CI 1244 I Graham

Submission

To: **Australian Law Reform Commission**

Re: **National Classification Scheme Review (Issues Paper 40)**

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1. Introduction

1. The writer of this submission is the provider of the web site "libertus.net": about censorship and freedom of expression, primarily in Australia. The web site has been online since late 1995 and is widely regarded as the most comprehensive online resource about the history and state of censorship in Australia.

2. Further, to avoid any potential misconceptions: during the period mid 2000 to mid 2007, the writer was the Executive Director of the non-profit membership-based organisation Electronic Frontiers Australia Inc. (EFA) and, in that capacity, met with ALRC representatives during the privacy review, and appeared before numerous Federal Parliamentary Committee inquiries, etc. Since mid 2007, the writer has not been in that role, nor on the Board of EFA. This submission is lodged in an entirely personal capacity.

2. Approach to the Inquiry (Q1)

Q1. In this Inquiry, should the ALRC focus on developing a new framework for classification, or improving key elements of the existing framework?

3. The ALRC should focus on:

(a) Improving the "classification" scheme (i.e. provisions of the Classification Act, Code, Guidelines and associated Intergovernmental Agreement).
(b) Developing an entirely new framework in relation to online content because the existing regulatory scheme, which applies elements of a classification scheme designed primarily for offline commercial entertainment media, is impractical and inappropriate.
(c) Overhauling, or deleting, the "Refused Classification" category, much of which unduly infringes Classification Code Principle 1(a), and Article 19 of the ICCPR.
(d) In relation to all types of media/platforms, developing classification and/or regulatory frameworks that are consistent with Australia's international obligations under Article 19 of the International Covenant on Civil and Political Rights (ICCPR)[1] (which would likely result in Australian "classification" scheme/s being significantly more consistent with the situation in numerous, probably all, other Western democratic countries).

3. Designing a regulatory framework

3.1 Why classify and regulate content? (Q2)

Q2. What should be the primary objectives of a national classification scheme?

4. The primary objective should be to facilitate informed choice, in a community of diverse views and standards, from the broadest possible range of content across all platforms and services.

5. The classification scheme should not have an objective of prohibiting, or attempting to prevent, all adults' access to content that is considered offensive by **some** adults in a diverse, multi-cultural, multi-religion society (as the current scheme does; for an example, see Section 5.2.6 later herein).

6. The current principles/objectives in the National Classification Code (s1) were developed during a period when few members of the public were providers of content, and subsequently amended by politicians at various times in an ad hoc manner, resulting in tension/conflict and associated potential for inconsistent classification decisions.

7. Issues with the current principles are discussed below (italics denote extracts from the Classification Code):

> *1. 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;*

8. **Principle (a)** does not recognise that adults should be able to say what they want (e.g. in content they provide) nor that adults should be able to play computer games that they want. It should, at the least, be amended to include the words "say" and "play". Alternatively it should be replaced with phrasing such as: "adults should be able to seek, receive and impart information and ideas of all kinds, regardless of frontiers,

1 International Covenant on Civil and Political Rights (ICCPR) http://www2.ohchr.org/english/law/ccpr.htm

either orally, in writing or in print, in the form of art, or through any other media of his choice" (i.e. similar to Article 19 of the ICCPR, which Australian Governments have been purporting to comply with since 1980[2]).

(c) everyone should be protected from exposure to unsolicited material that they find offensive;

9. **Principle (c)** is evidently incapable of operating without infringing existing Principle (a). It has apparently been used to justify banning/prohibiting material merely because **some** adults find the material offensive (see for an example Section 5.2.6 later herein). It should be either deleted entirely, or changed to "everyone should be warned about potential exposure to unsolicited material that some people may find offensive". (This, like other principles, would apply "as far as possible" as currently stated in the preface to the list of principles).

(d) the need to take account of community concerns about:
(i) depictions that condone or incite violence, particularly sexual violence; and
(ii) the portrayal of persons in a demeaning manner.

