Civil Liberties Australia **CLA**

Submission to the

Australian Law Reform Commission

inquiry into

National Classification Scheme

Civil Liberties Australia (CLA) is a not-for-profit association, which reviews proposed legislation to help make it better, as well as monitoring the actives of parliaments, departments, agencies and forces to ensure they match the high standards Australia has traditionally enjoyed, and continues to aspire to.

We work to keep Australia the free and open society it has traditionally been, where you can be yourself without undue interference from 'authority'. Our civil liberties are all about balancing rights and responsibilities, and ensuring a 'fair go' for all Australians.

1 Overview

Civil Liberties Australia thanks the Australian Law Reform Commission for the opportunity to contribute to the discussion of the much needed overhaul of the National Classification Scheme. For further, in depth, detail of our views, we refer the ALRC to our submission to the 2011 Senate Legal and Constitutional Affairs Reference Committee's inquiry into the Australian film and literature classification scheme (Submission 34).

The overriding points to keep in mind in the discussion of the Classification Scheme is that Australia is a pluralist, secular nation, with a strong precedent of individualism. What that means in practice is that an individual's right to engage in actions and experiences does not depend on what others think about the actions or experiences. To do otherwise would violate these basic principles of what it means to be Australian. This is the philosophical argument.

The pragmatic argument is that what the Classification Scheme currently attempts to do is simply no longer practical. The Internet and other technological advancements mean there is simply far too much content for any government body to even begin to make a dent on a tiny fraction of the content that is produced every day. The distribution channels are also no longer entirely under the Government's control, and the public is increasingly accessing content from overseas. Mandatory classification has only been logistically possible because a physical product was required to deliver content, and the means to produce content were restricted to corporations with significant resources. Neither of which is any longer true. Additionally, the Internet age has shown that censorship attempts now draw attention to content that would otherwise have had a small audience and little impact; the Streisand Effect.

The government should have no place in creating and enforcing laws and regulations that have no victims, cannot be policed nor perceived by the community as breaches. Claims of a connection between particular content and anti-social behaviour have been made since before the first novel was written. After nearly a century of searching, recent Government reports still say that such links are far from being proved, even within the most interactive content of today. Extraordinary claims require extraordinary evidence. What matters is the totality of messages, media literacy and education, most of which are rightly not the domain of the Classification Scheme.

2 Response To Questions

2.1 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?*

Ideally, the ALRC should develop a new framework. The technological landscape, and major distribution channels for content have dramatically changed over the past two decades. This means that many of the things that the current framework attempts are no longer possible. A new framework that does not depend on there necessarily being a physical item for content delivery, and acknowledges the sheer volume of content available today, is the way forward. This means the new framework should see the end of the direct government regulation model, and instead install a self-regulation system. It would also be great to see consolidation, so that all consideration of content falls under the same rules, including imports and exports and treating ISPs as common carriers.

Priority, however, should be given to improving the key elements of the existing framework. This is because many of the aspects of the current framework that need the biggest overhaul are things that are politically difficult to change. The Commonwealth has not been deemed to have the power to impose a national scheme without the cooperation of the States. Given the relative weakness of the current Federal Government and that there is usually at least one contrary state government, a completely new system may prove politically unattainable, despite the strong benefits for all involved. There may also be problems associated with concessions made to generate agreement. Improvements to the current framework would be incremental in nature and therefore still improvements, and that is where priority should be.

2.2 Why classify and regulate content?

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

The primary objective, indeed to the point that it eclipses all others, is to provide information about the content of material. Classification is about categorising material according to the kind of content it contains and the relative level of impact that material can be expected to have so that individuals, including parents, can make informed decision for themselves and their families. For purchasable content, it is about fair trading, so that consumers can know what they're getting. The primary objective must be to equip people with the information they need to decide whether they want to purchase or experience particular content beforehand.

Looking at what the Classification Scheme should not be further emphasises this point. Currently the scheme extends beyond being a tool to inform people about the nature and probable impact of content and reaches into the realm of censorship. As a result, content that was produced without breaking any laws sometimes is denied to Australian adults. To rectify this, the line between what is legal and illegal

would need to be very much more clearly drawn, instead of remaining the quasi-grey area that it is today. Illegal content needs to be clearly made the domain of Law Enforcement, and not the domain of the Classification Scheme. In particular, what is determined to be illegal content must be sensible and transparent for people to identify when they have broken the law. Very high impact content must be available to be experienced by adults who judge themselves capable of understanding or analysing it. This is encapsulated in the first principle of the current Scheme, which reads: 'adults should be able to read, hear and see what they want'.

