activity accompanied by fetishes that are revolting or abhorrent, would constitute RC content.

12 Office of Film and Literature Classification, *Guidelines for the Classification of Films and Videotapes (Amendment No. 2)* (1999).

13 Ibid.

14 Ibid.

15 Ibid.

16 Explanatory Note, Commonwealth of Australia Gazette, *Guidelines for the Classification of Films and Videotapes (Amendment No 3)*, 6 September 2000, No GN 35, 2417.

17 Supplementary Explanatory Memorandum, Classification (Publications, Films and Computer Games) Amendment Bill (No 2) 1999 (Cth), 1.

18 Eg, Classification Board, *Decision on Elexis Unleashed Vol 2* (2011) was refused classification because of depictions of the application of candle wax. Another example is Classification Board, *Decision on Rough Sex 2* (2011) refused classification because it depicted bondage and asphyxiation.

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

Offensive depictions or descriptions of children—Code item 1(b)

11.22 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 Code tables and in other parts of the Code.²⁰ The phrase has been subject to judicial consideration in respect of the X 18+ category for films.²¹

Child sexual abuse

11.23 The Guidelines provide that publications, films and computer games are to be classified RC if they contain

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.²²

11.24 The use of the term ‘child sexual abuse’, rather than ‘child pornography’, may recognise that, as one commentator observed, ‘it is generally accepted that children are harmed whenever child pornography is created, disseminated and viewed’.²³ The Internet Watch Foundation has explained:

The IWF uses the term **child sexual abuse** content to accurately reflect the gravity of the images we deal with. Please note that **child 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**.²⁴

11.25 As discussed in more detail below, the relevant terms used in the *Criminal Code* (Cth) are ‘child pornography material’ and ‘child abuse material’.²⁵ The ALRC also uses ‘child sexual abuse content’ as a generic term in this Report.

Sexual activity involving minors

11.26 Any representation of persons less than 18 years of age involved in consensual sexual activity could potentially be classified RC, even though they may be legally permitted to consent to sexual activity. For example, ‘sexting’ content²⁶ could fall

20 *National Classification Code 2005* (Cth) cls 2, 2(a), 3(2)(a).

21 *Adultshop.Com Ltd v Members of the Classification Review Board* (2008) 169 FCR 31. The Federal Court has 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’. *Adultshop.Com Ltd v Members of the Classification Review Board* (2007) 243 ALR 752, [170].

22 Classification Board, *Decision on ACMA 2011001035 Item 3* (2011) confirmed that 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.

23 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.

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

25 *Criminal Code* (Cth) s 473.1.

26 ‘Sexting’ refers to ‘sending sexually explicit or sexually suggestive text messages’ and ‘the electronic transfer of nude and semi-nude images via mobile phone’. See K Albury, N Funnell and E Noonan, ‘The

within the bounds of the RC classification category—even where those involved are over the age of consent, but under 18 years of age. One submission to this Inquiry stated:

Sexting is another example where laws designed to pick up one group of people (users of child pornography) are inadvertently picking up private individuals who should not be expected to know better. That is, it is unreasonable that the law even has reach into such distribution.²⁷

11.27 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 novitiate 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.²⁸

11.28 The *Guidelines for the Classification of Publications* also refer to ‘sexualised nudity’, which includes ‘poses, props, text and backgrounds that are sexually suggestive’.

Promoting, inciting or instructing in crime—Code item 1(c)

11.29 This category of RC 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)—on which item 1(c) of the Code was based—indicates that the original expression was ‘promotes, incites or *encourages terrorism*’.²⁹ 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.³⁰

11.30 Judicial consideration of this content has focused on matters of crime. The Federal Court of Australia has expressly rejected the contention that the crime must be a serious one.³¹ Merkel J observed that ‘what may be a less or more serious crime may often be a matter in the mind of the beholder’.³² The phrase ‘matters of violence’ in item 1(c) of the tables in the Code has not been subject to detailed judicial interpretation.

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.

27 J Trevaskis, *Submission CI 2493*.

28 Classification Review Board, *Decision on Holy Virgins* (2008), 5. This is not the only such case. For example 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.

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

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

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

32 *Ibid*, 478.

Content instructing how to commit crime

11.31 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 crime can be committed,³³ and, secondly, there must be ‘some element of encouraging or exhorting the commission of crime’.³⁴ An objective test is used to determine whether the second element is met.³⁵ Accordingly, the actual intent of the author or publisher is not relevant.³⁶ 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.³⁷

11.32 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’.³⁸ The decision was confirmed by the Classification Review Board.³⁹ 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.⁴⁰

11.33 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.⁴¹ 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)’, among other things.⁴²

Drug use

11.34 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

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

34 *Ibid.*, 242.

35 *Ibid.*, 239, 242, 257.

36 *Ibid.*, 242.

37 *Ibid.*, 240, 241–242, 256–257.

38 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.

39 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.

40 *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.

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

42 *Ibid.*, [1].