10. **Principle (d)(ii)** creates tension and conflict with current Principle (a) because both before and since (d) was added in 1995, there has been ongoing debate/argument about the meaning of the word "demeans" and what it "should be" interpreted to mean in the context of classification/censorship, primarily by lobby groups and individuals who regard all sexually explicit material as offensive and seek to have it banned. As offensiveness to some adults is generally not sufficient to achieve banning of material, an argument that all sexually explicit material is demeaning to women is used instead, although such a view is not shared by all women. Principle (d) was a new principle introduced by the 1995 Classification Act[3], which had been decided on by Censorship Ministers in early 1994[4]. There appears to be no publicly available information on the reasons for this addition, other than that the Senate Select Committee on Community Standards[5] (particularly Senator Brian Harradine) had been contending/complaining for years that all sexually explicit material is demeaning to women, and that according to Senator Harradine, in 1992 the "Commonwealth State Ministers for the Status of Women" requested that Censorship Ministers consider developing guidelines "which deal with three issues of concern to women: material which condones or incites violence against women; material which shows women in demeaning sexual poses; and banner advertising of restricted magazine"[6].

11. Key classification principles should not include special criteria advocated by one or more special interest groups, nor matters of concern to the community in general. The inclusion of criteria, such as "in a demeaning manner", in key principles encourages a perception that it over-rides, or should over-ride, all other principles and matters relevant to classification decisions.

12. Principle (d) should be deleted and, if it is considered necessary to specially refer to any of the matters in (d), other than in the Classification Guidelines, then such matters should be included in a list of matters to be considered in classification. (Such a list currently exists in Section 11 of the Classification Act, and any such list probably should not be in the Act, but in a new consolidated document as suggested by the ALRC in Q23).

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2 http://www.austlii.edu.au/au/other/dfat/treaties/1980/23.html

3 Federal Attorney-General (Michael Lavarch), Second Reading speech, Classification (Publications, Films and Computer Games) Bill 1994, 22 September 1994. http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansardr%2F1994-09-22%2F0027%22

4 Federal Attorney-General (Michael Lavarch), Press Release, "Computer games and censorship reforms agreed", 18 February 1994. http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2FCHS10%22

5 Full title was: Senate Select Committee on Community Standards Relevant to the Supply of Services Utilising Electronic Technologies

6 Senator Brian Harradine, Estimates Committeee E Hansard (Attorney-General's Department, Subprogram 3.3-Office of Film and Literature Classification), 10 September 1992. http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22committees%2Festimate%2Fecomw920910a_ece.out%2F0032%22 (Note: That URL does not show the names of speakers as at 4 June 2011, however, the writer has a copy of the transcript which does include speaker names).

3.2 What content should be classified and regulated? (Q3 - Q10)

Q3. Should the technology or platform used to access content affect whether content should be classified, and, if so, why?

13. No. However, this does **not** mean that all content should be classified regardless of the method of delivery/access. Parity is only desirable when that objective will, in practice, achieve the same outcome in terms of both accessibility and restriction, and is cost effective, and does not have undesirable and negative consequences. The foregoing is not possible in relation to online content (not even in relation to Australian hosted content), as has been well demonstrated by the existing online content regulatory framework, which was implemented for the claimed purpose of parity with regulation of offline content (in particular, television broadcasting).

Q4. Should some content only be required to be classified if the content has been the subject of a complaint?

14. Complaints-based systems in relation to classification/censorship are problematic because they are typically used by members of vocal minority groups to complain about material they find offensive. Such systems are especially problematic when the first point of call for complaints is corporations/businesses and/or industry organisations that have little or no awareness or experience in the type of orchestrated complaint campaigns run by such minority groups.