It is even questionable whether the actual act of classification is a service that government still needs to provide. There are really only 3 areas where the Classification Scheme is visible today, exhibited films, films and television programs for home viewing, and video games. Many people now actively seek out reviews of the content they plan to consume for themselves or their families before acquiring or experiencing them. Additionally, for film and video game releases, there are numerous services that do this job and there is agreement between these classifications. It is thus rare, for example, for a film given an 'adults only' rating in Australia, to not also have an 'adults only' rating in Europe or the United States. Therefore, an industry or aggregate classification system would already sufficiently reduce the burden on government, and limit the Classification Board to dealing with more serious and obnoxious matters like maliciously labelled content. That is, classification is only relevant today for broadcast, as opposed to multicast, situations. As the volume of content increases, the capacity of the Classification Board to meet the challenge and fulfil its role becomes increasingly difficult to the point of absurdity. This was made clear when the Classification Board recently expressed a desire to look at mobile applications despite the sheer scope of the task.

2.3 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?*

In principle, the answer to the question of whether the technology or platform used to access content should affect whether content is classified is no. A content experience shouldn't depend on the platform. There are, however, several points to be made. Watching a film in a cinema is very different to watching the same film as low resolution footage on a computer monitor. This is both the difference between projected and reflected light, as well as the presence or absence of strangers. Context is more important than the platform. Graffiti, for example, can unquestionably be art and is often commissioned for this reason. If it is unwanted, however, it may still be art, but the context has changed to one of property damage.

In practice, most new technological platforms are accessed only in the context of private use. There is therefore a less pressing need for classification where these devices are concerned. Internet access, regardless of the platform, is clearly a private use context, in contradistinction to the cinema context. It is far easier to control and classify content when there is some physical thing involved. When only a handful of major corporations had the resources to produce content, classifying it was easy and practical. Such large scale physical media is, however, already in decline, and

the National Broadband Network will hasten its demise. Today, mobile phones are powerful enough to even plan, film, edit and distribute films, meaning that everyone can be a content producer. It is simply unfair to hold an individual to the same standard as a corporation. This also means that it is simply no longer practical for classification to function the way it has in the past.

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

In terms of practicality, it might be a good idea if content were only 'officially' subject to classification if it was the subject of a complaint. A self-regulated, industry system would offer the best solution, with a complaints process for improper classifications. The cost of reviewing the classification should then be borne by the complainer if the classification was found to be manifestly appropriate, and by the producer if the classification was found to be significantly or deliberately misleading. In borderline cases where the content straddles two categories and there is no hint of maliciousness on the part of the content producer, both parties should either share the cost, or the taxpayer bears it.

The real question is, what should the outcome of the complaint be. There are two obvious scenarios. The first is content as sold with a classification that is judged to be accurate. In this case, clearly no action needs to be taken. The second is that of content sold with a classification that is incorrect, in which case the classification needs to be changed, and the producer possibly punished. It is the other more complex cases that are difficult. In the case where content is being sold specifically for an Australian audience it is easy to require classification, but whether such a requirement is a good idea is another matter. In the global marketplace, where content can be imported from all over the world without necessarily requiring any physical shipping, it is unclear why Australian retailers should be particularly subject to classification. If the content is freely available, then the requirement for classification becomes absurd and hard to justify. Does anyone really think it is practical to require all YouTube videos to be classified before they can be seen by an Australian audience? The sheer volume of content available today simply makes mandatory classification impractical.

The nature of complainants should also be considered. The web, for example, is very much an interactive medium. The days of pop-ups and unintended access have largely passed with current generation browsers. Access to content that would be subject to a complaint is therefore largely the result of a deliberate act. For instance, the AFP have stated that they rarely believe claims of accidental access to child abuse material. The larger Internet is also very dynamic, with content changing by the second, and servers that will present different content to different users, even at the same address. Classification attempts may therefore be invalid before they've even begun.

Context has another dimension. Consider the recent Four Corners report on the live cattle export industry, and the treatment of Australian cattle overseas. The footage was certainly disturbing, but it certainly shouldn't have been repressed. It

may become offensive if such footage were to be used for the purpose of entertainment. That is the context difference attaching to content that must be approached with great care.