RC. The Classification Board has classified online content as RC because the text constituted detailed instruction in ‘recreational’ drug use and promoted such drug use.⁴³

Advocating a terrorist act—Act s 9A

11.35 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 had 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,⁴⁴ but the application was dismissed.⁴⁵ While judgment was reserved in this case, the Australian Government released a discussion paper about material that advocates terrorist acts.⁴⁶ 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.⁴⁷

11.36 The Australian Government had hoped that agreement could be achieved through the Standing Committee of Attorneys-General (SCAG) to amend the Code and Guidelines in this respect.⁴⁸ However, the required unanimous support was not forthcoming,⁴⁹ so the Parliament of Australia amended the *Classification Act* by inserting s 9A,⁵⁰ which provides that a publication, film or computer game that advocates the doing of a terrorist act must be classified RC.

11.37 The Act adopted the same use of the terms ‘advocates’ and ‘terrorist act’ that are used in the *Criminal Code*.⁵¹ The Classification Board has classified some online content as RC on the basis of s 9A of the *Classification Act*.⁵²

43 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.

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

45 *NSW Council for Civil Liberties Inc v Classification Review Board* (2007) 159 FCR 108. In doing so the Federal Court expressly rejected the argument that the words ‘promote’ and ‘incite’ contain a requirement to look to the effect or likely effect of the action: *NSW Council for Civil Liberties Inc v Classification Review Board* (2007) 159 FCR 108, [67].

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

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

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

49 *Ibid*, 18–19.

50 *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).

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

Computer games that are unsuitable for minors

11.38 At the time of writing, there is no R 18+ classification category for computer games and computer game content that is unsuitable for a minor to see or play must be classified RC. Accordingly, the *Guidelines for the Classification of Films and Computer Games* state that computer games that ‘exceed the MA 15+ classification category will be [RC]’.⁵³

11.39 In March 2011, the Classification Review Board classified the computer game *Mortal Kombat* as RC, on the basis of the violence it contained.⁵⁴ The Classification Board also classified the game *The Witcher 2: Assassins of Kings* as RC because it ‘contains sexual activity related to incentives and rewards’.⁵⁵

11.40 However, if the Australian Parliament passes the Classification (Publications, Films and Computer Games) Amendment (R 18+ Computer Games) Bill 2012 then there will be an R 18+ category for computer games from 1 January 2013.

Renaming the RC category

11.41 The category name ‘Refused Classification’ is problematic for two reasons. First, the plain meaning of the term is confusing because content that is ‘Refused Classification’ has, in fact, received a classification. That is, the term is open to misunderstanding because it does not make it clear that the content has been subject to a classification decision-making process. This may give the erroneous impression that, for example, RC content is ‘material that the Classification Board is incapable of classifying’.⁵⁶

11.42 Secondly, the term does not make clear the important implications of content being classified as RC—that is, the content is effectively banned and may not be sold, screened, provided online or otherwise distributed.

11.43 The RC category should be named to better reflect its nature. In the ALRC’s view, referring to ‘Prohibited’ content would be more appropriate, reflecting the fact that the distribution of the content is prohibited.

11.44 Schedules 5 and 7 of the *Broadcasting Services Act 1992* already use the terms ‘prohibited content’ and ‘potentially prohibited content’ to refer to categories of online content that include, but are broader than, the RC category. This includes, for example, content that has been classified MA 15+, access to which is not subject to a ‘restricted access system’.⁵⁷ The legislative framework for the new National Classification Scheme would replace these schedules, removing any confusion between these terms and a new ‘Prohibited’ classification for content.

52 Eg, 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.

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

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

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

56 R Harvey, *Submission CI 2467*.

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

Recommendation 11–1 Under the Classification of Media Content Act, the ‘Refused Classification’ category of content should be named ‘Prohibited’.

Reforming the scope of Prohibited content

11.45 The SCAG meeting, in December 2010, agreed that the review of the National Classification Scheme to be conducted by the ALRC should include review of the scope of the RC category for publications, films and computer games.⁵⁸

11.46 A diverse range of views about the desirable scope of the RC category have been provided in submissions and consultations. While some stakeholders and individuals considered that the current scope of what is prohibited is appropriate,⁵⁹ others considered that it should be broadened,⁶⁰ narrowed,⁶¹ or that RC should not exist as a classification category at all.⁶² Text analysis of the many submissions received to the Issues Paper suggested that the majority of respondents who commented on the scope of the RC category considered it to be too broad—at least for the purpose of prohibiting online content.⁶³

11.47 Some stakeholders argued for the continuing relevance of an RC category.⁶⁴ For example, the Uniting Church in Australia’s Justice and International Mission Unit stated that it ‘supports the existing definition of RC as adequately setting boundaries around what content should be entirely prohibited online’.⁶⁵ Another submission stated:

It is essential that the government support the efforts of parents in setting boundaries and to protect children by restricting certain inappropriate material to mature audiences, or to adults over the age of eighteen, and in more extreme cases, to refuse classification.⁶⁶

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

59 Eg, Communications Law Centre, *Submission CI 2484*; National Civic Council, *Submission CI 2226*; NSW Council of Churches, *Submission CI 2162*; Australian Christian Lobby, *Submission CI 2024*; Uniting Church in Australia, *Submission CI 1245*; Australian Council on Children and the Media, *Submission CI 1236*; Bravehearts Inc, *Submission CI 1175*; Australian Family Association of WA, *Submission CI 918*.

