Australian Government
Australian Law Reform Commission

National Classification Scheme Review

ISSUES PAPER

You are invited to provide a submission or comment on this Issues Paper

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MAY 2011

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Making a submission

Making a submission to the Inquiry

Any public contribution to an inquiry is called a submission. The Australian Law Reform Commission seeks submissions from a broad cross-section of the community, as well as from those with a special interest in a particular inquiry.

The closing date for submissions to this Issues Paper is **15 July 2011**.

There are a range of ways to make a submission or comment on the questions posed in the Issues Paper. You may respond to as many or as few questions as you wish. The ALRC strongly encourages online submissions directly through the ALRC's website http://www.alrc.gov.au/inquiries/classification/respond-issues-papers, where an online submission form will allow you to respond to individual questions. Once you have logged into the site, you will be able to save your work, edit your responses, and leave and re-enter the site as many times as you need to before lodging your final submission. Further instructions are available on the site. If you have any difficulties using the online submission form, please email web@alrc.gov.au, or phone +61 2 8238 6333.

Alternatively, written submissions may be mailed, faxed or emailed to:

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Open inquiry policy

As submissions provide important evidence to each inquiry, it is common for the ALRC to draw upon the contents of submissions and quote from them or refer to them in publications. Non-confidential submissions are also made available on the ALRC's website.

The ALRC also accepts submissions made in confidence. Confidential submissions will not be made public. Any request for access to a confidential submission is determined in accordance with the *Freedom of Information Act 1982* (Cth), which has provisions designed to protect sensitive information given in confidence.

In the absence of a clear indication that a submission is intended to be confidential, the ALRC will treat the submission as non-confidential.

Contents

Terms of Reference

Review of Censorship and Classification

Having regard to:

- it being twenty years since the Australian Law Reform Commission (ALRC) was last given a reference relating to Censorship and Classification
- the rapid pace of technological change in media available to, and consumed by, the Australian community
- the needs of the community in this evolving technological environment
- the need to improve classification information available to the community and enhance public understanding of the content that is regulated
- the desirability of a strong content and distribution industry in Australia, and minimising the regulatory burden
- the impact of media on children and the increased exposure of children to a wider variety of media including television, music and advertising as well as films and computer games
- the size of the industries that generate potentially classifiable content and potential for growth
- a communications convergence review, and
- a statutory review of Schedule 7 of the *Broadcasting Services Act 1992* and other sections relevant to the classification of content

I refer to the ALRC for inquiry and report pursuant to subsection 20(1) of the *Australian Law Reform Commission Act 1996*, matters relating to the extent to which the *Classification (Publications, Films and Computer Games) Act 1995* (the Classification Act), State and Territory Enforcement legislation, Schedules 5 and 7 of the Broadcasting Services Act 1992, and the Intergovernmental Agreement on Censorship and related laws continue to provide an effective framework for the classification of media content in Australia.

Given the likelihood of concurrent Commonwealth reviews covering related matters as outlined above, the Commission will refer relevant issues to those reviews where it would be appropriate to do so. It will likewise accept referral from other reviews that fall within these terms of reference. Such referrals will be agreed between the relevant reviewers.

1. In performing its functions in relation to this reference, the Commission will consider:

    1. relevant existing Commonwealth, State and Territory laws and practices
    2. classification schemes in other jurisdictions
    3. the classification categories contained in the Classification Act, National Classification Code and Classification Guidelines
    4. any relevant constitutional issues, and
    5. any other related matter.

2. The Commission will identify and consult with relevant stakeholders, including the community and industry, through widespread public consultation. Other stakeholders include the Commonwealth Attorney-General's Department, the Department of Broadband, Communications and the Digital Economy, the Australian Communications and Media Authority, the Classification Board and Classification Review Board as well as the States and Territories.

3. The Commission is to report by 30 January 2012.

List of Questions

Approach to the Inquiry

Question 1. In this Inquiry, should the ALRC focus on developing a new framework for classification, or improving key elements of the existing framework?

Why classify and regulate content?

Question 2. What should be the primary objectives of a national classification scheme?

What content should be classified and regulated?

Question 3. Should the technology or platform used to access content affect whether content should be classified, and, if so, why?

Question 4. Should some content only be required to be classified if the content has been the subject of a complaint?

Question 5. Should the potential impact of content affect whether it should be classified? Should content designed for children be classified across all media?

Question 6. Should the size or market position of particular content producers and distributors, or the potential mass market reach of the material, affect whether content should be classified?

Question 7. Should some artworks be required to be classified before exhibition for the purpose of restricting access or providing consumer advice?

Question 8. Should music and other sound recordings (such as audio books) be classified or regulated in the same way as other content?

Question 9. Should the potential size and composition of the audience affect whether content should be classified?

Question 10. Should the fact that content is accessed in public or at home affect whether it should be classified?

Question 11. In addition to the factors considered above, what other factors should influence whether content should be classified?

How should access to content be controlled?

Question 12. What are the most effective methods of controlling access to online content, access to which would be restricted under the National Classification Scheme?

Question 13. How can children's access to potentially inappropriate content be better controlled online?

Question 14. How can access to restricted offline content, such as sexually explicit magazines, be better controlled?

Question 15. When should content be required to display classification markings, warnings or consumer advice?

Who should classify and regulate content?

Question 16. What should be the respective roles of government agencies, industry bodies and users in the regulation of content?

Question 17. Would co-regulatory models under which industry itself is responsible for classifying content, and government works with industry on a suitable code, be more effective and practical than current arrangements?

Question 18. What content, if any, should industry classify because the likely classification is obvious and straightforward?

Classification fees

Question 19. In what circumstances should the Government subsidise the classification of content? For example, should the classification of small independent films be subsidised?

Classification categories and criteria

Question 20. Are the existing classification categories understood in the community? Which classification categories, if any, cause confusion?

Question 21. Is there a need for new classification categories and, if so, what are they? Should any existing classification categories be removed or merged?

Question 22. How can classification markings, criteria and guidelines be made more consistent across different types of content in order to recognise greater convergence between media formats?

Question 23. Should the classification criteria in the *Classification (Publications, Films and Computer Games) Act 1995* (Cth), National Classification Code, Guidelines for the Classification of Publications and Guidelines for the Classification of Films and Computer Games be consolidated?

Refused Classification (RC) category

Question 24. Access to what content, if any, should be entirely prohibited online?

Question 25. Does the current scope of the Refused Classification (RC) category reflect the content that should be prohibited online?

Reform of the cooperative scheme

Question 26. Is consistency of state and territory classification laws important, and, if so, how should it be promoted?

Question 27. If the current Commonwealth, state and territory cooperative scheme for classification should be replaced, what legislative scheme should be introduced?

Question 28. Should the states refer powers to the Commonwealth to enable the introduction of legislation establishing a new framework for the classification of media content in Australia?

Other issues

Question 29. In what other ways might the framework for the classification of media content in Australia be improved?

National Classification Scheme Review

Contents

The Inquiry

1. On 24 March 2011, the Attorney-General of Australia, the Hon Robert McClelland MP, asked the Australian Law Reform Commission (ALRC) to inquire into and report on the framework for the classification of media content in Australia. The ALRC was asked to conduct widespread public consultation across the community and industry and to provide its final Report by 30 January 2012.

Issues Paper

2. This Issues Paper has been released to form a basis for consultation. The paper is intended to encourage informed community participation in the Inquiry by providing some background information and highlighting the issues so far identified by the

ALRC as relevant. The Issues Paper may be downloaded free of charge from the ALRC's website, www.alrc.gov.au.

3. The Issues Paper will be followed by the publication of a Discussion Paper later in 2011. The Discussion Paper will contain a more detailed treatment of the issues, and will indicate the ALRC's current thinking in the form of specific proposals for reform. The ALRC will then seek further submissions and undertake a further round of national consultations in relation to these proposals before preparing its final Report by 30 January 2012.

Request for submissions

4. The ALRC invites individuals and organisations to make submissions in response to specific questions, or to any of the background material and analysis provided.

5. There is no specified format for submissions, although the questions provided in this document are intended to provide guidance for respondents. The ALRC welcomes submissions, which may be made in writing, by email or using the ALRC's online submission form. Submissions made using the online submission form are preferred. Generally, submissions will be published on the ALRC website, unless marked confidential. In the absence of a clear indication that a submission is intended to be confidential, the ALRC will treat the submission as non-confidential.

> Submissions using the ALRC's online submission form can be made at: http://www.alrc.gov.au/inquiries/classification/respond-issues-papers.
>
> In order to inform the content of the Discussion Paper, submissions addressing the questions in this Issues Paper should reach the ALRC by 15 July 2011.

Other inquiries

6. There are several recent and concurrent public consultations and reviews covering matters related to the ALRC Inquiry. Recent consultations and reviews include:

- the Attorney-General's Department's public consultation on an R 18+ classification for computer games;[1] and
- the Department of Broadband, Communications and the Digital Economy (DBCDE) review of measures to increase accountability and transparency for Refused Classification (RC) material.[2]

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1 See Australian Government Attorney-General's Department, *Final Report on the Public Consultation on the Possible Introduction of an R18+ Classification for Computer Games* (2010).