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

Children, or more accurately, the protection of minors, is really the entire crux of classification today. Claims that a particular group or class of people lack the capability to properly understand and appreciate, or at best, not be harmed by, a particular category of content has been the standard cry for censorship since Pythagoreans first suppressed knowledge of irrational numbers. As society has progressed, so has such a mindset been shown to be dangerous and insulting to all the excluded groups time and time again.

Children are the last bastion for this line of thinking, albeit mostly for real biological reasons. There certainly are people under the age of 18 who are capable of understanding, analysing and even enjoying mature themes and concepts. Nothing magical happens on the night of a person's 15th or 18th birthday that suddenly makes them more capable than they were the day before. What's important is to keep in mind that the lines we draw are arbitrary and done for convenience. While there is almost certainly a problem exposing a 5 year old to mature themes, there isn't necessarily in a 15 year old exploring those themes for themselves. Most of the classification categories that exist today do so to provide protection to designated younger age groups. The current Classification Scheme is a 'quantisation' of the continuum of young people growing towards maturity.

If there were no children involved, the question of whether to classify mostly goes away. Adults are deemed capable of making decisions for themselves and held responsible for the decisions they do make. Parents, however, want to have some control over the messages their children receive and seek some help to ensure that the content their children are exposed to is age-appropriate. This is a process that must require some active engagement by parents, but shouldn't be too onerous. There is therefore greater need to have content classified when it is specifically directed at children. The same argument holds for a far more nuanced level than is currently the case, such as how the content treats gender and racial equality, body image and religious and other supernatural themes. So, it is not just the impact on children that is important but also the target audience.

On the other hand, care should again be taken to not limit the creativity of children. People under the age of 18 are now frequently producing content of their own now that the technology to do so is readily available. There should be no cases where such people are, due to their age, punished for possessing or viewing the products of their own imaginations or artistic efforts.

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?*

As a matter of general principle, the size or market position of particular content producers and distributors, or the potential mass market reach of the material, should not affect whether content should be classified, although that derives from a position that classification shouldn't be a requirement in the first place. If classification is to remain mandatory for some content, then the answer changes to 'absolutely'. It is unfair to hold an individual or small group to the same standards as a corporation that has the time and resources to advertise and comprehensively research issues. Their motives are also very different. A small group of people are more likely to be producing content because it has some value to them, whereas a corporation is likely to be doing so for profit. As content is increasingly produced by individuals and small groups, the real question is whether larger producers should still be required to classify content.

Classification is part of the metadata that can be available about content. When profit motive is the dominant factor in producing content, classification becomes more justifiable as a feature of fair trading. The claim of content produced for that purpose is that it is worth the price to the consumers. Part of making that determination is for each consumer to be able to evaluate if the experience will be worth the outlay, and classification can help in reaching that decision. When profit motive is not the dominant factor, then there are other values at play that make classification much harder to justify. The goal of producing the content is that it has some value in and of itself, certainly to the producers, and hopefully to their audience. The producers feel it provides something that is worth the outlay of time and effort involved in producing it. There is thus usually much more metadata available about the work anyway.

When corporations were the only groups with the resources to produce content, the only content available for rating was driven by the profit motive. To make matters more difficult, the market may already be moving to make the distinction harder. With the rise of eBook readers, for example, self-publishing is increasingly being resorted to by those interested in making enough money to live on, but unsure about the size of their audience or their works acceptance by publishing houses. The Internet has likewise seen a similar rise in visual forms of content produced by people who probably hope to come out at least even, but really have no idea if the work they love doing has much of an audience. This is why there is now far too much content for mandatory classification to be practical. Classification thus reduces to effectively being nothing more than an imposition on corporations that can produce content for a large, if relatively indifferent audience. That makes market size a key point to consider.

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

In recent times, the very question of classifying artwork is nothing more than fallout from Bill Henson's Oxley9 exhibition. It should be noted that the Classification Board did examine many of the images and found their impact to be mild to moderate. Access to such an exhibit would not have been restricted in the event of mandatory classification of artwork. Other than this particular exhibit, it is difficult to think of any other instances where there was even a small call for the need for

classification. It is therefore hard to see classifying art works for exhibition as a pressing need worthy of the time and effort required to implement it. That said, there would be nothing wrong with museums and galleries advising visitors that particular exhibits may disturb some classes of people. Many museums and galleries already do this.