60 Collective Shout, *Submission CI 2477*; Family Council of Victoria Inc, *Submission CI 1139*.

61 Eg, T McGannon, *Submission CI 2359*; J McHugh, *Submission CI 2038*; N Leverett, *Submission CI 203*.

62 Eg, R Williams, *Submission CI 2515*; J Trevaskis, *Submission CI 2493*; L Mancell, *Submission CI 2492*.

63 Australian Law Reform Commission, *Responses to ALRC National Classification Scheme Review Issues Paper (IP40) - Graphical Representation of Submissions* (2011) <<http://www.alrc.gov.au/publications/responses-IP40>> at 26 January 2012.

64 Eg, T Brown, *Submission CI 2498*; Communications Law Centre, *Submission CI 2484*; C Roper, *Submission CI 2475*.

65 Uniting Church in Australia, *Submission CI 1245*.

66 T Brown, *Submission CI 2498*.

11.48 Other stakeholders called for the scope of the RC category to be extended so that it includes X 18+ content,⁶⁷ or in order to reverse the SCAG ministers' decision to make the R 18+ classification category available for computer games.⁶⁸

11.49 Many submissions criticised the breadth of the current scope of the RC classification category.⁶⁹ These criticisms, which are discussed below, included concern about the use of community standards and 'offensiveness' in defining RC content; and that the RC category covers content that:

- is legal to possess but illegal to distribute, as well as different content which is illegal to possess and illegal to distribute;
- depicts or describes particular sexual fetishes which are legal between consenting adults;
- 'promotes, incites or instructs in matters of crime or violence'; and
- provides detailed instruction in the use of proscribed drugs.

Community standards

11.50 In the course of the Inquiry, a range of views were expressed about using 'community standards' in deciding whether media content should be prohibited.

11.51 The Communications Law Centre submitted that the criteria for RC should 'continue to reference both community standards and offensiveness'.⁷⁰ The Centre stated:

The terms of the RC classification are, rightly, broad because particular terms cannot hope to cover all the various types of content which exist and will exist in the future. It is up to the Classification Board and the Classification Review Board as independent boards which represent the community to apply the terms and concepts used in the RC classification in accordance with the then community standards, which change over time.⁷¹

11.52 While some stakeholders advocated the continued relevance of standards based on 'public decency',⁷² others were concerned about the subjective nature of determining a 'community standard'.⁷³ It was noted that standards will vary across

67 Collective Shout, *Submission CI 2477*; Hon Nick Goiran MLC, *Submission CI 1004*; Family Council of Victoria Inc, *Submission CI 1139*.

68 L D, *Submission CI 2454*.

69 A Hightower and Others, *Submission CI 2159*; K Weatherall, *Submission CI 2155*; Pirate Party Australia, *Submission CI 1588*; The Arts Law Centre of Australia, *Submission CI 1299*; I Graham, *Submission CI 1244*; N Suzor, *Submission CI 1233*; Civil Liberties Australia, *Submission CI 1143*; Interactive Games and Entertainment Association, *Submission CI 1101*.

70 Communications Law Centre, *Submission CI 2484*.

71 Communications Law Centre, *Submission CI 1230*.

72 Eg, Australian Council on Children and the Media, *Submission CI 1236*; Communications Law Centre, *Submission CI 1230*.

73 Eg, The Arts Law Centre of Australia, *Submission CI 1299*; G Urbas and T Kelly, *Submission CI 1151*.

communities,⁷⁴ including online communities,⁷⁵ and are likely to change over time.⁷⁶ 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.⁷⁷

11.53 Some respondents submitted that the current standards that are determined to be reflective of the community may be unduly narrow.⁷⁸ For example, Pirate Party Australia submitted that ‘[t]he current scope of RC does not reflect the attitudes and morals of today’s society’.⁷⁹ 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.⁸⁰

11.54 Rebecca Randall, who had conducted research with five young BDSM practitioners in Brisbane, called for this aspect of the RC category to be revised, because:

[t]his morality system is excluding a culture within the Australian population, with inadequate justification. BDSM practitioners do not subject non consenting individuals to their practices. If it is between consenting adults, what does it matter whether or not the majority find it abhorrent?⁸¹

11.55 Some submissions questioned the propriety of media content being ‘banned’ because a majority determines it to be offensive.⁸² One respondent submitted that ‘community standards’ is a ‘pretty way of saying the tyranny of the majority’.⁸³ Another noted:

Few people who *would be* offended by RC ... material are ever actually offended by it—because they wouldn’t seek it out in the first place and they don’t accidentally encounter it. It is really just a case of one person who is offended by something attempting to impose his or her values on another person. This cannot be justified in a free society.⁸⁴

74 Eg, The Arts Law Centre of Australia, *Submission CI 1299*; G Urbas and T Kelly, *Submission CI 1151*.

75 Google, *Submission CI 2336*.

76 Eg, N Suzor, *Submission CI 1233*; G Urbas and T Kelly, *Submission CI 1151*.

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

78 Eg, Pirate Party Australia, *Submission CI 1588*; MLCS Management, *Submission CI 1241*; N Suzor, *Submission CI 1233*.