15. A recent example is the homophobic complaint campaign run by the Australian Christian Lobby (ACL) (which is not representative of a majority of Christians) targeting a safe-sex advertisement in some Brisbane bus stop shelters. The advertising company Adshel quickly removed the advertisements in response to complaints. However, after then receiving complaints about the removal and critical media publicity, Adshel re-instated the advertisements because, they said, "it has now become clear that Adshel has been the target of a coordinated Australian Christian Lobby campaign"[7]. (Even if it had not been, removal of a generally inoffensive advertisement, and especially a safe-sex one, in response to a small number of complaints is inappropriate).

16. If a complaints-based system is to be used in relation to any content, the first place for complaints to be received must be agencies, organisations, or businesses (e.g. existing TV channels) that are well-experienced in complaint handling, or who will be assisted by experienced agencies/organisations at least during the first 1-2 years. In addition, any classification criteria/guidelines which complaint recipients are required to apply must be much less vague and much less open to varying interpretations than the existing Classification Guidelines.

17. Furthermore, if a complaints-based system applicable to online content is to continue, the ACMA's power to investigate complaints and issue take-down and link-deletion orders should be narrowed, see Sections 7.2.2 to 7.2.4 inclusive).

Q5. Should the potential impact of content affect whether it should be classified? Should content designed for children be classified across all media?

18. No. The potential "impact" of content requires a judgement that is far too subjective to form the basis of whether or not any particular content should be classified. Content designed for children should not be required to be classified across all media because it is physically impossible to classify all content on the world-wide Internet. Classifying only a small proportion makes no significant difference to parents', or any adults', ability to choose or limit the type of online content that children in their care may access. They would still need to supervise children's access, which may include the use of PC-based software products that either provide access only to sites on a white-list (i.e. known, pre-approved sites containing content designed for young children) or that are designed to block access to content that is unsuitable for children.

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7 Adshel backs down on gay poster ban, PM, ABC Radio, 1 June 2011
http://www.abc.net.au/pm/content/2011/s3233013.htm
HIV campaigners outraged as safe sex ads pulled from Brisbane bus shelters, Courier-Mail (Brisbane), 1 June 2011
http://www.couriermail.com.au/lifestyle/hiv-ads-pulled-from-brisbane-bus-shelters/story-e6frer4f-1226066760845

Q6. 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?

19. There is merit in requiring large content producers/distributors, who make material available for sale or hire and/or exhibition in public cinemas, to provide prospective purchasers/viewers with classification information. This is a consumer protection issue in relation to financial expenditure, i.e. it is desirable that prospective purchasers have a means of ascertaining whether the material is likely to be suitable for their children and/or themself, before paying for it, and large commercial companies are more likely (than small companies) to be able to provide such information without significantly increasing cost to consumers.

20. However, in relation to small commercial producers/distributors, the high cost of classification and/or need to employ or contract trained classifiers seems likely to be counter-productive to an objective of enabling Australians to have the option of access to the broadest range of material possible. There would be merit in allowing small commercial producers/distributors to, if they want, sell material without classification to adults, and perhaps with a general warning that the material has not been classified to make it readily apparent to parents that they should view any such material prior to viewing by their children.

Q7. Should some artworks be required to be classified before exhibition for the purpose of restricting access or providing consumer advice?

21. No. Such requirements would most likely result in artists being, in effect, prevented from having their works exhibited in galleries etc, and therefore adults being prevented from viewing same, due to the physical difficulties and costs of restricting access, e.g. to adults, to one or more of the works intended to be exhibited. It is well-known that artworks often deal with controversial subjects and/or be confronting in some way.

22. Moreover, it should be noted that public 'debate' and 'complaints' in the last 3 years about artworks has centred on works by Bill Henson and by other artists published in "Art Monthly" in 2008 all of which were subsequently classified "G", PG", or "Unrestricted" by the Classification Board. Hence the complainants about such artworks (who wanted same banned) would not have been happy even if the artworks, or exhibition entry point, had been legislatively required to display e.g. "PG" (Parental Guidance recommended) notices.

Q8. Should music and other sound recordings (such as audio books) be classified or regulated in the same way as other content?