The real world hardly fits into nice, 'safe' boxes anyway. Just recently we've had a very disturbing Four Corners report showing the apparently poor treatment of Australian cattle in Indonesia. Real history too is littered with disturbing events. While Australia has no museums like Oświęcim (Auschwitz) in Poland, no-one would seriously suggest that kind of content needs to be censored (although the museum at Oświęcim does contain advisories that children under 12 must be accompanied by adults who can explain the more disturbing images). The reality is that there are more emotions than just happiness and delight. Sometimes we actively seek out content to make ourselves depressed, sad, fearful or disgusted. They are valid emotions that are part of the human experience and their exploration should not be constrained. Certainly governments shouldn't have the power to decide what is art, and what emotions are permissible for their citizens to experience.

The real questions from the Henson Case is whether minors can be photographed nude and whether that should automatically constitute an illegal act. It is difficult to see how limits can be placed on Henson's photographs that wouldn't also include most parents' and grandparents' photo albums. The Classification Board made it very clear that the images were not sexual. Clothing is hardly 'natural' for humans, and there is, or should be, no shame in the human body. At any rate, the motivation for imposing classification on artwork is not to prevent access by children, but to prevent access by adults and eventually the creation of controversial work in the first place. That is an outcome that would be truly dangerous.

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

Music and other sound recordings should be classified or regulated in the same way as other content, but only in the sense that all content should be treated equitably. It is more correct to say that all other content should be classified or regulated in a similar way to music. The self-regulatory system for music has attracted little controversy. If music and sound recordings where to be brought under a new, broader Classification Scheme, it would be reasonable for them to be treated very much like publications are. The vast majority would not be considered to require submission, and therefore require no classification.

The motivation behind this particular point seems to be aimed at music videos rather than music per se. Music videos, as they include visual content, are already classified, either by the Classification Board or by television broadcasters. The perceived problem doesn't seem to be with the Classification Board, but with television broadcasters that possibly aren't taking into account the reality of the music videos' content and therefore giving it too low a classification or an inappropriate time slot. That is a question of education and enforcement, and whether the ACMA is doing its job.

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

In general, the potential size and composition of the audience should not affect whether content should be classified, but again, that derives from the view that classification shouldn't be required at all. If classification requirements are to remain, then because the size and composition of the audience can be estimated, the answer in practice should be yes. This comes back to children being the main crux of classification and profit motive. A larger audience means both are more likely to be involved. A large audience is also likely to represent more of a herd response where people attend largely because everyone else is. This plays out across all kinds of content, and with a large audience comes the higher importance in making sure there is no negligence and the impact level is known.

That being said, the premise of the question seems a little curious. Are radio stations currently falling over themselves to broadcast the most offensive, unclassified music available? Is it really thought that television broadcasters won't take their expected audience makeup into account when choosing what to show? There is a profit motive involved here too. Broadcasters have an audience to sell to their advertisers. The larger the audience the higher its value. Continuously annoying their audience with inappropriate content for a particular time slot would not be a good business decision even in the absence of a classification requirement. Of course, that is only relevant to broadcasters, like television and radio. It doesn't apply to mediums like the Internet or newspapers, where active participation by the audience is required. Generally the more contentious the content, the smaller the audience.

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

Yes, the fact that content is accessed in public or at home should absolutely affect whether it should be classified. It should be possible to move through public spaces without being required to be in a mindset to appreciate or expect higher impact themes. Public spaces are all about community, and therefore community standards should apply. In private spaces, by contrast, community standards are irrelevant. This is the whole point of pluralism. Private spaces are places where individuals and their likeminded acquaintances can explore what the human experience means to them. In private spaces, individuals have the ability to control what they experience and to cut short experiences they find unrewarding. Neither of which is true in public spaces. Therefore, classification is far more justifiable in public spaces.

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

To reiterate, classification should be about providing metadata on the impact and themes of content. It is about fair trading so that consumers can know whether their time and money will be well spent before they experience content. It is not about controlling what emotions citizens can experience or restricting the legal actions of adults in a free society. It is about context and intent. People pretending to be dead or dying for the purpose of entertainment is in the context of telling a

story and therefore also inherently fine. A news report containing footage of people actually dead or dying is in the context of a news report describing real events in the world and therefore also inherently fine. Footage of people actually dead or dying for the purpose of entertainment is offensive precisely because it is in the context of entertainment. The footage may even be identical in these last two cases, the difference is entirely in context and intent.