79 Pirate Party Australia, *Submission CI 1588*.

80 Ibid.

81 R Randall, *Submission CI 2462*.

82 Eg, Ibid; New South Wales Council for Civil Liberties, *Submission CI 2120*; N Suzor, *Submission CI 1233*.

83 L Mancell, *Submission CI 2492*.

84 J Trevaskis, *Submission CI 2493*.

11.56 A number of respondents argued that to warrant prohibition online, or an RC classification, content should be capable of causing harm.⁸⁵ For example, the NSW Council for Civil Liberties Inc submitted that only where ‘serious harm is to be prevented is curbing liberty acceptable’.⁸⁶

11.57 In this context, Electronic Frontiers Australia suggested that prohibitions on the production or possession of child sexual abuse content ‘reflects the harm inflicted on an innocent person in its production’.⁸⁷ Similarly, another respondent observed that depictions of sexual abuse and assault ‘aren’t illegal because they are offensive or fail to meet community standards; they are illegal because they cause harm to the victims’.⁸⁸

11.58 The notion of ‘community standards’ has underpinned the Australian classification scheme for many years, and is also a relevant object of the *Broadcasting Services Act* framework.⁸⁹ With respect to the current classification cooperative scheme, it is important to note that the community standards criterion does not exist in a vacuum but, rather, must be read in light of the principles in cl 1 of the Code. The ALRC sees no reason to abandon the notion of community standards at this time and has identified ‘community standards’ as a guiding principle for reform of the classification scheme. Specifically, the ALRC proposes 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.⁹⁰

11.59 The argument that ‘community standards’ should be abandoned as a relevant concept in classification would require, at the very least, strong evidence of significant changes in community attitudes over time. This Inquiry has not identified any empirical evidence of such a shift.

Prohibited and ‘illegal’ content

11.60 Another significant criticism of the scope of the RC category focuses on the fact that RC encompasses both content which is illegal to possess (such as ‘child pornography material’ and ‘child abuse material’) and content which is not illegal, but is seen to offend community standards.⁹¹

11.61 Some who commented on the distinction between ‘illegal’ and offensive content called for the RC category to cover illegal content only, or alternatively, be abolished altogether.⁹² It was suggested, for example, that:

85 Eg, New South Wales Council for Civil Liberties, *Submission CI 2120*; G Urbas and T Kelly, *Submission CI 1151*; Civil Liberties Australia, *Submission CI 1143*.

86 New South Wales Council for Civil Liberties, *Submission CI 2120*.

87 Electronic Frontiers Australia, *Submission CI 2194*.

88 L Mancell, *Submission CI 2492*.

89 See Ch 4.

90 See Ch 4, Principle 2.

91 Eg, L Green and Others, *Submission CI 2522*; Eros Association, *Submission CI 1856*; Pirate Party Australia, *Submission CI 1588*; N Suzor, *Submission CI 1233*; Civil Liberties Australia, *Submission CI 1143*.

92 J Trevaskis, *Submission CI 2493*; Civil Liberties Australia, *Submission CI 1143*.

this review is a good opportunity to separate classification from censorship, and so abandon the RC classification and have such [illegal] content dealt with by the criminal justice system.⁹³

11.62 Dr Nicolas Suzor submitted that only material that is ‘illegal to possess should be entirely prohibited online’.⁹⁴ Other respondents considered that the content which should be entirely prohibited is that which is ‘illegal to create or possess’—with child sexual abuse content being given as a common example.⁹⁵

The only content that should be entirely prohibited online is that which required the commission of certain illegal acts to produce, such as child abuse material, and does not have any artistic, literary, academic, historic or newsworthiness value.⁹⁶

11.63 The most obvious example of ‘illegal’ content is child sexual abuse content. All Australian jurisdictions provide for offences in relation to the making, distribution or possession of child sexual abuse content, with some differences in terminology and approach.⁹⁷

11.64 The *Criminal Code* definitions of both ‘child pornography material’ and ‘child abuse material’:

- include ‘material in any form, or combination of forms, capable of constituting a communication’;
- encompass depictions or descriptions of persons who are, or appear to be, under 18 years of age; and
- contain a requirement that the relevant material convey the particular content the subject of each definition ‘in a way that reasonable persons would regard as being, in all the circumstances, offensive’.⁹⁸

11.65 ‘Child pornography material’ is defined broadly and relates to the portrayal of:

- sexual poses or sexual activity where the child is the one engaged (actual or implied) in that pose or activity—regardless of whether they are in the presence of other persons;
- the child in the presence of a person who is engaged (actual or implied) in a sexual pose or sexual activity; or
- other content—namely specific parts or areas of the child’s body—in a context which the dominant characteristic of the portrayal is for a sexual purpose.⁹⁹

93 R Williams, *Submission CI 2515*. See also J Trevaskis, *Submission CI 2493*.

94 N Suzor, *Submission CI 1233*.

95 Eg, Google, *Submission CI 2336*; A Hightower and Others, *Submission CI 2159*; I Graham, *Submission CI 1244*.

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

97 See G Griffith and K Simon, *Child Pornography Law* (2008), prepared for NSW Parliamentary Library Research Service 27, 35–36.