23. In relation to music/sound recordings, the existing scheme that operates under the ARIA/AMRA Recorded Music Labelling Code of Practice is sufficient. While some vocal minority fundamentalist religious groups are unhappy with that scheme, and one or two current Senators appear to share such views, the views of such groups should not dictate public policy. If they did, all types of content legally available to adults, across all media/platforms, would very likely be reduced to that suitable for persons under 18 years, or possibly under 12 years.

24. In relation to "audio book" sound recordings, they should not have to classified merely because they are audio, nor should classification requirements and/or criteria, if any, be more restrictive than applicable to the book if printed on paper.

Q9. Should the potential size and composition of the audience affect whether content should be classified?

25. No. The potential size/composition of an audience is impossible to determine in relation to online content. Furthermore, the existing requirement that classification decisions take into account "the persons or class of persons to or amongst whom it is published or is intended or likely to be published"[8] should be deleted because:

- if interpreted as meaning that one "class" is children and applied to the classification of online content, it appears to have potential to reduce permitted online content to that suitable for young children;
- the "class" criteria appears to encompass an outdated paternalist attitude to adult citizens' competence to decide for themselves what they want to read, see and hear. It appears to be the basis

8 Section 11(d), C'th Classification Act

on which film festivals have been granted exemptions that permit them to exhibit unclassified films (and some films that have been or would potentially be Refused Classification for exhibition in public cinemas). The notion that people who attend film festivals are significantly different from other adults is ridiculous, and such special exemptions unfairly discriminate against adults who do not reside in the capital cities where film festivals are typically held. Any film that would/could be permitted to be shown at a film festival should be permitted to be exhibited to adults in public cinemas (and available to adults on DVD/video, or online, if the producer/distributor chooses to make it available by such means).

Q10. Should the fact that content is accessed in public or at home affect whether it should be classified?

26. Yes. Content that is accessed in the privacy of one's home should not be subject to mandatory classification requirements. It is more important that content accessed in public, i.e. in the presence of many other people (strangers) viewing the same material, be classified to provide forewarning of the type of content, due to the potential for some people to become upset/disturbed in public view. This risk does not exist when a person is choosing to access material in the privacy of their own home.

27. It should be noted that while some aspects of the existing classification/censorship regime are apparently based on grounds similar to the above, historically some classification decisions have permitted public exhibition of a film, but refused classification to the same film on video/DVD for sale/hire, due to fear that that a person under 18 years may obtain access to a video/DVD left lying around the home by some parents, and/or that scenes/sections on a video/DVD can be repeatedly viewed. While such arguments may appear to have had possible merit historically, they are unsustainable in a converged media environment, unless the Australian Parliament enacts legislation requiring the Australian Government (or someone) to construct a nationwide Internet 'firewall' that prevents access (which is impossible) from all homes to all Internet content that has not been classified by an Australian Government classification authority.

3.3 How should access to content be controlled? (Q12 - Q14)

Q12. What are the most effective methods of controlling access to online content, access to which would be restricted under the National Classification Scheme?

28. There is no effective method that is implementable by means of government regulation.

Q13. How can children's access to potentially inappropriate content be better controlled online?

29. It can't be, other than by increased efforts to educate parents about the need to supervise and control children's access.

Q14. How can access to restricted offline content, such as sexually explicit magazines, be better controlled?

30. Make it lawful in all States and Territories to sell/distribute films classified X18+, and publications classified Category 2 Restricted, under licensing and regulatory conditions that are the same as in the A.C.T. (i.e. among other things, businesses are required to apply for a licence to sell X18+ films, and access to premises, or to an area of premises containing sexually explicit material, is restricted to access by adults).

31. In addition, revoke/delete the increased restrictions on content in the X18+ category that were implemented in 2000.

32. The above changes would very likely wipe out a substantial proportion of the black-market which exists as a result of public demand for material that is currently illegal to sell in all States, and the inability of law abiding businesses (who would be willing to prevent access by children) to "compete" with the black market. That latter has no incentive to ensure children cannot access/purchase the material they illegally sell/distribute.