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

7. Current inquiries relevant to the ALRC Inquiry include:

- The Senate Legal and Constitutional Affairs References Committee inquiry into the Australian film and literature classification scheme (due to report 30 June 2011).
- The House of Representatives Standing Committee on Social Policy and Legal Affairs inquiry into the regulation of billboard and outdoor advertising.
- The Convergence Review examining Australia's communications and media legislation and advising the Government on potential amendments to keep this regulatory framework effective and appropriate for the new environment (due to report in the first quarter of 2012).[3] The Convergence Review incorporates a statutory review of the operation of sch 7 of the *Broadcasting Services Act 1992* (Cth) and whether the schedule should be amended or repealed.[4]

Approach to the Inquiry

8. The potential scope of the Inquiry is broad. In addition to considering the classification of publications, films and computer games under the *Classification (Publications, Films and Computer Games) Act 1995* (Cth) (*Classification Act*), the ALRC will also examine schs 5 and 7 of the *Broadcasting Services Act* and the need for a classification framework that accommodates online content.

9. To ensure that the work of related recent and current inquiries is not duplicated and that the Inquiry is completed on time, it is important to identify from the outset the matters on which the Inquiry should focus.

10. The ALRC will focus on developing recommendations for a new or reformed classification system, rather than on detailed evaluation of the existing system. Criticism of, and support for, aspects of the existing system are documented extensively in the literature and in submissions to recent and current inquiries.

11. The focus of the ALRC—as indicated by the Terms of Reference—will be on the framework for classifying content given the existing classification categories. Therefore, any consideration by the ALRC of the specific content that should be permitted or prohibited under each of the classification categories will necessarily be at a high level of generality, to complement broader research or consultation on prevailing community standards.

12. Finally, the ALRC does not intend to duplicate the Government's extensive consideration of a system for mandatory filtering of online content. However, the Inquiry will consider how a national classification scheme could operate better in the online environment.

13. The ALRC is interested in comment on the general approach it should take to the Inquiry.

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3 See Department of Broadband Communications and the Digital Economy, *Convergence Review Framing Paper* (2011).

4 As required by *Broadcasting Services Act 1992* (Cth) sch 7, s 118.

Question 1. In this Inquiry, should the ALRC focus on developing a new framework for classification, or improving key elements of the existing framework?

The current classification system

14. The current framework for the classification of media content in Australia is based on the Commonwealth *Classification Act* and complementary state and territory legislation. Online content is primarily regulated under schs 5 and 7 of the *Broadcasting Services Act*.[5] These regulatory regimes are summarised below.

National Classification Scheme

15. The National Classification Scheme (NCS) was established following recommendations made by the ALRC in its 1991 report, *Censorship Procedure* (ALRC Report 55). The report recommended establishing a legislative framework that would enable the Commonwealth, states and territories to take a national approach to classification.

16. The NCS is an example of a Commonwealth-state cooperative scheme. The legislative framework is based on the *Classification Act* and complementary state and territory legislation (state and territory enforcement legislation).[6] It is underpinned by the Intergovernmental Agreement on Censorship (IGA). The IGA provides that Australian Government, State and Territory Censorship Ministers must consider and approve certain changes to the Scheme, including amendments to the National Classification Code and classification guidelines.

17. Under the NCS, the Classification Board, an independent statutory body, classifies certain publications, films (including videos and DVDs), and computer games.[7] The Classification Review Board, also an independent statutory body, can review original classification decisions in certain circumstances and provide a fresh classification decision.

18. The *Classification Act* provides for a range of classifications for each of the three media formats. Material must be classified in accordance with the National Classification Code and Classification Guidelines—both agreed to by the Commonwealth and the states.

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5 *Broadcasting Services Act 1992* (Cth) schs 5, 7.

6 *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (NSW); *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* (Vic); *Classification of Publications Act 1991* (Qld); *Classification of Films Act 1991* (Qld); *Classification of Computer Games and Images Act 1995* (Qld); *Classification (Publications, Films and Computer Games) Enforcement Act 1996* (WA); *Classification (Publications, Films and Computer Games) Act 1995* (SA); *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (Tas); *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* (ACT); *Classification of Publications, Films and Computer Games Act 1985* (NT).

7 Queensland, South Australia, Tasmania and the Northern Territory also have concurrent classification powers.

19. State and territory enforcement legislation, among other things:

- prohibits the sale, distribution and advertising of unclassified material; and
- restricts the sale, distribution and advertising of classified material in various ways.

20. To comply with state and territory laws, producers of classifiable products are expected to submit products for classification; retailers and other distributors of classified products must enforce relevant point-of-sale age restrictions and adhere to advertising and display requirements; and individuals must ensure that certain restricted material is not accessible to minors. Enforcement of these classification laws is the responsibility of states and territories.

21. In addition, the Australian Customs and Border Protection Service (Customs) identifies and confiscates 'objectionable material' at the border. The definitions of 'objectionable material' in the *Customs (Prohibited Imports) Regulations 1956* (Cth) and *Customs (Prohibited Exports) Regulations 1958* (Cth) substantially mirror the definition of RC material in the National Classification Code. These regulations are intended to prevent the import and export of material that would be classified RC.

Online content

22. The *Broadcasting Services Act* establishes a co-regulatory scheme for regulating online content and content provided by mobile carriers. Schedule 5 of the *Broadcasting Services Act* sets out provisions in relation to internet content hosted outside Australia, and sch 7 does so in relation to content services, including some content available on the internet and mobile services hosted in or provided from Australia. Broadly, the scheme constrains internet service providers (ISPs) and content service providers of online content.

23. Under the scheme, the Australian Communications and Media Authority (ACMA) investigates complaints about online content that the complainant believes to be 'prohibited content' or 'potential prohibited content' with reference to the National Classification Code.

24. Schedule 7 defines prohibited or potentially prohibited content. Generally, prohibited content is content that has been classified by the Classification Board as X 18+ or RC and, in some cases, content classified R 18+ or MA 15+ where the content is not subject to a 'restricted access system'. Content is potential prohibited content if the content has not been classified by the Classification Board but, if it were to be classified, there is a substantial likelihood that it would be prohibited content. The Classification Board will classify online content on receipt of an application for classification.

25. ACMA must investigate all complaints that are not frivolous, vexatious, made in bad faith, or made to undermine the effective administration of the schedules. It may also investigate on its own initiative.

26. The action ACMA must take depends, among other things, on where the content appears to be located. Where prohibited content is hosted in Australia, ACMA must issue a final notice to the content service provider seeking removal of the content, the link, or service or placement behind a restricted access system, depending on the nature and classification category of the content. ACMA must issue an interim notice for Australian-hosted potential prohibited content and apply to the Classification Board for classification of the content. Content hosts must undertake the action required by the notice by 6pm the next business day, and financial penalties apply for failing to comply with a notice. Where Australian-hosted prohibited or potential prohibited content is also considered to be sufficiently serious, ACMA must notify law enforcement agencies.

27. Where prohibited or potential prohibited content is hosted outside Australia, ACMA notifies filter software makers accredited by the internet industry in accordance with the code of practice in place under sch 5. The filters are made available by internet service providers to their customers for free or on a cost recovery basis. Where prohibited or potential prohibited content hosted overseas is also considered to be sufficiently serious, ACMA notifies the member hotline in the country where the content appears to be hosted. Where no member hotline exists, ACMA notifies the Australian Federal Police for action through Interpol.

Strengths and weaknesses of the current system

28. Commentators have characterised the current classification system as having a number of important strengths and weaknesses. Some of these are discussed briefly below.

Strengths

29. Compared to the pre-1995 scheme's 'complex network' of laws—under which classifying one film might have involved 13 pieces of legislation in various jurisdictions—the current classification system is widely acknowledged as an improvement.[8] Each year, the Classification Board makes thousands of decisions within prescribed time limits.[9] Few decisions attract controversy, and commentators have suggested that distributors generally have realistic expectations about eventual classifications.[10]

30. The Classification Board and the Classification Review Board are independent statutory bodies, operating apart from government, industry and each other. This

8 G Griffith, *Censorship in Australia: Regulating the Internet and Other Recent Developments—Briefing Paper No 4/02* 2002 New Parliamentary Library Research Service; D McDonald, 'Sense and Censorbility' (Paper presented at Currency House Arts & Public Life Breakfast, Sydney, 2007); Australian Law Reform Commission, *Censorship Procedure*, Report 55 (1990), [1.11].

9 Senate Legal and Constitutional Affairs Legislation Committee—Parliament of Australia, *Estimates: Transcript of Public Hearing* 18 October 2010, 10–11 (D McDonald) (6,468 decisions made in financial year immediately preceding review, all of which were made within the statutory time frame).

10 See, eg, J McGowan, 'Classified Material' (2007) 22 *Law Society Journal*, 22.

formal independence has been described as one of the system's 'very important features'.[11]

31. The current classification system is well-known and widely understood by the public. In a 2005 survey, virtually all respondents were familiar with the classification system for film and video, and the vast majority believed that classification symbols were useful.[12]

32. It has been argued that the co-regulatory system based on industry codes of practice has worked reasonably well in relation to broadcast television in particular. In 2009–10, ACMA received 194 complaints and finalised 39 investigations into classification matters for broadcasting content.[13] This figure has remained relatively static, suggesting that the bulk of viewer concerns about program classification matters are suitably dealt with by the broadcasters themselves, and that this framework has reduced the costs of regulatory compliance since its introduction almost 20 years ago. The question of whether such co-regulatory models provide guidance for other industries, particularly in the fast-changing digital content sectors, will be a matter considered in this inquiry.