Privacy considerations should also play a roll in determining what is classified. Customs, for example, should not be able to read the contents of a personal diary for the purpose of deciding if is potentially offensive content. Likewise, they should not have the power to browse private photographs or video footage. There must be reasonable grounds to assume a crime has been committed before privacy can be violated.

2.4 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?*

The premise of this question is rather suspect. A strict answering of the question presupposes that there is value to controlling access to online content. That is certainly open to debate and far from being a clear cut issue. It is also concerning why such a question should appear in relation to the Classification Scheme. Classification should not be about censorship, which is what controlling access is about. Certainly the vast majority of people in Australia are adults, and therefore should not be subject to any restrictions amounting to censorship.

Even with that in mind, there are simply no effective methods to control access to online content anything like the manner sought by most advocates. What is possible is to restrict access to some small subset of particular copies of restricted online content, and then only in particular controlled environments. The real question is whether the costs of such limited controls are worth the relatively minor, and largely symbolic, benefits. There are real dangers for the future of Australia as an open society in violating the basic tenet of net neutrality and establishing a right of government to secretly suppress access to information from the people it serves. Certainly, there is insufficient evidence to back the assertion that the level of accidental exposure to illegal content is even high enough to warrant thinking about restricting online access.

There certainly is content that is and should be illegal. This is content that revels in causing demonstrable harm to real people, and then passes if off as entertainment. This kind of content is best dealt with by law enforcement, not the Classification Scheme. There are several stories each year of law enforcement doing just this. The victims of such crimes would be far better served with extra resources spent on law enforcement rather than the security theatre that is controlling online content. The ethical response is to destroy such content rather than pretending it doesn't exist. Indeed, the vast majority of server admins are so appalled by such content that they will often destroy it as soon as it is brought to their attention

without even bothering to check if the accusations are truthful. Indeed, deleting content without properly asserting if a crime has occurred is a major problem with the way online content is often managed.

In terms of access to age-inappropriate material by people under the age of 18, that is absolutely something that is best managed by parents. The Internet, like newspapers, but unlike television, requires active participation from its users. To make parents' lives easier, there would be value in providing subsidised technical support and improved technical literacy to monitor and manage what their children have access to, but that is well outside the domain of the Classification Scheme. The ACMA's own reports show that most parents are happy with the way the Internet is used by their families and don't use filtering products by and large.

Internet Service Providers should be considered and treated as common carriers. It is the responsibility of customers to manage their own content access. This is exactly the same as not holding Australia Post responsible for the sending of illegal or age-inappropriate material. Treating ISPs otherwise will rapidly lead to difficult legal problems, and a false sense of security in the minds of parents. The recent filters introduced by Telstra and Optus, for example, can be easily bypassed by not making use of their default DNS. Instead, Google's DNS or the popular OpenDNS, which already provides much better and more transparent online content access management, could or should be used. The secrecy of mandatory filtering just invites people who do not trust government or the corporate world to investigate or interfere. Already, work is being done on reverse engineering the Interpol blacklist now that it has gone live. There is no way to win here. Either the list actually contains illegal content, in which case the ease with which it can be reverse-engineered is a serious problem, or the list contains mundane material that shouldn't have been blacklisted in the first place, in which case the ISP or government can rightly be condemned for censorship.

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

Again, children form the main focus of classification and access restriction concerns. For young children, it is perhaps better to reverse the traditional thinking of online access. Most methods of attempting to control age-inappropriate content work by blocking a list of material, dynamically or statically, in an attempt to make online content 'safe' for children. This only works for a sufficiently broad definition of 'safe', as there is simply too much content online and algorithms aren't particularly good at working out context. Instead, if online content were restricted to a list of 'safe' material, a whitelist, then there would be the guarantee of safety that most parents expect in their understanding of the term. Better still, as companies and groups would have to apply for inclusion on such a list, they can be held responsible if they violate the definition of 'safe' being used. The problem then becomes that parents and other adults don't want to be restricted to impact levels and themes that are age-appropriate for a kindergarten child. Therefore, such a scheme can only work at the end-user level, which means it has to be a parent's choice to make use of it.

For slightly older children, traditional methods of restricting access become viable, as those children are expected to have enough life experience to deal with the occasional brush with higher level themes. This is one of the things that OpenDNS is already designed to do. For still older children, it isn't worth bothering to control their access as they have the skills to bypass such attempts and the life experience to not be adversely effected by high impact themes. They are also of the age group that particularly enjoys the shock value of Internet memes such as *Goatse*.