33. In addition, reduction in the size of the black market would reduce the frequency with which police are being asked/required to spend time investigating the illegal sale of material that is merely offensive to some adults, and police would presumably have more resources available to investigate and prosecute persons illegally selling material that is or may be harmful, i.e. some of the material that is or would be "Refused Classification".

34. Note: Publications classified Category 1 Restricted are not permitted to contain sexually explicit material, and the category is not limited to material pertaining to sex and/or nudity. Some books on entirely different topics have been classified Category 1 R because the content requires an adult perspective and is therefore not suitable for children. Existing classification criteria requires that the covers of Category 1 R publications be suitable for public display, or else sealed in a **plain opaque** wrapper, and all publications are required to be contained in sealed packages. This category of publications should not be limited to sale from premises restricted to adults.

3.4 Who should classify and regulate content? (Q16 - Q18)

Q16. What should be the respective roles of government agencies, industry bodies and users in the regulation of content?

35. The writer is currently unable to form an opinion in the above regard because it would depend, in large part, on methods of classification enforcement. In particular, the penalties and/or other sanctions that would apply to industry bodies, businesses, or anyone else, for incorrectly assessing/guessing the classification of any particular content.

36. Under the current highly subjective and poorly defined classification criteria, it is not possible for anyone, other than the Classification **Review** Board, to assess with certainty what the classification of any particular content would be. Even assessments by members of the Classification Board are found to be sometimes "wrong" by the Review Board, and this would likely be evident much more frequently if the fee for review of a classification was significantly less than $8000.

37. Furthermore, assuming classification criteria will continue to be based on knowledge of "the standards of morality, decency and propriety generally accepted by reasonable adults" and/or determination of what is "likely to cause offence to a reasonable adult", how would industry bodies, businesses, and/or anyone else be able to know that? Currently the extent (if any) to which such criteria/requirements may be regarded as practical, and/or a legitimate basis for penalties (imprisonment and/or large monetary penalties) for breach of classification enforcement laws, rests on the requirement and claim that members of the Classification Boards are "broadly representative of the Australian community" and that a classification issued by the Classification Boards protects a publisher/distributor from prosecution.

38. Hence, the writer is highly concerned about the potential for, and probability of, very cautious classification decisions being made by industry bodies and/or businesses (to avoid the risk of prosecution for guessing wrongly), especially in relation to the grey line between R18+ and RC, which would have the effect of further restricting adults' rights/freedom to read, see and hear what they want. (Note: Businesses such as free to air TV channels, who are currently permitted to "classify" material they provide, are not permitted to broadcast R18+ material in the first place, and therefore the issue of such businesses guessing whether material would be R18+ or RC does not arise.)

39. In addition, the writer is strongly opposed to "users" having a legislatively enforced "role" in the regulation of content where "user" means an individual who uses the Internet to publish/make available content and the "role" requires such users to self-classify and mark/label speech/content they make available and subjects them to penalties and/or sanctions, of any type whatsoever, for incorrectly guessing/assessing the applicable classification category. Classification criteria is extremely subjective, and almost certainly always will be (in that regard, see also Q18 below). (Note: The foregoing refers to classification of content, not users' existing responsibility to refrain from committing offences in Criminal Codes/Acts e.g. concerning prohibition of child sexual abuse material.)

Q17. 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?

40. The writer is currently unable to form an opinion in the above regard, for the same reasons as stated in response to Q16 above.

Q18. What content, if any, should industry classify because the likely classification is obvious and straightforward?

41. Given the existing classification code, guidelines and associated glossary definitions, the writer is of the opinion that there is no content where the classification is "obvious and straightforward", other than some, not all, educational type material e.g. a video about how to plant a tree in a garden.