98 *Criminal Code* (Cth) s 473.1.

99 *Ibid* s 473.1.

11.66 The focus of ‘child abuse material’ is the portrayal of the child as a victim (whether actual or implied) of torture, cruelty or physical abuse.¹⁰⁰

11.67 Briefly, the *Criminal Code* criminalises the distribution of ‘child pornography material’ or ‘child abuse material’ by transmitting that content by post;¹⁰¹ and creates broader offences of accessing, transmitting, distributing, promoting, or soliciting ‘child pornography material’ or ‘child abuse material’ using a carriage service;¹⁰² and of producing or possessing ‘child pornography material’ or ‘child abuse material’ with intent to transmit it using a carriage service.¹⁰³ Offences also apply to internet service providers or content hosts who are aware that their service is being used to access ‘child pornography material’ or ‘child abuse material’ and who do not report this to the Australian Federal Police within a reasonable time.¹⁰⁴

11.68 The *Criminal Code* also creates offences for Australians or residents of Australia, who produce, obtain, possess, distribute, or facilitate the production or distribution of ‘child pornography material’ or ‘child abuse material’ outside of Australia;¹⁰⁵ and the *Customs Act 1901* (Cth) and relevant regulations provide offences for the import or export of ‘child pornography material’ or ‘child abuse material’.¹⁰⁶

11.69 Some stakeholders commented that, because this kind of ‘illegal’ content is already subject to criminal law enforcement, there may be no need to target it through the classification scheme.¹⁰⁷ MLCS Management, for example, 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 [national classification scheme] 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.¹⁰⁸

11.70 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’.¹⁰⁹ Civil Liberties Australia submitted

100 Ibid s 473.1.

101 See Ibid ss 471.16; 471.17; 471.19; 471.20.

102 Ibid, ss 474.19 (child pornography material); 474.22 (child abuse material).

103 Ibid, ss 472.20 (child pornography material); 474.23 (child abuse material).

104 Ibid, s 474.25.

105 Ibid, ss 273.5 (child pornography material); 273.6 (child abuse material).

106 See *Customs Act 1901* (Cth) s 233BAB; *Customs (Prohibited Imports) Regulations 1956* (Cth) reg 4A(1A)(b); *Customs (Prohibited Exports) Regulations 1958* (Cth) reg 3(2)(b). The latter two provisions use identical wording to item 1(b) of the Classification Code tables rather than the terms ‘child pornography material’ or ‘child abuse material’.

107 Watch On Censorship, *Submission CI 2472*; Electronic Frontiers Australia, *Submission CI 2194*; Civil Liberties Australia, *Submission CI 1143*.

108 MLCS Management, *Submission CI 1241*.

109 A Hightower and Others, *Submission CI 2159*. Some stakeholders called for appropriate resourcing of the enforcement of such criminal laws: eg, Electronic Frontiers Australia, *Submission CI 2194*; Artsource, *Submission CI 1880*.

that ‘what material is deemed illegal should be well defined, well understood, and sensible. There must be real, provable harm’.¹¹⁰

11.71 Dr Lyria Bennett Moses, from the Faculty of Law of the University of New South Wales, noted that the RC category contains two types of content: (a) ‘content that has been internationally condemned, most obviously child pornography’; and (b) content that cannot be sold in Australia, but can be possessed legally. Dr Bennett Moses submitted that, by giving separate labels to these two categories of content, ‘censorship regulations can be better targeted’.¹¹¹

11.72 That is, in the case of child pornography, prohibition is based on different goals and purposes than in the case of some other RC material, as the content is ‘rightly treated as falling outside even a broad notion of freedom of speech’ and may warrant a different regulatory response.¹¹² Bennett Moses argues that the community ‘expects an active police response ... including the prosecution of those responsible’ for the production of such material.¹¹³ Further, 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.¹¹⁴

11.73 For some purposes, the distinction between content that is illegal to possess and content for which it is prohibited to sell and distribute may be significant—including in relation to enforcement. In the context of this Inquiry, however, there is no reason to recommend either that the new Classification of Media Content Act should restrict the Prohibited category to ‘illegal’ content; or that prohibitions on the sale and distribution of such content should be left to the operation of general criminal law.

11.74 Such changes would mark a radical departure from existing classification arrangements for which detailed justification would be required. In the ALRC’s view, the community expects that some media content will be classified as Prohibited even where that same content is not illegal to possess or create—for example, content depicting extreme sexual violence. This view receives some support from the results of the ALRC’s pilot study on community attitudes to higher level media content (discussed below).