This kind of discussion always turns around twin themes of violence and sexual content. After nearly a century of investigation, there is still little evidence of a firm link between either and anti-social behaviour. What's important is the variety of messages being received and the trustworthiness of the sources. Good quality sex and relationship education, including respectful ways to negotiate sexual encounters and other issues in relationships, is important and sorely lacking in many children's upbringing. Media literacy is another important aspect of growing up that could be improved. Part of the maturity process is sculpting adults who are capable of dealing with a large variety of content and putting it into context, whether it is as disturbing as the recent livestock abuse footage, or as mild as The Wiggles. That is all well outside of the domain of the Classification Scheme, but may be within the domain of future education policy.

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

It is hardly clear that this should be a pressing concern. The magazine industry is dying and most sexually explicit content is now accessed online. This 'problem' will almost certainly go away by itself over the next few years anyway. That said, as a 2010 Hungry Beast story made clear, the rules regarding unrestricted sexually explicit publications are counterproductive and far too subjective. Altered images of human bodies may set up unrealistic expectations and should be discouraged, not enforced.

As for other offline content, it is unclear what more can be done. Australians seem generally happy in this regard. Retailers are already prohibited from selling age-inappropriate material to people under the age of 18. If the concern is that some parents or guardians are purchasing such content and then giving it to their children, then that sounds like a problem for child services, not classification.

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

Consumer advice should only be required to be shown if the content is available in a public space, or if it is reasonable to suppose that people under the age of 18 could make up some of the audience.

2.5 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?*

The solution going forward is to have a mixed industry - government solution to providing consumer advice. All industry produced content intended for an audience which includes people under the age of 18 should have consumer advice provided. Preferably, the existing classification categories, which are generally well understood, should be retained. This means the code of practice will have to be government approved. A useful way to encourage honesty could be to require industry to have and present proof of accuracy if asked. Proof could be as simple as a similar classification from another reliable or reputable classification system.

The Classification Board, or more likely, the Classification Review Board, should be retained to handle claims of incorrect or maliciously mislabelled content. The regulations of this remaining Classification Board should require that the makeup of the Board more closely reflect the makeup of Australia. In particular, the average age of members of the Board should reflect the average age of Australians. There should also be significant gender and socioeconomic diversity similar to the make up of Australia itself. That means it should be impossible for this Board to be composed almost entirely of retired male lawyers or politicians, as has been the situation with some Boards in the past.

For non-industry produced content, individuals and individual organisations must be deemed responsible for their own measures. As non-industry produced content is accessed almost exclusively in private, the only complaints that are relevant are those for content that is, or appears to be, illegal. That is the domain of law enforcement. In terms of defence, it should be enough to prove that no laws were violated in the production of the content.

Users should be expected and encouraged to research their content decisions. The Government should not foster a culture of dependence, but instead promote a culture of responsibility. Government's role in classification is to make the decision process easier, not to remove the burden entirely.

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?*

Yes. There, realistically, is no other practical solution. It may be true that, except in the area of video games, the volume of content industry itself produces hasn't greatly increased. It is increasingly the case, however, that individuals are more often choosing to experience non-industry produced content. Therefore, overall there is simply too much content available today for any government body to be able to mange the job of ubiquitous classification. Further, even if it were possible, the Government is increasingly powerless to force the majority of this content to carry approved classification markings. Australia is simply too small for international websites to go to far out of their way for. That is not a situation that shows any signs of changing in the future, indeed, it'll probably only accelerate. As this continues, it makes less and less sense to hold industry to standards increasingly not expected by individuals. A co-regulatory model would ease this burden and foster a greater culture of responsibility which is required in this new reality.

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

Industry would obviously classify sexually explicit material as such. It should be enough for sellers to be able to prove that all participants were consenting, legal adults in the case a concern is raised. This also frees government from being in the position of paying public servants to experience sexually explicit material.

If overall mandatory classification is to be retained, then an additional means of classification may be helpful. If a particular piece of industry-produced content is considered to be uncontentious at all levels, then the producers should be able to apply a G rating without the requirement for a review. There can then be a significant penalty attached to abusing this bypass of classification. This would be an easy way for games like Chess or Tetris to pass without requiring classification.