Weaknesses

33. Technological developments have altered the media landscape and challenged many of the underlying assumptions of, and justifications for, content regulation.[14] In Australia today, 72% of households have broadband connections, and it is estimated that this penetration rate will reach close to 90% by 2014. It is also estimated that 3.5 million Australians will be mobile internet subscribers by 2014.[15] Against this background regulators face an enormous amount of internet content, much of which is more mutable, housed outside Australia, and less amenable to border-based regulation than offline content.

34. The structure of media delivery has also changed. With the influence of media convergence, content is now available across platforms and devices that previously had

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11 See D Hume and G Williams, 'Australian Censorship Policy and the Advocacy of Terrorism' (2009) 31 *Sydney Law Review* 381, 386. See also M Ramaraj Dunstan, 'Australia's National Classification System for Publications, Films and Computer Games: Its Operation and Potential Susceptibility to Political Influence in Classification Decisions' (2009) 37 *Federal Law Review* 133 (describing current system as 'superior to ones of the past', but discussing ways in which political influence still exists).

12 Office of Film and Literature Classification, *Classification Study* (2005), 6, 17, 32.

13 Australian Communication and Media Authority, *Overview of the Australian Communications and Media Authority's interaction with the National Classification* Scheme, paper prepared for the ALRC, May 2011.

14 See, eg, V Scott and C Fankhauser, 'It's Different on the Internet: Regulating Online Content' (2010) *Internet Law Bulletin* 200, 200; H Coonan, 'Reforming Australia's Media Legislation to Meet the Challenge of a Multi-Media Revolution' (2007) 30 *University of New South Wales Law Journal* 232, 233; Interactive Games and Entertainment Association, *Submission to Parliament of Australia Senate Legal and Constitutional References Committee Inquiry into the Australian Film and Literature Classification Scheme*, 4 March 2011.

15 PriceWaterhouseCoopers, *Global Entertainment and Media Outlook 2010–2014* (2010) <http://www.pwc.com/gx/en/global-entertainment-media-outlook> at 11 May 2011.

distinct functions.[16] Media convergence dramatically alters the practical implementation of classification principles, as news, information and entertainment services are increasingly accessed across multiple platforms.

35. For example, new devices allow for private viewing of media that once would have been available only in public stores or venues and which, in some instances, decrease the need to protect others from unsolicited material. Conversely, in other situations it is harder to protect consumers—an individual's age, for example, is more difficult to authenticate online, undermining the effective implementation of age-based restrictions.[17]

36. These broad shifts in the media landscape have manifested themselves in practical weaknesses in the classification system. The regulatory status of new types of media, such as mobile phone games and 'apps',[18] has been ambiguous and uncertain.[19] Despite frequent discussion about the need to treat similar content consistently across media platforms, there are numerous inconsistencies—for example, the same online content is treated differently depending on where it is hosted, and RC material can be accessed online by those seeking it.[20]

37. Inconsistent or ineffective compliance and enforcement has also emerged as a significant issue across media contexts. Controlling access to, and enforcing penalties for, online material poses significant challenges.[21] Other issues concern offline material, including distribution of unclassified or incorrectly marked material, distributors not complying with call-in notices,[22] the resources required to investigate and prosecute breaches, and inconsistent enforcement provisions.

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16 See Department of Broadband, Communications and the Digital Economy, *Convergence Questions and Answers* <http://www.dbcde.gov.au/digital_economy/convergence_review/questions_and_answers> at 21 April 2011.

17 See generally L Lessig, 'The Law of the Horse: What Cyberlaw Might Teach' (1999) 113 *Harvard Law Review* 501 (an early articulation of the ways in which the internet altered the regulatory paradigm, with particular discussion of age-based 'zoning' laws).

18 An 'app' refers to computer software designed for performance of a specific task. While it has typically referred to applications related to documents (eg, graphics or accounting software), the term is increasingly used to refer to small items downloadable onto handheld devices such as mobile phones and tablet computers that have a myriad of purposes, from productivity tools to games to news and information.

19 Attorney-General's Department, *Submission to Parliament of Australia Senate Legal and Constitutional Affairs References Committee Inquiry into the Australian Film and Literature Classification Scheme*, 4 March 2011, 15; Interactive Games and Entertainment Association, *Submission to Parliament of Australia Senate and Legal Constitutional Committee Inquiry into the Australian Film and Literature Classification Scheme*, 4 March 2011.

20 Senate Legal and Constitutional Affairs Legislation Committee—Parliament of Australia, *Estimates: Transcript of Public Hearing* 18 October 2010, 11 (D McDonald).

21 See, eg, Attorney-General's Department, *Submission to Parliament of Australia Senate and Legal Constitutional Committee Inquiry into the Australian Film and Literature Classification Scheme* 4 March 2011, 14.

22 Senate Legal and Constitutional Affairs Legislation Committee—Parliament of Australia, *Estimates: Transcript of Public Hearing* 18 October 2010, 11, 14 (D McDonald); Attorney-General's Department, *Submission to Parliament of Australia Senate Legal and Constitutional References Committee Inquiry into the Australian Film and Literature Classification Scheme*, 4 March 2011, 6.

Designing a regulatory framework

Regulatory models

38. The regulatory form is a central concept in establishing a framework for classification of media content. Regulatory forms can be placed on a continuum of government oversight ranging from self-regulation, through quasi-regulation and co-regulation, to direct government regulation.[23]

- ***Self-regulation*** is generally characterised by industry-formulated rules and codes of conduct, with industry solely responsible for enforcement.
- ***Quasi-regulation*** describes those arrangements where government influences businesses to comply, but which do not form part of explicit government regulation.
- ***Co-regulation*** typically refers to situations where industry develops and administers its own arrangements, but government provides legislative backing to enable the arrangements to be enforced.
- ***Direct government regulation*** comprises primary and subordinate legislation. It is the most commonly used form of regulation.[24]

39. Current regulation of media content in Australia takes several different regulatory forms. For example, audio material is currently self-regulated under the *Recorded Music Labelling Code of Practice*.[25] There is no legislation and individual record companies are responsible for labelling recordings under a code that outlines labelling provisions and establishes a complaints-handling mechanism.

40. An example of quasi-regulation is the agreement by Telstra, Optus and Primus to filter voluntarily a list of child abuse URLs compiled and maintained by ACMA. This arrangement was entered into against the background of the Australian Government's proposed system for mandatory ISP-level filtering of URLs.[26]

41. As discussed above, a co-regulatory scheme for online content is established under the *Broadcasting Services Act*. This scheme allows for and encourages industry development of codes of practice for ISPs and content service providers of online and mobile content. The matters that must be dealt with in the codes are specified in the legislation. For example, sch 5 of the *Broadcasting Services Act* provides that a code or industry standard must deal with, among other things, giving customers information about the availability, use and appropriate application of internet content filtering software.

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23 The ALRC's usage of these terms is based on Australian Government, *Best Practice Regulation Handbook* (2010).

24 Ibid, 34–35.

25 Australian Music Retailers Association and Australian Recording Industry Association, *Recorded Music Labelling Code of Practice* (2003).

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

42. Regulation of radio and television content is also co-regulatory. Industry groups have developed codes under s 123 of the *Broadcasting Services Act* and in consultation with ACMA. Most aspects of program content are governed by these codes, which include the *Commercial Television Industry Code of Practice* and the *Commercial Radio Australia Code of Practice and Guidelines*. ACMA only registers industry codes of practice once it is satisfied that broadcasters have undertaken public consultation and the codes are endorsed by the majority of broadcasters in the relevant sector and contain appropriate community safeguards. Once implemented, ACMA monitors these codes and deals with unresolved complaints made under them. The industry codes of practice require consumer complaints to be forwarded to the relevant broadcaster in the first instance.

43. Direct government regulation applies to the classification of publications, films and computer games under the *Classification Act*. For example, state and territory classification laws provide that films must usually be classified before they can be legally sold and exhibited. Classification decisions are made by the Classification Board in accordance with criteria set out in the *Classification Act*, the National Classification Code and Classification Guidelines.

Factors in determining regulatory forms

44. The Australian Government *Best Practice Regulation Handbook* states that direct government regulation should be considered when, among other things: the problem is high-risk, of high impact or significance; the community requires the certainty provided by legal sanctions; and there is a systemic compliance problem with a history of intractable disputes and repeated or flagrant breaches of fair trading principles, with no possibility of effective sanctions.[27]

45. On the other hand, self-regulation—or by extension, more co-regulation—may be a feasible option if: there is no strong public interest concern, in particular no major public health and safety concerns; the problem is a low-risk event, of low impact or significance; and the problem can be fixed by the market itself—for example, if there are market incentives for individuals and groups to develop and comply with self-regulatory arrangements.[28]

46. Practical factors may also favour more self- or co-regulation if the time, effort or cost of government regulation outweighs its benefits.

47. An overarching issue for this Inquiry is assessing an appropriate regulatory form or forms for a content classification scheme. Questions include whether direct government regulation remains an appropriate and effective model for classifying publications, films and computer games; what regulatory model is most appropriate and effective for online material; and what the relationship should be between the regulatory models. These fundamental questions underpin much of the following discussion.

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27 Australian Government, *Best Practice Regulation Handbook* (2010), 35.
28 Ibid, 34.

48. Evaluating and developing a framework for classification laws in Australia in a changed media landscape may be approached from first principles by asking four broad questions:

- Why classify and regulate content?
- What content should be classified and regulated?
- How should access to content be controlled?
- Who should classify and regulate content?