Content depicting sexual fetishes

11.75 A distinction may also be drawn between content depicting legal conduct and content depicting actual acts which are illegal. The Eros Foundation, for example, stated that ‘depictions of legal sex acts between consenting adults should never be subject to censorship or bans’.¹¹⁵ Such acts were contrasted with ‘depictions of real murder, rape and serious assault; child sex abuse; bestiality’, which should be

110 Civil Liberties Australia, *Submission CI 1143*.

111 L Bennett Moses, *Submission CI 2126*.

112 *Ibid.*

113 *Ibid.*

114 *Ibid.*

115 Eros Association, *Submission CI 1856*.

prohibited.¹¹⁶ This raises specific issues surrounding the depiction of sexual fetishes. Such acts, where consensual, are often legal.

11.76 As discussed above, the *Guidelines for the Classification of Films and Computer Games* provide that some specific fetishes, for example, ‘bondage’ and ‘spanking’ are not permitted in the X 18+ classification. The *Guidelines for the Classification of Publications* differ, in providing that ‘descriptions and depictions of stronger fetishes may be permitted’—arguably including fetishes effectively prohibited under the Films and Computer Games Guidelines.

11.77 The ALRC considers that this is an area where the Government could consider narrowing the scope of the RC classification category. Prior to 2000, the X 18+ classification category for films accommodated ‘mild fetishes’. It may be that Australians are open to the X 18+ classification category accommodating ‘mild fetishes’. The results of the ALRC’s pilot study on community attitudes to higher level media content are not incompatible with such a suggestion.

11.78 In any case, it is not clear why the *Guidelines for the Classification of Films and Computer Games* refers to the particular fetishes that it does, and not others that are arguably more ‘revolting or abhorrent’, in terms of the Code criterion. There is no apparent application of any harm principle that might, for example, allow a distinction to be made between ‘spanking’ and more extreme forms of sadomasochism. Questions may also be raised about consistency with international classification practices.

11.79 The ALRC recommends that the Australian Government should review current prohibitions in relation to the depiction of sexual fetishes in films.

Content promoting, inciting or instructing in crime

11.80 A number of submissions were critical of the current provisions of item 1(c) of the Code, requiring content that ‘promotes, incites or instructs in matters of crime or violence’ to be classified RC.¹¹⁷ Clearly, there is an ‘extraordinary range of activities’¹¹⁸ that is proscribed by the criminal law and the content that may come within this item of the Code is ‘potentially extremely broad’.¹¹⁹

11.81 Stakeholders noted that this criterion of the RC category has been used to make ‘highly publicly controversial RC decisions’, including the decisions with respect to *Rabelais*, *The Peaceful Pill Handbook*,¹²⁰ and on a computer game entitled *Marc*

116 At least, where not part of an educational or news report: *Ibid.*

117 Eg, K Weatherall, *Submission CI 2155*; I Graham, *Submission CI 1244*; National Drug Research Institute, *Submission CI 1186*.

118 K Weatherall, *Submission CI 2155*.

119 *Ibid.*

120 Google 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, but was banned in Australia: Google, *Submission CI 2336*.

Ecko's Getting Up: Contents Under Pressure—which had elements promoting graffiti.¹²¹

11.82 Google stated that prohibition of 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' is inappropriate.¹²²

11.83 While some stakeholders were critical of the prohibition of media content concerning euthanasia,¹²³ others considered that media content which promotes or provides instruction in suicide should be prohibited.¹²⁴ 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.¹²⁵

11.84 The Uniting Church also submitted that material instructing in criminal acts of graffiti, the safe use of illicit drugs, suicide, or euthanasia 'is more likely to result in harm within the community than good'.¹²⁶

11.85 In the ALRC's view, the breadth of the current criterion prohibiting content that 'promotes, incites or instructs in matters of crime' is unjustifiable. Again, the results of the ALRC's pilot study on community attitudes to higher level media content are not incompatible with such a suggestion. Participants registered a low level of offence to content depicting graffiti activity and did not consider that such content should be banned.¹²⁷

11.86 The ALRC recommends that the Australian Government should consider confining the prohibition on content that 'promotes, incites or instructs in matters of crime' to 'serious crime'. The category of 'serious crime' might be defined, for example, by reference to maximum penalty levels provided by the *Criminal Code* (and state and territory criminal law).¹²⁸

121 I Graham, *Submission CI 1244*. See Classification Review Board, *Decision on Marc Ecko's Getting Up: Contents Under Pressure* (2006).

122 Google, *Submission CI 2336*.

123 Eg, T Namow, *Submission CI 2459*; Eros Association, *Submission CI 1856*.

124 Eg, Collective Shout, *Submission CI 2477*; Hunter Institute of Mental Health, *Submission CI 2136*; Australian Christian Lobby, *Submission CI 2024*.