42. Furthermore, apparently even the ACMA, which has been attempting to correctly apply classification criteria for over a decade, still does not always find it obvious and straightforward to assess what would be classified "G", i.e. not "MA15+". The ACMA's online content regulatory powers are limited to content that is or would be classified MA15+ or higher, and it is not required to apply for classification of any other types of online content. However, a search of the Classification Boards' online database shows that during the 2010/2011 year the Board classified, for the ACMA, 148 items of content (that had been the subject of a complaint) at a cost/fee of $510 per item. Of the 148 items, 7 were classified "G", 20 "PG" and 26 "M".

43. In addition, the Classification Boards' online database shows that, since 28 June 2011, the ACMA has submitted over 70 items of online content for classification under the applicant name "ACMA ISP Filtering". While the overwhelming majority of items were classified "RC", a few were classified "G", "MA15+" and "R18+". This indicates there are occasions when the ACMA believes particular content would be classified "RC", but the Classification Board classifies it "G".

3.5 Classification fees (Q19)

Q19. In what circumstances should the Government subsidise the classification of content? For example, should the classification of small independent films be subsidised?

44. Yes, classification of e.g. small independent films should be government subsidised - to facilitate and encourage increased availability of, and diversity in, films available to Australian viewers.

45. Furthermore, although the Issues Paper states that "Fees are calculated according to the length of the material submitted for classification" (para 97), that is not factual in relation to Internet content.

46. The fee for classifying one Web page of text, or one online static image/photo, is the same as that for classifying a video/DVD of up to 60 minutes running time, i.e. $510, regardless that the fee for classifying a printed (paper) publication of 76 pages is $520. While this fact is not apparent in the Regulations (which do not mention Internet content), it is made clear in Ministers' answers to Questions on Notice in the Senate, in 2002 and 2009, concerning the fees charged by the Classification Board to ACMA for classification of items of Australian hosted online content[9]. This exorbitant fee situation exists because Internet content is legislatively required to be classified as if it is a film/movie, even if the online content consists solely of text on a short web page, or a single static image/photo (see Q22 later herein).

47. If the ALRC decides to recommend that any online content providers/publishers be required to have online content classified, then such a recommendation should be subject to the proviso that the fee for classification of online content be largely subsidised by the Government, and fully subsidised in the case of non-commercial online content. Alternatively, in relation to commercial online content, the Government should massively reduce the fees for online content consisting of text and static images - such fees should be scaled consistent with the length of text and/or quantity of static images. Most Web pages are equivalent in length to just a few pages in a paper magazine, not 76 pages. Furthermore, the Classification Boards' online database reveals that many of the items classified for the ACMA had so-called "running times" of 3 to 10 minutes. A flat fee based on the time taken by classifiers to read 76 pages on paper, or view a film with a running time of 60 minutes, cannot be justified. Moreover, currently it appears that the fees charged to the ACMA (paid by taxpayers) for classification of online text and static images, are subsidising the cost of classification of offline commercial publications/films, or the Classification Board is making a profit from classifying online content for the ACMA.

4. Classification categories and criteria (Q20 -23)

Q20. Are the existing classification categories understood in the community? Which classification categories, if any, cause confusion?

48. The X18+ classification category is apparently not understood by a significant number of commentators who appear to believe it is the same as 'XXX' ratings used in other countries (whether officially or not) which include content involving violence, whereas the X18+ category (formerly "X") has not been permitted to include depictions of violence, coercion or non-consent, since at least June 1988[10]. It appears "X" was

9 Communication Minister's answer to QoN No. 223(10), 17 June 2002
http://www.aph.gov.au/hansard/senate/dailys/ds170602.pdf
and Communications Minister's answer to QoN No. 834(7), 3 February 2009
http://www.aph.gov.au/hansard/senate/dailys/ds030209.pdf

10 Guidelines for the Classification of Films, Videotapes and Printed Matter June 1988, Senate Hansard, 4 Dec 1990

originally an abbreviation for "Extra Point of Sale restrictions", according to the April 1984 Guidelines[11]. The X18+ category should be renamed SE18+ (sexually explicit) or SR18+ (sex restricted) to minimise the potential for confusion with overseas "X" ratings, given governmental plans/efforts to rename it "NVE" (Non-Violent Erotica) in 2000 failed and such a category name seems unlikely to be implemented because the same arguments against would arise. Alternatively, if it is decided to use the same classification categories as the British Board of Film Classification (which the writer considers have merit), then existing X18+ would be renamed R18 (and existing R18+ would become 18).