49. These questions, all of which are closely related, will be considered in the following sections. The answers will assist the ALRC to evaluate and develop options for reform of the classification system.

Why classify and regulate content?

50. Regulating and classifying content may be seen to have three key purposes:

- providing advice to consumers to help inform their viewing choices, including warning them of material they might find offensive;
- protecting children from harmful or disturbing content; and
- restricting all Australians from accessing certain types of content.

51. The purpose of providing advice to consumers is reflected in the more recent preference, in policy discourse, for the term 'classification' rather than 'censorship'—though any classification scheme is likely to also involve some censorship. Gareth Griffith has observed:

> *Prima facie* classification implies that nothing is banned only restricted if necessary. Classification has certainly a more neutral flavour than the more pejorative term censorship ... Whereas censorship is suggestive of public order and idea of the public good, classification is associated with the facilitation of informed choice in a community of diverse standards.[29]

52. These purposes are currently reflected in the National Classification Code, which provides that classification decisions are to give effect, as far as possible, to the following principles:

> (a) adults should be able to read, hear and see what they want;
>
> (b) minors should be protected from material likely to harm or disturb them;
>
> (c) everyone should be protected from exposure to unsolicited material that they find offensive;
>
> (d) the need to take account of community concerns about:
>
> (i) depictions that condone or incite violence, particularly sexual violence; and

29 G Griffith, *Censorship in Australia: Regulating the Internet and Other Recent Developments—Briefing Paper No 4/02* 2002 New Parliamentary Library Research Service, 3.

(ii) the portrayal of persons in a demeaning manner.[30]

53. The Convergence Review committee has suggested that policy objectives suitable for a converging media environment should include that:

- communications and media services available to Australians should reflect community standards and the views and expectations of the Australian public; and
- Australians should have access to the broadest possible range of content across platforms and services.[31]

54. The *Broadcasting Services Act* itself contains similar objectives including, for example, ensuring that broadcasters and internet service and content providers 'respect community standards' in relation to content, while promoting the availability of a diverse range of broadcasting and datacasting services.[32]

Question 2. What should be the primary objectives of a national classification scheme?

What content should be classified and regulated?

55. Determining what should be classified might be expected to follow from the primary purposes of regulating content, discussed above. If the purpose of classification is to give Australians information about content they might choose to view, hear or play, and to protect people from harmful or distressing material, then this might suggest that most content should be classified—and certainly as much potentially harmful content as possible. However, even if it were thought useful for everything to be classified—to provide Australians with as much information as possible—this is unlikely to be practically possible or cost-effective. Excessive regulation might also place an unreasonable cost burden on industry, and be particularly disadvantageous to sole traders and small-to-medium enterprises who form the backbone of an emergent digital media content sector.[33]

56. Therefore, any new or reformed classification scheme must select which types of content should be classified or regulated. There are a number of possible ways of thinking about content for the purpose of deciding which content should be classified. The following table highlights some ways in which content may be differentiated for these purposes. Some of the distinguishing features in the table are built into the

30 National Classification Code, cl 1.

31 Department of Broadband Communications and the Digital Economy, *Convergence Review Framing Paper* (2011), 15–16.

32 *Broadcasting Services Act 1992* (Cth) s 3.

33 See Australian Mobile Telecommunications Association, *Submission to Parliament of Australia Senate Legal and Constitutional Affairs Reference Committee Inquiry into the Australian Film and Literature Classification Scheme* 4 March 2010. More generally on small-to-medium enterprises in the creative economy, see T Cutler, *Venturous Australia: Building Strength in Innovation* (2008) Department of Innovation, Industry, Science and Research.

current classification scheme. It is important to note that the criteria listed below are not mutually exclusive, nor is it likely that one criterion will usefully determine what should be classified. Instead, a number of overlapping criteria are likely to help determine what should be classified.

Distinguishing features of content	Examples
physical properties of content	still image / moving image text / image interactive / non-interactive sound / visual photos / animation 2D / 3D live / recorded
purpose of content	literature / popular fictional / factual education / entertainment music / other audio (eg spoken books) pornography / art tools (navigation app) / games (drinking app)
media and technology platform	internet film DVD mobile phone computer/laptop/tablet portable storage device (eg USB drive) broadcast television narrowcast or subscription television magazine book radio CD board game T-shirt
whether part of content has already been classified	'extras' on DVDs abridged content reproductions
whether substantially similar content has already been classified	serial issues of sexually explicit magazines 2D and 3D films extra content, such as levels, of computer games
likely audience	adults children size (of audience) familiarity and awareness of the likely content
likely classification	likely to be X 18+ likely to be MA 15+ or higher
complaints	complaints to industry complaints to ACMA complaints to Classification Board

Distinguishing features of content	Examples
what is done with the content	sold hired distributed exhibited demonstrated viewed possessed copied uploaded downloaded showed to a minor advertised
distributors	major distributors *v* user-generated companies *v* not-for-profit
duration	feature length film short film
complexity	'simple' games (Tetris, chess) complex games (Grand Theft Auto)
market penetration	available online screened at film festivals
public or private	billboards cinema films mobile phone games home entertainment DVD

57. Some of these important distinguishing features of content will be the focus of the following discussion about what should be classified. However, a number of other issues also bear on the question of what should be classified, including:

- *who should be responsible for classification*—if an independent body, such as the Classification Board or a government entity, is required to classify all content that should be classified, then what must be classified may depend on what is practically possible or cost-effective for such a body. If industry had a greater role in classification, it might be possible to regulate more content.
- *cost of classifying material*—the more regulation, the greater the likely cost to industry and to the public. The high cost of classifying and regulating certain content might call for increased industry involvement in classification or for some content to be excluded completely from the regulatory regime. There is also a need for cost-effective solutions for the large number of start-up businesses, sole traders and small-to-medium enterprises engaged in the emergent digital content industries.
- *compliance with classification laws*—if compliance with some classification laws depends on active enforcement, and enforcement resources are better directed elsewhere, it may be important to craft classification laws that do not require high levels of enforcement.

Media and technology platforms

58. The growth, diversity and convergence of media technologies has arguably undermined the distinctions between media that underpin the current classification scheme. Currently, similar content may be subject to different regulatory requirements, classification processes and rules, depending on the medium, technology, platform or storage device used to access and deliver the content. For example, the same film may be subject to different regulation, or subject to classification or not, depending on whether it is shown in a cinema, sold or rented as a DVD, accessed through the internet, broadcast on television or narrowcast on subscription television.

59. Another media-based distinction built into the NCS is the distinction between film-media and print-media. Each has separate guidelines and although most films must be classified to be sold, only some publications need to be classified (sexually explicit magazines, for the most part).

60. Some argue that the media used to deliver content is irrelevant to the question of whether the content should be classified. A child will be no less distressed watching a violent film downloaded from the internet than they would be watching the same film hired from a DVD store. Therefore, it is argued, if films on DVD must be classified, then so too should films delivered on the internet.

61. However, the same factors might be used to argue for less regulation. If it is impossible or prohibitively costly to regulate content delivered by one medium (eg, the internet), then it may be argued that the content should also not be regulated when delivered on other media (eg, DVDs). The argument for consistency or parity could therefore lead to less regulation—and less information about, and protection from, content for Australians.[34]

62. As noted above, many factors arguably undermine the effect of existing Australian state and territory classification laws, including the sheer quantity of content that may be delivered via new media, the speed with which it is released, and the fact that much content is 'user-generated' or produced by small entities throughout the world. The nature of media consumers has also changed, from passive recipients of media content to active co-creators in a more participatory media culture, as seen with multi-player online games, blogs, citizen journalism and social media sites such as *Facebook*, *Flickr* and *Twitter*.[35]

63. The growth and convergence of media technology may suggest that the type of media on which content is delivered should not determine whether the content should be classified.

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34 See 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, 594: 'The desire for similar outcomes for offline and online content regulation is, however, a contested ambition. If similar outcomes are impossible or can only be achieved with significant costs or negative side effects not encountered offline, then an attempt to achieve parity of outcome is undesirable'.

35 H Jenkins, *Convergence Culture: Where Old and New Media Collide* (2006); J Burgess and J Green, *YouTube: Online Video and Participatory Culture* (2009).

Question 3. Should the technology or platform used to access content affect whether content should be classified, and, if so, why?

Complaints

64. Another way of distinguishing content for the purpose of deciding whether it needs to be classified is whether the content has been the subject of a complaint—for example, to ACMA, the Classification Board, the police or other enforcement bodies—or has been otherwise singled out by regulators.

65. The classification of online content is now largely a complaints-based system: online content will often only be classified if someone has lodged a complaint with ACMA and if ACMA decides the content requires classification. Submittable publications, films and computer games, on the other hand, must usually be classified whether or not anyone has complained about their content (although the Director of the Classification Board may, upon receiving a complaint about unclassified offline content, issue a notice requiring the relevant person to submit the content for classification).[36]

66. Complaints-based regulation may only result in a very small proportion of content being classified, and the number of complaints is unlikely to capture all relevant content.[37] Regulators may struggle to handle the number of complaints about online content. Further, an effective complaints-based system requires high public awareness and public confidence in decision-makers.

67. However, it may be a useful way to target the most extreme and offensive content, without placing too high a regulatory burden on industry or government regulatory authorities.

Question 4. Should some content only be required to be classified if the content has been the subject of a complaint?