125 Hunter Institute of Mental Health, *Submission CI 2136*.

126 Uniting Church in Australia, *Submission CI 2504*.

127 Urbis Pty Ltd, *Community Attitudes to Higher Level Media Content: Community and Reference Group Forums Conducted for the Australian Law Reform Commission—Final Report* (2011), prepared for the Australian Law Reform Commission, iii.

128 Eg, the *Criminal Code* defines a 'serious offence', for the purposes of provisions dealing with telecommunications offences and serious computer offences, as an 'offence against a law of the Commonwealth, a State or a Territory that is punishable by imprisonment for life; or for a period of 5 or more years: *Criminal Code* (Cth) ss 473.1, 477.1(9).

Detailed instruction in drug use

11.87 The depiction of drug use may lead to content being classified RC under criteria set out in the Code and Guidelines.

11.88 Item 1(a) of the Code provides that publications, films or computer games that depict, express or otherwise deal with matters of ... drug misuse or addiction ... in such a way that they offend against the standards of morality, decency and propriety generally accepted by reasonable adults to the extent that they should not be classified.

As mentioned, item 1(c) of the Code also provides that publications, films or computer games will be RC if they ‘promote ... or instruct in matters of crime’.

11.89 The Guidelines provide that publications, films or computer games will be RC if they include or contain ‘detailed instruction in the use of proscribed drugs’. The *Guidelines for the Classification of Films and Computer Games* also refer to ‘[m]aterial promoting or encouraging proscribed drug use’.

11.90 A number of stakeholders commented on the classification criteria relating to drug use.¹²⁹ The National Drug Research Institute 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’.¹³⁰

11.91 The Institute 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.¹³¹

11.92 Depiction of drug misuse or addiction is generally not considered as so offensive as to justify banning the content. Content involving drug use constituted, together with graffiti, the content which registered the lowest levels of offence in the ALRC’s pilot study on community attitudes to higher level media content.¹³²

11.93 Rather, debate focuses on whether content that instructs in drug use should be prohibited under the ‘promotes, incites or instructs in matters of crime’ criterion of the Code. As discussed above, the ALRC recommends that the Australian Government considering narrowing this criterion to matters of serious crime, which would exclude most drug use offences.¹³³

11.94 In addition, it may not be justified to include specific reference to ‘detailed instruction in the use of proscribed drugs’ in classification criteria. The ALRC

129 Eg, Google, *Submission CI 2336*; National Drug Research Institute, *Submission CI 1186*; M Lindfield, *Submission CI 2164*.

130 National Drug Research Institute, *Submission CI 1186*.

131 Ibid.

132 Urbis Pty Ltd, *Community Attitudes to Higher Level Media Content: Community and Reference Group Forums Conducted for the Australian Law Reform Commission—Final Report* (2011), prepared for the Australian Law Reform Commission, iii.

133 Eg, in NSW, the offence of self-administering a prohibited drug is punishable by imprisonment for a maximum term of two years: *Drug Misuse and Trafficking Act 1985* (NSW) ss 12, 21.

recommends that the Australian Government should review current prohibitions in relation to the ‘detailed instruction in the use of proscribed drugs’.

A narrower Prohibited category

11.95 The ALRC recommends that, under the Classification of Media Content Act, the Prohibited category should be framed more narrowly than the current RC category. As discussed, the ALRC has suggested three aspects of current classification criteria that the Australian Government should consider changing in the new Act.

11.96 In making this recommendation, the ALRC took into account concerns expressed in submissions and consultations about the broad scope of the RC category and the practical difficulties in applying RC criteria. The ALRC’s recommendations are also consistent with the results of the ALRC’s pilot study on community attitudes to higher level media content, which is discussed in more detail below.

11.97 The aim of the ALRC’s pilot study was to test a methodology for determining community attitudes to the current higher level classification categories. It was not a comprehensive review of relevant community standards. The Australian Government’s conclusions on the scope of the Prohibited category in the new Act should be informed by further research into community standards.

Recommendation 11–2 The Classification of Media Content Act should frame the ‘Prohibited’ category more narrowly than the current ‘Refused Classification’ category. In particular, the Australian Government should review current prohibitions in relation to:

- (a) the depiction of sexual fetishes in films; and
- (b) ‘detailed instruction in the use of proscribed drugs’.

The Government should also consider confining the prohibition on content that ‘promotes, incites or instructs in matters of crime’ to ‘serious crime’.

Pilot study into community attitudes to higher-level media content

11.98 In order to better inform itself about community standards relevant to classification, the ALRC commissioned Urbis Pty Ltd to conduct a series of forums to assess community attitudes to content that falls within higher-level classification categories. This involved recruiting participants for a one-day forum where they would view and respond to content that ranged from MA 15+ to RC.

11.99 The final report, *Community Attitudes to Higher Level Media Content: Community and Reference Group Forums Conducted for the Australian Law Reform Commission*, can be accessed from the ALRC website.

11.100 This pilot study was qualitative in nature, involving consultations with a total of 58 participants across four forums, conducted over October–November 2011.