49. It appears that the difference between M and MA15+ are not well understood and in the writer's opinion the abbreviated category names are too similar.

Q21. Is there a need for new classification categories and, if so, what are they? Should any existing classification categories be removed or merged?

50. A new classification, R18+, for computer games should be established.

51. The X18+ classification should **not** be removed, and the increased restrictions on permitted content in the X18+ category, that were implemented in 2000, should be repealed/deleted.

52. There would appear to be merit in a category hinged to age 12 or 13 and above.

53. The ongoing practicality and enforceability of the MA15+ category, which means "Mature Accompanied", should be considered in view of converging media. The legislative intention i.e. must be accompanied by an adult, cannot be complied with by online content providers - who cannot know whether a child is attempting to view their content, let alone whether a child is accompanied by an adult, unlike staff of public cinemas and offline shops.

54. Unless significant changes are made to existing criteria for the adults only categories, a new classification category should be established to include material/content that falls into the gap between R18+ and X18+ criteria and therefore is "Refused Classification" although it does not of itself meet the criteria for "RC". This gap has been ever widening as a result of ad hoc amendments to the adult content categories in the absence of evidence of changes in general community "standards" (see Sections 5.2.1 and 5.2.6 later herein).

Q22. 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?

55. Remove the existing legislated inconsistency that requires online content consisting solely of text or non-moving images to be classified as if is a film/movie produced for entertainment purposes. No logical or rational explanation for this situation has ever been provided.

56. An Internet web page, or PDF file, etc., that consists solely of text is deemed to be a "film" merely because it can be viewed on a computer screen. This situation exists because the 1996 Commonwealth Classification Act amended definitions (s5), that were previously in the Classification of Publications Ordinance, to include reference to computer generated images as follows (emphasis added):

> *"film" includes a cinematograph film, a slide, video tape and video disc and any other form of recording from which a visual image, **including a computer generated image**, can be produced...*
>
> ***"computer generated image" means an image (including an image in the form of text) produced by use of a computer on a computer monitor, television screen, liquid crystal display or similar medium from electronically recorded data.***

57. In 2008 an additional inconsistency was introduced, after the Federal Government announced in 2007 intention to extend the online content regulatory scheme to prohibit commercial MA15+ content on Australian hosted sites unless subject to an ACMA-approved restricted access system. Some commercial producers of publications classified Unrestricted complained, because some printed publications classified Unrestricted, when made available online, could be classified MA15+ under criteria for films/movies. The government's "solution" to this problem was a decision to legislate a special exemption from applicability of

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http://libertus.net/censor/history/docarchive/fvclass8806.html

11 Guidelines for Classification of Videotapes/Discs for Sale/Hire April 1984, Senate Hansard, 4 October 1984 http://libertus.net/censor/history/docarchive/fvclass8404.html

the Film Guidelines for online content that is or was available as a print edition to the public in Australia, i.e. "eligible electronic publication"[12]. This special rule for, in practice, commercial content providers unfairly and inappropriately discriminates against online content providers who cannot afford to pay for printing and offline distribution of their content. All providers of content that consists of text and static images should be treated equally.

58. Regardless of delivery platform, if particular content is required to be classified, then content that consists of text (or an audio reading of words) and/or static images should be classified under the Guidelines for Publications. Only content that includes moving images should be classified under the Guidelines for Films.

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

59. The writer is opposed to the above proposal because Publications Category 1 Restricted does not equate to R18+ films, and Category 2 Restricted does not equate to X18+ films (for an example, see Section 5.2.6) and, although X18+ films are illegal to sell in all States, Category 2 Restricted publications are legal to sell to adults from shops in all States and Territories (as is Cat 1 R) except in Queensland.