Impact level and children's content

68. The need to protect children from harmful or distressing content, and to warn all consumers about potentially distressing content, might suggest that it is more important to regulate higher-level content. This is reflected in the current regulation of online content, which targets material that is or would be restricted offline, and in government

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36 See, eg, *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (NSW) ss 46–48.

37 In 2008 there were over 1,000,000,000,000 unique URLs: Google Web Search Infrastructure Team, *We Knew the Web Was Big…* (2008) <http://googleblog.blogspot.com/2008/07/we-knew-web-was-big.html> at 16 May 2011. As of 2009, ACMA's list of prohibited sites contained 1,175 URLs: Senate Environment, Communications and the Arts Legislation Committee—Parliament of Australia, *Supplementary Estimates: Transcript of Public Hearing* 19 October 2009, 127.

proposals to introduce ISP-level filtering of content classified RC. It may be that some content does not need to be classified at all, because it is likely to have no impact, or a negligible impact, on any viewer.

69. On the other hand many parents and guardians rely on classification information to guide their choice of entertainment for young children. For these individuals, the differences between lower-level content—for example, the impact of a film classified G (very mild) and a film classified PG (mild)—may be more important.

Question 5. Should the potential impact of content affect whether it should be classified? Should content designed for children be classified across all media?

Content from certain producers and distributors

70. Classification laws could also be directed at content distributed by companies and corporations and exclude content distributed by individuals, such as 'user-generated content'. Large organisations and companies, such as the major distributors of publications, films and computer games, may have the resources to ensure their material is classified and, under a new scheme, may also be able to employ their own classifiers for some content.

71. Regulation targeting major distributors may mean that most of the content that has traditionally been classified and regulated in Australia would continue to be. This content generally has the largest potential audience, and the Australian community may particularly value and expect classification of 'mainstream' content.

Question 6. Should the size or market position of particular content producers and distributors, or the potential mass market reach of the material, affect whether content should be classified?

Other criteria for determining what should be classified

72. There are many other ways of determining what content should be classified. Another way of thinking about this question is to ask what type of content should *not* need to be classified. Explicit exemptions are made for some types of film, computer game and publication under the existing NCS.[38] Other types of content (eg, artworks) have generally been understood to be outside the scheme, though there has been recent debate about whether potentially contentious displays of visual art in public galleries should be subject to classification laws.

38 *Classification (Publications, Film and Computer Games) Act 1995* (Cth) s 5B.

73. Whether content must be classified now also partly depends on what is *done* with the content. Possessing an unclassified film is usually not illegal under state and territory classification laws, but selling and exhibiting an unclassified film generally is.

74. The criteria used to determine what should be classified may overlap, and it is unlikely that any one criterion will be sufficient to determine what should be classified. The ALRC welcomes any further comments or suggestions on what content should be regulated.

Question 7. Should some artworks be required to be classified before exhibition for the purpose of restricting access or providing consumer advice?

Question 8. Should music and other sound recordings (such as audio books) be classified or regulated in the same way as other content?

Question 9. Should the potential size and composition of the audience affect whether content should be classified?

Question 10. Should the fact that content is accessed in public or at home affect whether it should be classified?

Question 11. In addition to the factors considered above, what other factors should influence whether content should be classified?

How should access to content be controlled?

75. Methods of giving information about, and controlling access to, content may include the following:

- prohibiting the possession of certain content (eg, owning a film containing child abuse; downloading RC material);
- blocking or filtering certain online content;
- prohibiting or restricting the sale, demonstration, public exhibition, broadcasting of certain content (eg, sale of unclassified material and RC films);
- prohibiting the creation of certain content (eg, making a film containing child abuse; uploading RC material);
- prohibiting making certain content publicly available;
- prohibiting the importation of certain content;
- restricting access—online and/or offline—to adults;
- requiring certain content to display special markings, warnings or consumer advice; and
- requiring certain content to be sold only in opaque plastic.

76. These and other methods of giving information about and controlling access to content are not mutually exclusive—some content might need to be subject to multiple forms of regulation. For example, laws may prohibit the sale of RC content, and ISPs may be required to filter that same content. Also, it is unlikely that any one form of regulation will be suitable for all types of content. Some content may be regulated in some ways, other content in other ways, and some content might not need to be regulated at all.[39]

77. Regulating online content has proved difficult. Obstacles to effective regulation of online content include:

- *the quantity of online content*—for example, with over one trillion unique URLs on the web, compiling a comprehensive list of prohibited sites is considered a common weakness in systems meant to filter online material.[40] It has also been estimated that there were 500,000 apps available for downloading to mobile phones in early 2011.[41]
- *the content is dynamic or mutable*—much online content changes constantly, making it difficult to establish what precisely should be classified or regulated.
- *the number of persons producing content*—a largely discrete and identifiable group of bodies distribute magazines, films and computer games offline, but millions of users produce content online.
- *content is produced and hosted all over the world*—even if a scheme effectively regulates content hosted in Australia, the practical effect will be 'limited due to the vast volume of unrestricted content hosted overseas'.[42]
- *the difficulty of determining age and of restricting content to adults*—a shop-owner can refuse to sell a violent film to a ten-year-old; it is more difficult to verify age accurately and efficiently online.

78. There are also difficulties with regulating offline content. Although most films and computer games offered for sale in cinemas and retail outlets have been classified and carry the appropriate classification markings, compliance with laws restricting the sale of adult content is low. Unclassified and X 18+ films are sold illegally throughout Australia, and many sexually explicit magazines are not classified or carry incorrect classification markings. Such breaches of classification laws draw particular criticism when minors are exposed to or able to access adult content.

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39 The question of what content should be classified or subject to regulation has been discussed above.

40 Google Web Search Infrastructure Team, *We Knew the Web Was Big…* (2008) <http://googleblog.blogspot.com/2008/07/we-knew-web-was-big.html> at 16 May 2011; R Deibert et al, *Access Denied: The Practice and Policy of Global Internet Filtering* (2008), 59.

41 A Beachley, Research-in-Motion, *Senate Legal and Constitutional Affairs References Committee Inquiry into the Australian Film and Literature Classification Scheme: Transcript of Public Hearing*, 25 March 2011, 44.

42 See Attorney-General's Department, *Submission to Parliament of Australia Senate Legal and Constitutional Affairs References Committee Inquiry into the Australian Film and Literature Classification Scheme*, 4 March 2011, 14.

Question 12. What are the most effective methods of controlling access to online content, access to which would be restricted under the National Classification Scheme?

Question 13. How can children's access to potentially inappropriate content be better controlled online?

Question 14. How can access to restricted offline content, such as sexually explicit magazines, be better controlled?

Question 15. When should content be required to display classification markings, warnings or consumer advice?

Who should classify and regulate content?

79. Closely related to the question of what content should be classified is the question of who should classify the content. This Inquiry will consider who currently classifies or examines such content and whether there are more effective ways to assess content, especially given its changing nature and increasing volume.

80. This question concerns allocating responsibility to an independent body or bodies, to government, to industry, or to a combination of these. The answer to this question may vary with content and will depend on the regulatory model chosen. Some options (variations of which could be combined) include:

- a government agency or independent board classifying all content that must be classified;
- a government agency or independent board classifying all content that must be classified, but relying on industry assessments or recommendations for some or all content;
- industry classifying all content that must be classified using statutory guidelines and trained and approved assessors;
- industry classifying all content under an industry-developed, but government approved, code of practice, with decisions subject to review and audit by a government agency or independent board;
- a government agency or independent board classifying some content, and industry classifying other content, with industry decisions subject to review and audit by government agencies; and
- individual organisations implementing their own measures for assessing material and dealing with inappropriate content—for example, the online video service *YouTube* allows users to flag videos which are then reviewed by *YouTube* specialist content reviewers and removed if they violate the company's community guidelines.

81. Even where industry takes the leading role in classifying content, a government agency or other independent body may be involved in responding to complaints, managing consumer information and awareness, providing training, conducting compliance audits and other regulatory activities.

82. Before considering the roles of government and industry under the current classification scheme, it is useful to outline some of the important considerations relevant in deciding who should classify content.

Organisational factors

- *independence and the perception of independence*—government agencies may be more independent and are likely to be seen as more independent than industry classifiers. Industry may sometimes have an interest in giving their content a lower classification than is appropriate.
- *experience and expertise*—trained and experienced classifiers may be more likely to make reliable classification decisions. Government or independently established bodies with committed, fulltime classifiers may be better placed to ensure classifiers have adequate experience and proper training.
- *consistent decision-making*—decisions made by the one body are more likely to be consistent. Such a body would also have built-in checks and safeguards, such as the ability of classifiers to discuss approaches with fellow classifiers.
- *cost efficiency*—industry may be able to classify its own content more efficiently and at a lower cost than a government or other independent body.
- *speed*—industry may have the capacity to make quicker decisions particularly if each industry sector or individual company is responsible for its content. That is, the volume of classification work is spread over multiple classifiers in multiple organisations.
- *international reach*—industry, for example mobile telecommunications providers, may manage content assessment across jurisdictions more efficiently than nationally-based classifiers and content regulators.[43]

The nature of the content to be classified

- *straightforward and uncontentious*—it may be unnecessary and burdensome for such material to be classified by a government or independent body, for example, 'simple' computer games such as Tetris, Snake and Chess that are almost certain to be classified G.
- *sexually explicit material*—most films that would be classified X 18+ and most submittable publications containing sexual activity and nudity may be reasonably easy to classify.