11.101 Two forums involved community participants and two involved stakeholder representatives and others with an interest in the classification field. The community group (CG) forums involved 30 participants, while the reference group (RG) forums involved 28 participants.

11.102 Participants were recruited from across Australia, with a sampling methodology used for the community groups to ensure their representativeness of the broader community. The final sample of 40 community participants who formed the basis of the final 30 participants (two CGs of 15) were selected from more than 1,000 applicants, who responded to newspaper advertisements throughout Australia, as well as notification through the web or social media. Selection criteria included demographic characteristics (gender, age, parental status), occupation, representation of all States and Territories, metropolitan, regional and rural representation, and attitudinal indicators nominated by applicants.

11.103 The 28 RG participants were recruited by the ALRC on the basis of people who were representative of a community group or advocacy organisation, people who have publicly engaged with classification issues, people representing a relevant industry sector, or having established experience or academic expertise in matters related to media classification and media audiences.

11.104 Each forum took place over one full day at the Australian Government Attorney-General's Department Classification Branch in Sydney, with participants from outside of Sydney being flown in for the day. A full list of the RG participants, as well as demographic information on the CG participants, is available in the consultant's final report.

11.105 Participants were informed prior to involvement in the groups about the confronting and possibly offensive nature of the material that would be shown and that it would include RC material. Counsellors provided a briefing to participants before the event and at its conclusion. Participants were also advised about the availability of post-forum counselling services available to them.

11.106 Although the forums involved the screening of RC material, it was decided to exclude material that may have generated the highest levels of risk, such as child abuse material or abhorrent content. Given the risks associated with showing people higher-level media content of types that they may never previously have seen—particularly in the RC category—the consultants felt the need for some caution in exposure to material that would be potentially at the highest levels of offence or impact.

11.107 Material from across the classification categories and across media platforms (films, television programs, computer games and online content) was shown to participants, who responded using coloured cards or 'traffic lights' to indicate offence, in addition to completing a survey instrument and engaging in small group discussions of the content. Participants were also asked whether the discussion had caused them to change their opinions on banning or restricting the material both which were recorded on the survey questionnaire.

11.108 The findings from the two CG forums were compared to the findings from the two RG forums in order to obtain an assessment of how closely evaluations of content correlated within the framework of the prototype methodology.

11.109 The primary aim of this study was to develop and test a prototype methodology to determine broader community standards with regards to classifiable media content, including films, computer games, television programs and online content. The view was taken that findings from public submissions commenting on the National Classification Scheme would be usefully augmented by an empirical study that engaged a broad cross-section of the community with actual relevant content across classification categories (themes; sex; nudity; violence; drug use; coarse language) and across media platforms.

11.110 The study was not an assessment of classification decisions made by the Classification Board or any other entity. Participants were not provided with information on classification guidelines in advance as the intention was not to ‘test’ material against classification criteria.¹³⁴ Rather, the purpose of the study was to gauge responses to particular items of content in terms of offence and potential impact.

11.111 Some of the key findings arising out of the pilot study were:

- ***Responses between the community groups and the reference groups were broadly comparable.*** There was a high degree of consistency between the opinions of CG and RG participants in relation to the degree of offence taken to the material found to be most offensive and least offensive, as well as considerable agreement about whether particular material should be banned or restricted. This was despite the RG being comprised of people, who in a number of cases, were selected on the basis of known strong views on the current classification scheme, in contrast to the more randomised selection of community participants.
- ***The content that registered the highest levels of offence included both scripted drama and material involving actual criminal activity.*** The two items of content that registered the highest level of offence with both CG and RG participants were a scene from the film *A Serbian Film* and a recorded online solicitation of a child for apparently sexual purposes.
- ***The content that registered the lowest levels of offence included material involving drug use and graffiti.*** Both the CG and the RG viewed the items of content depicting drug use (both fictional and real) to be the least offensive and impactful. There was also a view among both CG and RG participants that material depicting graffiti activity was low impact, and should not be banned.
- ***Most of the screened violent material from computer games was not considered to be offensive.*** In three of the four items of violent and/or sexual

¹³⁴ As in the case community assessment panels which are sometimes used by the Attorney-General’s Department to test whether Classification Board decisions are consistent with community standards.

computer game material screened, a majority of both CG and RG participants found the material not to be offensive.

- ***Responses to explicit sex and fetish material were broadly similar between the two groups, and varied according to the nature of the material.*** Both CG and the RG participants had varying responses to the explicit sex and fetish material that was shown based on the item in question, but their responses to each item were broadly similar. In particular, the greatest level of offense was registered towards material where some degree of coercion may have been implied.
- ***A majority of participants in both groups found terrorism material offensive.*** A majority of both CG and the RG participants found material promoting acts of terrorism to be offensive, although opinions varied as to whether it should therefore be banned.

11.112 A detailed analysis of the findings is provided in the consultant's final report. This also includes information about the content that was viewed and the methodology that was used in the pilot study. It may provide the basis for ongoing research into community attitudes to higher-level media content—including research that may be conducted or commissioned by the new Regulator.¹³⁵