2.6 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?*

In the ideal industry self-regulation system, whatever replaces the Classification Board would only have a role to handle disputes. In such circumstances, the complainer should be responsible for the classification fees in the event it is found that industry self-regulated correctly. Industry should be responsible for fees in the event it is clear they falsely labeled their products. There would then be a role for government to subsidise classification fees in borderline cases where it is clear that industry didn't act maliciously, but on balance might have only got the classification slightly wrong.

As long as there is mandatory classification, the application of fees should be means-tested, and the director should not have the ability to arbitrarily waive the fees of those complaining about a given classification. Above all, care must be taken to avoid the *Chilling Effect* where content producers pre-censor their work to guess what will be acceptable for the censor.

2.7 Classification categories and criteria

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

The majority of the categories do seem to be clearly understood. The MA15+ video game category is slightly misunderstood. This is partially the result of video games still carrying the stigma that they are 'just for kids'. The larger component of this misunderstanding is the lack of an R18+ rating for video games, which means that higher impact games are often shoe-horned into the MA15+ category because the Classification Board is reluctant to ban games the rest of the world can access. This can be solved by introducing the long awaited R18+ category, which was always intended to be part of the Scheme.

The Refused Classification category across all content types, however, is clearly misunderstood. It is deemed, even sometimes by members of government, to be synonymous with illegal. Throughout most of Australia, for instance, it is not a crime to own a copy of *The Peaceful Pill Handbook* and many Australians did purchase this book during the short time it was available and continue to own it today. Yet the conflation of illegal and Refused Classification would make owning this book appear to be a crime. It is good that Refused Classification content is not illegal to posses, provided the content is not in fact illegal. Non-illegal Refused Classification content should also be available to purchase and import.

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?*

Other than the still ongoing requirement for an adult rating for video games, there is little need for new classification categories. Categories are about attempting to turn a continuous spectrum into discrete stages. The current categories basically distinguishes between those under the age of 15, those between the ages of 15 and 18, and those over the age of 18. It is probable that these groups were decided on because those under the age of 15 generally don't have the financial capacity to make their own content decisions, and therefore a parent or guardian will always feature in any access to content such a person would like to experience and what they can actually experience. With the increased purchasing power and freedom of people under the age of 15, there may be some merit to an additional distinction for 12 to 15 year olds. On the other hand, there is a point where it becomes silly; there is clearly no need for 18 different categories.

The Refused Classification category should be abolished. If there is still content in this category that a majority feels cannot be accommodated in the R18+ category, then a new category should be created with a name like 'Highly Confronting 18+' (HC18+) to accommodate the content currently in the Refused Classification category that is not illegal. The large majority of content currently in the Refused Classification category should be able to be accommodated in either R18+ or a new HC18+ because, as a general rule, those who produce illegal content do not submit it for classification. This would remove the confusion surrounding this very high impact category. Obviously, a new HC18+ category should be available for sale or viewing in any private location.

The X18+ category should be restored to its pre-2000 definition. In particular, the government should not be in the business of regulating the consensual sexual practices of its citizens, regardless of how alternative or 'fetishised' they may seem to be. If actions are legal for Australian adults to engage in, it makes no sense for the documentation of those actions to be prohibited.

There is no objection to effectively renaming the publication restricted categories as R18+ and X18+ (and hopefully HC18+). However, publications that do not need to be submitted for classification should not be required to carry a classification marking.

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?

This is certainly a big question. Apple and BigPond already provide Australian classifications for the films and television programs they sell online. On the other hand, there is no chance of getting small producers producing content for foreign audiences to provide Australian classifications for their work. This is increasingly going to be the way many shows get produced. Web-serials like *Chad Vader*, *Dr Horrible's Sing-A-Long Blog* and *The Guild* have small budgets and simply have neither the resources nor the inclination to research and apply Australian classifications. If they are eventually sold as physical media in wholesale or retail outlets in Australia, then yes, but for their online presence, classification is impractical.

Australian classification moreover becomes increasingly irrelevant as more people buy their digital and other content from overseas. This is due to both the currently high Australian dollar, and to the often high markup on content that is specifically for the Australian market. Attempting to force this issue will only further erode local retailers and respect for the Classification Scheme as more people will be driven to purchase from overseas.

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?*

Yes. Also the *Customs (Prohibited Imports) Regulations* 1956, *Customs (Prohibited Exports) Regulations* 1958 and the relevant sections of the *Broadcasting Services Act*.