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43 A Beachley, Research-in-Motion, *Senate Legal and Constitutional Affairs References Committee Inquiry into the Australian Film and Literature Classification Scheme: Transcript of Public Hearing*, 25 March 2011, 44.

- *content substantially similar to already classified content*—it is not cost efficient or effective to duplicate classification actions. For example, if a government agency or independent entity has classified the 3D version of a film, then classification of the 2D version is likely to be straightforward.
- *content that is likely to fall within advisory classifications*—less risk of harm or distress is attached to content that does not require restriction to particular age groups—for example, DVDs and computer games likely to be classified G, PG and M.

83. The range of schemes already in use under the NCS and in the regulation of other content, as described below, may provide useful models for the allocation of roles and responsibilities under a new or reformed classification scheme.

Classifiers and assessors under the current scheme

84. All publications, films and computer games that are classified in Australia are classified by the Classification Board and the Classification Review Board. Online content that is referred under ACMA's complaints-based system is also classified by the Boards.

85. The Classification Board is a full-time board comprised of a Director, a Deputy Director, a Senior Classifier and, at present, nine other members,[44] intended to be broadly representative of the community. The Board makes approximately 7,000 classification decisions annually.[45]

86. The Classification Review Board is a part-time board that convenes in response to an application for review. The Classification Review Board is currently comprised of a Convenor, Deputy Convenor and four other members.[46] In 2009–10 the Classification Review Board made eight classification decisions.[47]

87. The Director and Convenor determine the procedures of the Boards. The Director decides the constitution of panels for each classification application. For example, sexually explicit DVDs may be considered by one Board member, while a high profile or controversial public exhibition film may be viewed by the full Board.

Other government decision-makers

88. Government employees also assess content pursuant to obligations outlined in Commonwealth and state and territory legislation. For example, the Director of the Classification Board can delegate content assessment to employees of the Attorney-General's Department; Customs officers intercept prohibited imports and exports; ACMA employees investigate complaints about online content; and some state and territory law enforcement officers issue notices regarding the likely classification of material for the purpose of prosecutions.

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44 *Classification (Publications, Films and Computer Games) Act 1995* (Cth) s 46.
45 Classification Board, *Annual Report 2009–10*.
46 *Classification (Publications, Films and Computer Games) Act 1995* (Cth) s 73.
47 Classification Review Board, *Annual Report 2009–10*, 63.

Industry assessors under the current scheme

89. There are also three schemes that allow industry-based assessors to submit reports and make classification and consumer advice recommendations to the Classification Board when submitting a classification application. The final classification decision rests with the Board.

90. These schemes provide for the classification of computer games that are likely to be classified G, PG or M; classified or exempt films for sale or hire that contain additional content (eg, cast interviews, director's commentary, deleted scenes); and television series sold as films for sale or hire.[48] Since July 2009, authorised advertising assessors have been able to self-assess the likely classification of an unclassified film or computer game so that distributors can advertise these products before they are classified by the Classification Board.[49]

91. Assessors under these schemes must complete training approved by the Director of the Board and be authorised by the Director to provide assessments. While each scheme varies in its detail, they all have eligibility criteria, application conditions, sanctions and other safeguards to maintain the integrity of classification decisions and deal with misconduct by assessors.[50]

Other industry assessors under codes of practice

92. Some content that falls outside the NCS is subject to classification or assessment by industry under self- or co-regulatory codes of practice. Under these schemes, for example:

- industry classifiers engaged by recording companies assess music recordings for the purpose of labelling products with warnings if it contains offensive lyrics;
- industry classifiers engaged by subscription television channels apply the classification guidelines and markings used by the Classification Board to classify content;
- industry classifiers engaged by commercial television broadcast licensees apply industry-developed classification guidelines and symbols to classify content; and
- industry classifiers ('trained content assessors') engaged by mobile and online content service providers apply the guidelines used by the Classification Board to determine whether a restricted access system is required.[51]

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48 *Classification (Publications, Films and Computer Games) Act 1995* (Cth) ss 14, 14B, 17.

49 Ibid s 32.

50 Ibid ss 21AA, 21AB, 22D–J; *Classification (Authorised Television Series Assessor Scheme) Determination 2008*; *Classification (Advertising of Unclassified Films and Computer Games Scheme) Determination 2009*.

51 See *Broadcasting Services Act 1992* (Cth) sch 7, cl 14 definition of 'restricted access system'. Trained content assessors must complete training approved by the Director of the Classification Board: *Broadcasting Services Act 1992* (Cth) sch 7, cl 18.

Question 16. What should be the respective roles of government agencies, industry bodies and users in the regulation of content?

Question 17. Would co-regulatory models under which industry itself is responsible for classifying content, and government works with industry on a suitable code, be more effective and practical than current arrangements?

Question 18. What content, if any, should industry classify because the likely classification is obvious and straightforward?

Classification fees

93. The regulatory model, responsibility for content assessment and the scope of content captured under a new or reformed scheme, will affect classification costs. Who bears those costs is an important consideration.

94. Direct government regulation requires significant administration to develop policies and procedures, establish standards, support day-to-day operations, monitor compliance and enforce laws. Greater public expectations of transparency and accountability have implications for administrative workload. Statutory boards add a further resourcing and remuneration dimension. As such, government regulation can be costly.

95. The costs of the Boards classifying material, including secretariat support provided by the Attorney-General's Department, are largely recovered through classification fees charged to industry.[52] Some 'public good' activities are partly or fully government funded—for example, a substantial proportion of the cost of reviews.

96. Classification fees are prescribed in the *Classification (Publications, Films and Computer Games) Regulations 2005* (Cth). Under the NCS fees are set to recover the costs of classification services.[53] This is consistent with Australian Government cost recovery guidelines.[54]

97. Fees are calculated according to the length of the material submitted for classification, which in turn drives viewing time and consequently the resources required to provide a classification decision.

98. Criticisms of the existing classification fee regime include:

- fees are prohibitive for smaller, independent film distributors, computer games developers and developers of mobile phone applications, which may adversely

52 The Commonwealth does not pay fees payable under the *Classification Act*, although it is notionally liable. State and territory law enforcement agencies operate under a quota arrangement that allows for free classification. Reduced fees are payable if the quota is exceeded in a financial year.

53 Fees for classification range between $520 for a publication 0–76 pages and $5,090 for a film over 240 minutes long. A flat fee of $8,000 applies to all applications for review of a classification decision.

54 The Australian Government cost recovery guidelines are issued by the Department of Finance and De-Regulation.

affect the development of Australian creative and digital content industries (considered to be the primary drivers of content innovation);

- fees for classifications under assessor schemes are not substantially lower to reflect that industry takes on a significant part of the classification process;
- fees are not reduced for the classification of products that are substantially the same as already classified products (eg. cinema films later released on DVD);
- fees continue to increase even though classification processes or outcomes have not changed significantly; and
- fees should be calculated on a basis other than the length of the material.[55]

99. There is also widespread opposition to the flat fee for reviews of classification decisions. Some industry stakeholders, such as independent film distributors, consider the high fee a barrier to applying for a review even though there may be legitimate grounds for seeking a review. Likewise, community interest groups claim that the high fee ostensibly excludes them from the review process.

100. The NCS does recognise that there are applicants for whom it is difficult to comply with classification requirements due to classification costs. The *Classification Act* provides for full or partial fee waivers for eligible applicants under specific circumstances—for example, where it is in the public interest to do so for public health or educational reasons or for a short film from a new filmmaker with limited distribution.[56] The processing of film festival exemptions is publicly funded, facilitating the screening of hundreds of unclassified festival films annually. A wide range of other material is also exempt entirely from classification.

Question 19. In what circumstances should the Government subsidise the classification of content? For example, should the classification of small independent films be subsidised?

Classification categories and criteria

101. Under the NCS the current classifications are:

- for publications—Unrestricted; Category 1 restricted; Category 2 restricted; and RC Refused Classification.
- for films—G General; PG Parental Guidance; M Mature; MA 15+ Mature Accompanied; R 18+ Restricted; X 18+ Restricted; and RC Refused Classification.

55 These criticisms were among those raised in submissions to the Attorney-General's Department made during a public consultation on proposed new fees in May 2010.

56 *Classification (Waiver of Fees) Principles 2008* (Cth).

- for computer games—G General; PG Parental Guidance; M Mature; MA 15+ Mature Accompanied; and RC Refused Classification.[57]

102. Some classifications only provide advice or recommendations—it is ultimately a matter for parents and carers to decide whether their children may view, read or play the item. Other classifications are used to legally restrict access to certain age groups or adults, or to prohibit material entirely. These restrictions are enforceable under state and territory enforcement legislation which prescribes offences and penalties for breaches.

103. The Classification Board must also decide consumer advice for films and computer games classified PG and higher.[58] In relation to unrestricted publications or computer games and films classified G, the Board has discretion to provide consumer advice if it is deemed necessary.[59]

104. Under the *Broadcasting Services Act*, there are categories of online content defined as 'prohibited content' and 'potential prohibited content', which parallel the legally restricted classification categories under the *Classification Act*.[60]

105. Publications, films and computer games must be classified in accordance with criteria prescribed in the National Classification Code and Classification Guidelines.[61] Section 11 of the *Classification Act* prescribes certain matters that must be taken into account in the making of classification decisions and there are also provisions that direct the Boards to refuse classification to material that advocates terrorist acts.[62]

106. The classification categories have not changed substantially since the establishment of the NCS in 1995.[63] Though the categories are rarely criticised,[64] the ALRC is interested in whether they are understood in the community and in the merits of other possible classification categories, such as:

- the Children (C), Preschool Children (P) and the Adult Violence (AV) classification categories used by commercial television broadcasters;[65] and
- the age-based classification categories for films (U, PG, 12A/12, 15, 18, and R18) used by the British Board of Film Classification.[66]

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57 *Classification (Publications, Films and Computer Games) Act 1995* (Cth) s 7.
58 Ibid s 20(1).
59 Ibid s 20(2).
60 *Broadcasting Services Act 1992* (Cth) sch 7, ss 20, 21.
61 *Classification (Publications, Films and Computer Games) Act 1995* (Cth) s 9.
62 Ibid s 9A.
63 Before 1995, key changes were marked by the introduction of additional film classifications—the R certificate in 1971, the X classification in 1984 and the MA classification in 1993. Common classification markings and categories for films and computer games took effect in 2005.
64 Classification categories, with the exception of the absence of an R 18+ classification for computer games, do not feature as an issue in complaints to the Boards, media articles critical of the classification scheme or in comments by Senators during Senate Estimates hearings.
65 *Commercial Television Code of Practice* (2010).
66 See British Board of Film Classification, *BBFC: British Board of Film Classification* <http://www.bbfc.co.uk> at 16 May 2011.

Common classification categories and criteria

107. One potential reform in this area may be the introduction of common classification markings, categories and criteria for all types of classified media.

108. In a convergent media environment, the differences between media (eg, publications and films) are becoming increasingly blurred—particularly as people move to access traditionally offline content, such as books and magazines, online. Moving images and film footage, for example, are routinely included on text-based web pages and have been embedded in electronic books.[67] To some extent, this was recognised in the development of common classification markings, categories and combined classification guidelines for films and computer games, introduced by the Office of Film and Literature Classification between 2003 and 2005.[68]

109. It may, therefore, no longer make practical sense to have one set of classification markings for publications and another different set for films and computer games.[69] Instead, relevant publications might, for example, be classified R 18+ or X 18+ rather than Category 1 Restricted and Category 2 Restricted.

110. A highly converged, media-neutral environment might also lend itself to common classification criteria and guidelines. While the classification criteria articulated in the National Classification Code and Guidelines are broadly consistent—in expressing similar principles, community standards and limits on particularly extreme content—there are some differences. For example, impact thresholds from very mild to high are prescribed for each classification category in the classification guidelines for films and computer games, but not in the publications guidelines. The criteria under each of the classifiable elements, eg. nudity, sex, violence, themes etc, are also expressed differently.

111. That the R 18+ classification is not available for one type of media—computer games—is perhaps the most contentious anomaly in Australia's current classification scheme.[70] Leaving aside the specific issues concerning the absence of an R 18+ classification for computer games, this inconsistency with classifications across other media formats has potential implications for classifiers' decision-making processes as content converges. In future, one entertainment product may contain multiple media

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67 A book, for example, may be digitised and converted into an application imbedded with moving images; the application might then be read and watched from a mobile phone. Is this a film, a computer game or a publication?

68 The common classification markings were intended to address the 'outdated nature of the previous determinations in respect of the marking of emerging technologies which blur the distinction between "films" and "computer games", new storage devices and current marketing techniques': Explanatory Statement Issued by the Director of the Classification Board, *Classification (Markings for Films and Computer Games) Determination 2005*.

69 In the context of the R 18+ classification for computer games issue, Standing Committee of Attorneys-General ministers are considering a separate set of classification guidelines for computer games which are currently combined with the classification guidelines for films.

70 The final report of the Australian Government Attorney-General Department's recent review of the R 18+ classification for computer games is available at http://www.ag.gov.au/gamesclassification.

elements including text, still images, film sequences, gaming elements, interactivity, three dimensionality and more.

112. One objection to introducing common classification categories and criteria may be that some media intrinsically has a higher impact than other media: the moving images in a film, some may argue, have a greater impact than the still images in a magazine, so films and magazines should be treated differently. However, common classification guidelines might accommodate these concerns by, for example, referring to the potential for moving images to increase impact. Likewise, rather than have separate guidelines for computer games, the one set of guidelines might refer to the potential for interactive content to increase impact.

113. Common classification categories and criteria across media might not only simplify and reduce the cost of regulation, it may also streamline the classification decision-making processes. It might also increase community understanding of the classification categories, so Australians are able to make more informed decisions about content they choose for themselves and their families.

114. There may also be practical advantages to consolidating classification criteria and guidelines into one instrument or document. Currently, the Classification Boards and other classification decision-makers must consider matters and criteria in the *Classification Act*, the National Classification Code, the Guidelines for the Classification of Publications, and the Guidelines for the Classification of Films and Computer Games.[71] It might assist those undertaking classification activities to refer to one document containing all criteria and matters to be considered. Similarly, it may provide easier access to classification information and make classification decisions more transparent to the community.

Question 20. Are the existing classification categories understood in the community? Which classification categories, if any, cause confusion?

Question 21. Is there a need for new classification categories and, if so, what are they? Should any existing classification categories be removed or merged?

Question 22. How can classification markings, criteria and guidelines be made more consistent across different types of content in order to recognise greater convergence between media formats?

Question 23. Should the classification criteria in the *Classification (Publications, Films and Computer Games) Act 1995* (Cth), National Classification Code, Guidelines for the Classification of Publications and Guidelines for the Classification of Films and Computer Games be consolidated?

71 The National Classification Code was originally a schedule to the *Classification Act* but is now a separate legislative instrument.

Refused Classification (RC) category

115. The RC classification is the highest classification that can be given to publications, films and computer games in Australia.[72] In effect, it constitutes the censorship part of classification. The RC classification serves to prohibit—by way of the state and territory enforcement legislation—certain content from being sold, publicly exhibited or possessed with an intention to sell. However, it is not illegal to possess most RC material in most parts of Australia. RC content is also one type of 'prohibited content' under the *Broadcasting Services Act.*

116. The ALRC is primarily considering the RC classification because of its relationship to the Australian Government's proposed mandatory internet filter. As the Minister for Broadband, Communications and the Digital Economy, Senator Stephen Conroy has explained, 'the Government's mandatory ISP filtering policy is underpinned by the strength of our classification system'.[73] The Government has described its proposed mandatory ISP filtering scheme as follows:

> Overseas hosted content that is classified RC will be included on a list maintained by [ACMA] for the purpose of ISP filtering. This will be known as the 'RC content list'. It will be compiled in two ways:
>
> - overseas-hosted content that is the subject of a complaint from the public made to ... ACMA and
> - incorporation of international lists of overseas-hosted child sexual abuse material from highly reputable overseas agencies following a detailed assessment of the processes used by those agencies to compile their lists.[74]

117. As a result of the Government's public consultation on ways to ensure that the process of placing content on the RC content list was sufficiently accountable and transparent, it announced a number of measures including that all internet content complaints to ACMA that are assessed as being potentially RC are to be classified by the Classification Board.[75] Arguably, the proposed mandatory ISP-level filtering scheme is based upon a desire for parity between offline and online content regulation.[76]

118. Countries differ as to what content they prohibit—'depending on culture, historical content and differences of opinion on where the balance between freedom of speech and other interests lies'.[77] In Australia, RC content includes child abuse

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

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

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

75 Department of Broadband Communications and the Digital Economy, *Outcome of Public Consultation on Measures to Increase Accountability and Transparency for Refused Classification Material* (2010), 3.

76 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, 590.

77 Ibid, 601.

material such as child pornography, extreme violence including rape, bestiality, the incitement of a terrorist act, detailed instruction in crime or drug use, and what one commentator has described as 'live portrayals of certain sexual fetishes'.[78] The acts comprising the subject of some of this content—for example, rape—are prohibited by the criminal law. The criminal law recognises that such acts harm society and by way of an extension, the RC classification could be seen to recognise the harm that may or can be caused by the dissemination of certain information and images. As one commentator has observed, 'it is generally accepted that children are harmed whenever child pornography is created, disseminated and viewed'.[79]

119. In terms of the framework for the classification of media content in Australia, the *Classification Act* provides that publications, films or computer games that advocate the doing of a terrorist act must be classified RC.[80] However, in all other cases publications, films and computer games are to be classified in accordance with the National Classification Code and the Classification Guidelines.[81]

120. The National Classification Code assigns the RC classification 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 classified; or
- describe or depict in a way that is likely to cause offence to a reasonable adult, a person who is, or appears to be, a child under 18 (whether the person is engaged in sexual activity or not); or
- promote, incite or instruct in matters of crime or violence.[82]

121. In addition, the Code provides that publications that describe '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 classified' should also be classified RC. Further, the Code provides that computer games that are unsuitable for a minor to see or play should be classified RC.

122. Some commentators have argued that 'much of the material deemed RC in Australia would not be refused classification in other Western democratic liberal

78 Ibid, 583.

79 Ibid 588. Collette Langos notes that '[T]here is a large body of international research on children's distress when they inadvertently come across online pornography and other unwelcomed content.' See C Langos, 'Proposed Mandatory Filtering for Internet Service Providers (ISPs)—A Brief Insight Into How Filtering the Refused Content List May Affect Australian ISPs' (2010) 13 *Internet Law Bulletin* 137, 139.

80 *Classification (Publications, Films and Computer Games) Act 1995* (Cth) s 9A(1).