2.8 Refused Classification (RC) category

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

Through the Classification Scheme, none at all. The purpose of the Classification Scheme is to inform people about the impact level and themes in content before they choose to experience it. The Classification Scheme should not be an engine for censorship. For online content, law enforcement should only have the power to issue takedown notices in the event that the content is hosted in Australia and it is also illegal for other reasons. To do otherwise does nothing to actually satisfy the concerns of age-inappropriate access, but does serve to increase the costs of locally hosting content in Australia, and therefore drives business off-shore. Additionally, content that is nothing more than the documentation of legal actions should not be prohibited as a matter of principle. There is also no reason to prohibit content that is legal to own from being imported or sold.

That isn't to say that there isn't content that should be illegal. Illegal content should be the domain of law enforcement, and what material is deemed illegal should be well defined, well understood, and sensible. There must be real, provable harm. Visual documentation of real rape, statuary or otherwise, for the purpose of entertainment clearly fits this description. As the vast majority of this kind of content

does not exist on the web, and when it does it is typically hosted in friendly countries by hosting companies who are not aware of its presence, it is ethically better to aim to destroy such content rather than pretend it doesn't exist by filtering it.

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

No. The assumption in the question is that there is content that should be prohibited online. Only content that is actually illegal should be prohibited online. Even then, it is far better to destroy such content rather than attempt to hide it. The current scope of Refused Classification is far too broad to fit this definition. It is unclear, for example, why images of the Simpsons characters engaged in sexual acts is considered child abuse imagery, but Homer Simpson can throttle Bart Simpson on prime time television. As to content that advocates crimes, including terrorist acts, it seems to be far better for Australians to be aware that such things exist rather than hiding it. In particular, one would hope that law enforcement is aware of and monitors online content that advocates terrorist activities, and the people who are interested in it rather than pretending it doesn't exist. It can also be useful for retailers and the general public to be aware of what combinations of chemicals can be used to engage in crimes. It is harder, for example, to be aware of possible drug creation nearby, if one is not at least rudimentarily aware of the process involved in producing drugs.

2.9 Reform of the cooperative scheme

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

Consistency of state and territory classification laws is desirable, but not essential. How it can be promoted depends somewhat on the direction the Classification Scheme takes. Most of the States are far more restrictive than what the Commonwealth Scheme, so promotion should be directed towards liberalisation in the States. It is pointless to have laws that the majority of citizens actively ignore.

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

Whatever the new scheme, it should be difficult for governments and citizens to use it to censor or restrict what other people should freely and legally choose to experience. This means it must still require a substantial level of agreement to restrict the system. Expansion of the system should be relatively easy, so that it can adapt to new technologies and content types (for example virtual reality systems), without requiring a rework of the entire system.

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?*

This question cannot be easily answered. The current cooperative system has been both a curse and a blessing. Ideally, there would be only one Classification framework throughout the whole of Australia. There really is nothing different about the capabilities of people from Tasmania as opposed to Western Australia. The problem is that attempts to increase censorship are regularly proposed and only blocked because some states or territories simply refuse. Likewise, attempts to increase freedom are rarely proposed, but then also blocked because some other states or territories simply refuse. Both the protection and threat to individuals wanting to experience legal content in private is therefore directly connected to the makeup of the individual state and territory governments. Surrendering that power now for a minor improvement in uniformity is likely to lead to greater abuse in the future. That problem may already exist now. The *Classification (Publications, Films and Computer Games) Amendment (Terrorist Material) Act* 2007 is an example of Government overreaching in the face of state and territory reluctance, if not downright opposition.

This also isn't a problem that is going to go away. Technology will continue to improve, and the range and type of content available will continue to grow and diversify. Even though no solid link between any particular class of content and anti-social behaviour has yet been found in almost a century of looking, this debate reappears on a semi-regular basis. A group in favour of censorship will push a study claiming a link. An opposing group will point to the methodology problems in the study in question, and proclaim that the correlation is relatively small in any event. They will then produce a countering study to show no or indeed an inverse correlation. The first group will then fire back in kind. How many times do we have to turn on this merry-go-round? The basic idea that experiencing a particular kind of content necessarily leads to particular social outcomes is simplistic and flawed. What matters is the totality of content messages, and being able to put particular content into context. Until we get to that point, total control of this issue by the Federal Government is unwise. A temporary referral of state powers to set up a new framework may be a satisfactory vehicle towards that end.

2.10 Other issues

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

It is worth considering joining a system like the Pan European Game Information (PEGI), or at least convincing industry to use something like this as the foundation for a self-regulatory system.

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