81 Ibid s 9.

82 National Classification Code, cl 2, item 1; cl 3, item 1; cl 4, item 1.

countries'.[83] Criticisms have also been made of the ambiguity of the terms and concepts used in the RC classification[84] and the potential for 'scope creep'.[85]

Question 24. Access to what content, if any, should be entirely prohibited online?

Question 25. Does the current scope of the Refused Classification (RC) category reflect the content that should be prohibited online?

Reform of the cooperative scheme

123. The NCS is an example of a Commonwealth-state cooperative scheme. Under such schemes, each participating jurisdiction promulgates legislation to facilitate the application of a standard set of legislative provisions in that jurisdiction to regulate a matter of common concern.[86]

124. The *Classification Act* was enacted by the Parliament of Australia to provide for the classification of publications, films and computer games for the ACT, pursuant to Parliament's power to make laws for the government of a territory (the territories power).[87]

125. However, the Act specifically provides that it is intended to form part of a Commonwealth, state and territory scheme for classification and the enforcement of classifications and notes that 'provisions dealing with the consequences of not having material classified and the enforcement of classification decisions are to be found in complementary laws of the States and Territories'.[88]

Types of cooperative scheme

126. There are four main types of Commonwealth-state cooperative scheme: referral of power to the Commonwealth; mirror legislation; complementary law regimes; and a combined scheme.[89] The NCS is an example of a complementary law regime.

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83 K Crawford and C Lumby, *The Adaptive Moment: A Fresh Approach to Convergent Media in Australia* (2011) 46.

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

85 That is, expansion of the scope of the filter to material that would not be restricted offline. See 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, 598.

86 M Farnan, 'Commonwealth–State Cooperative Schemes—Issues for Drafters' (Paper presented at 4th Australasian Drafting Conference, Sydney, 3–5 August 2005), 3.

87 *Australian Constitution* s 122.

88 *Classification (Publications, Films and Computer Games) Act 1995* (Cth) s 3.

89 M Farnan, 'Commonwealth–State Cooperative Schemes—Issues for Drafters' (Paper presented at 4th Australasian Drafting Conference, Sydney, 3–5 August 2005).

Referral of power

127. Section 51(xxxvii) of the *Australian Constitution* gives the Parliament of Australia power to make laws with respect to matters referred to the Parliament by the Parliament of any state. The states have referred a number of matters to the Commonwealth, including corporations law and counter-terrorism.[90]

Mirror legislation

128. Mirror legislation refers to a scheme where one jurisdiction enacts a law that is then enacted in similar terms by other jurisdictions. An example of mirror legislation is the uniform Evidence Acts.[91]

Complementary law regimes

129. Complementary law regimes include complementary 'applied law' schemes and 'non-applied law' schemes. A complementary applied law scheme involves one jurisdiction enacting a law on a topic, which is then applied by other jurisdictions. A recent example is the Australian Consumer Law contained in the *Competition and Consumer Act 2010* (Cth). State and territory legislation has been enacted to apply the Australian Consumer Law as a law of each other jurisdiction.[92] The NCS is characterised as a complementary 'non-applied' law scheme, discussed further below.

Combined schemes

130. Another model is a combined scheme, combining mirror legislation and applied law approaches. Under this model, some states enact their own mirror legislation and other states apply Commonwealth law as a law of the state. An example of this approach is the regulation of gene technology. The *Gene Technology Act 2000* (Cth) extends to matters within the Commonwealth's constitutional power, leaving the states and territories with the option of either applying the Commonwealth Act or enacting their own legislation. Both options have been adopted by different states.[93]

The current cooperative scheme

131. The NCS is a complementary 'non-applied' law scheme. That is, the Commonwealth *Classification Act* is not enacted as a law of each other participating jurisdiction. Rather, the states and territories have enacted complementary legislation that provides for the enforcement of the classification system.

132. This arrangement may be seen as having disadvantages for what is intended to be a national scheme because of the substantial variations in state and territory (and Commonwealth) enforcement provisions. These variations include, for example:

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90 *Corporations Act 2001* (Cth) s 3; *Criminal Code* (Cth) s 100.3.

91 *Evidence Act 1995* (Cth); *Evidence Act 1995* (NSW); *Evidence Act 2008* (Vic); *Evidence Act 2001* (Tas); *Evidence Act 2004* (NI).

92 For example, the *Fair Trading Amendment (Australian Consumer Law) Act 2010* (NSW) was enacted to amend the *Fair Trading Act 1987* (NSW) so that the Australian Consumer Law became a law of NSW.

93 For example, NSW has opted for the applied law model while Victoria has adopted mirror legislation: *Gene Technology (New South Wales) Act 2003* (NSW); *Gene Technology Act 2001* (Vic).

- the ACT and Northern Territory do not prohibit the sale and exhibition of X 18+ films;[94]
- Queensland prohibits the sale of Category 1 Restricted and Category 2 Restricted publications;[95]
- in New South Wales, Category 1 Restricted publications may be sold in transparent sealed packages, while in Western Australia, they must be sold in plain, opaque wrappers;[96]
- penalties also vary—selling an RC publication in Western Australia can be punished by a $15,000 fine or 18 months imprisonment, but in Victoria it is $28,668 (240 penalty units) or two years imprisonment; and
- the *Classification Act* itself prohibits the possession or control of Category 1 restricted and Category 2 restricted publications, X 18+ films, and RC material by persons in prescribed areas of the Northern Territory—offences that do not apply to persons in any other part of Australia.[97]

133. More fundamentally, some states and territories retain powers to classify or re-classify material[98]—although only the South Australian Classification Council actively does so.[99]

134. While such inconsistencies might be seen as a weakness of the NCS, some jurisdictions may consider it an advantage to be able to craft jurisdiction-specific enforcement provisions or provide for the review of Commonwealth classifications.

135. Another possible problem with the NCS is that, under the IGA, the Classification Code and guidelines cannot be amended except with the agreement of Commonwealth, state and territory ministers, and following public consultation.[100]

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94 For example, *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* (ACT) ss 9, 22 cf *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (NSW) s 6.

95 *Classification of Publications Act 1991* (Qld) s 12.

96 *Classification (Publications, Films and Computer Games) Enforcement Act 1996* (WA) s 64.

97 *Classification (Publications, Films and Computer Games) Act 1995* (Cth) ss 101–102. These provisions were enacted as part of the Northern Territory National Emergency Response: *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth).

98 *Classification of Publications Act 1991* (Qld) s 9; *Classification of Films Act 1991* (Qld) 25CA; *Classification of Computer Games and Images Act 1995* (Qld) s 5; *Classification (Publications, Films and Computer Games) Act 1995* (SA) s 16; *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (Tas) s 41A; *Classification of Publications, Films and Computer Games Act 1985* (NT) s 16.

99 In 2008–09, the South Australian Classification Council reviewed the classification of a number of publications, but did not consider the classification of any films or computer games: South Australian Classification Council, *2008-09 Annual Report* (2009), 4–5.

100 *Agreement Between the Commonwealth of Australia, the States and Territories Relating to a Revised Co-operative Legislative Scheme for Censorship in Australia 1995*, cl 9.

Reform of the NCS cooperative scheme

136. The ALRC is interested in comment on whether a new framework for the classification of media content in Australia should be based on the current cooperative scheme, or whether this should be replaced with some other form of scheme.

137. A threshold question concerns the extent to which the Australian Parliament might enact legislation establishing such a framework. There are several constitutional heads of legislative power that are relevant.

138. Under the communications power,[101] the Australian Parliament may, and does, regulate online content and broadcasting (television and radio).[102] The trade and commerce power[103] grants the Commonwealth legislative power to regulate imported or exported media content including, for example, pornography,[104] and interstate trade in such content. In combination with other heads of legislative power, such as the corporations powers,[105] the Australian Parliament may be able to legislate more broadly in relation to classification of media content than is currently the case.

139. Other possible models would involve a referral of state powers to the Commonwealth under s 51(xxxvii) of the *Australian Constitution*. A state referral of powers may be stated to cover all matters relating to the operation of new Commonwealth classification legislation to the extent that the matter is not otherwise included in the legislative powers of the Parliament of the Australia.[106] A referral of power by the states would ensure that Commonwealth classification legislation was comprehensive in its coverage and less vulnerable to constitutional challenge.

140. A further option is a complementary applied law scheme, where Commonwealth legislation, as in force from time to time, would be applied by the other jurisdictions. Provided that there were effective limits on modification of the legislation—for example, through a new intergovernmental agreement on classification—this would provide a substantial degree of uniformity.

Question 26. Is consistency of state and territory classification laws important, and, if so, how should it be promoted?

Question 27. If the current Commonwealth, state and territory cooperative scheme for classification should be replaced, what legislative scheme should be introduced?

101 *Australian Constitution* s 51(v).
102 For example, *Broadcasting Services Act 1992* (Cth) schs 5, 7.
103 *Australian Constitution* s 51(i).
104 For example, *Customs Act 1901* (Cth) s 233BAB.
105 *Australian Constitution* s 51(i), (xx).
106 See, eg, *Corporations (Commonwealth Powers) Act 2001* (NSW) and cognate state and territory legislation; *Corporations Act 2001* (Cth) s 3.

Question 28. Should the states refer powers to the Commonwealth to enable the introduction of legislation establishing a new framework for the classification of media content in Australia?

Other issues

141. The ALRC welcomes comment on any other issues of relevance to its review of the classification system.

Question 29. In what other ways might the framework for the classification of media content in Australia be improved?