60. An outcome that would not result in increased censorship of what adults may choose to view, read and access offline would require significant changes to the existing Code and Guidelines for the classification of films to permit additional content in the X18+ category (and probably in the R18+ category), and the legalisation of sale of X18+ material in all States. The writer is highly doubtful that the foregoing outcomes are politically likely.

61. Furthermore, the writer does not support the idea that the Guidelines could, theoretically, accommodate differences in "impact" between written/static material and moving images/films. Relatively recent Australian censorship history strongly indicates that any initially recognised differences in criteria would be gradually whittled away (increasing censorship) on the claimed grounds of simplifying the guidelines, reducing confusion, reducing costs to government and/or industry, and so on.

Q23. 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?

62. Yes, but only if consolidation would not result in classification criteria being able to be changed unilaterally by the Federal Government/Minister. Amendments to the content of a consolidated document should require the agreement of a large majority of the Censorship Ministers (see also response to Q27 regarding procedures for modification/amendments).

5. Refused Classification (RC) category (Q24 - Q25)

Q24. Access to what content, if any, should be entirely prohibited online?

63. Content that is a criminal offence to possess or access, i.e. material specified in Criminal Codes/Crimes Acts such as child sexual abuse material.

64. However, there is a difference between what content should be illegal to make available and/or access online, and what content should be on a secret blacklist and "blocked" by ISPs, as planned by the Federal Labor Government. In the latter case, no content. Notwithstanding the Government's proposed so-called (weak) accountability and transparency measures, no government can be trusted not to abuse secret censorship powers and secret censorship is incompatible with democracy.

12 Sections 11 and 24 of Schedule 7, Broadcasting Services Act 1992 http://www.austlii.edu.au/au/legis/cth/consol_act/bsa1992214/sch7.html

Q25. Does the current scope of the Refused Classification (RC) category reflect the content that should be prohibited online?

65. No, the RC category encompasses material that should **not** be banned/prohibited (from publication, distribution, sale, etc.) either online or offline.

5.1 Protecting whom, from what, and why?

66. The RC category requires deletion, or a major overhaul commencing with the question of whom it is protecting, from what, and why. Followed by the question of whether refusing classification to a particular type of material, particularly since the advent of the world-wide Internet, is effective in achieving whatever is the intended purpose.

67. Currently, the same situation applies to much of the RC category as was referred to by Gunnel Arrbäck, then Director, Swedish National Film Classification Board, in a speech to the 2003 OFLC International Ratings Conference in Sydney:

> *"...I have seen a very different reasoning behind the Swedish legislation about protecting children and adults respectively. As far as children go, the intention is to protect them from seeing images that might really harm their souls. When it comes to adults it seems rather a matter of showing what a civilized society does not accept for anybody to watch (excepting of course such hard-headed individuals as me and you, who are supposed to watch and then make decisions of what is not proper for other people, our own age, to see – and be paid to do so). I would also like to link these thoughts to what I feel is an ever more popular tendency among politicians to make legislation an instrument for 'sending out signals' to society and to people. Some things we do not want. Perhaps accepting that they exist and would not really damage anyone in a serious way. But we just do not want them. Full stop."* [13]

68. However, as at 2003, the above as grounds for "protecting" adults was apparently used much less frequently than it was and still is used in Australia. Ms Arrbäck also remarked:

> *"[I]n some countries, definitely in Sweden but also in at least a few others, the legislation or other kinds of framework of regulation still makes it possible for classifiers to 'protect' – in big quotation marks – other adults from some moving images. In practice it might not be used very often – by the Swedish Board not really since 1995 – but still."*

69. If a "Refused Classification" category is to continue to exist, the core criteria for refusing classification should be changed from assumption of mere offensiveness to some unknown number of hypothetical "reasonable adults" to criteria based on empirical evidence that the availability of a particular type of material, to adults, may cause actual harm. Such a basis would also be likely to result in classification decisions about what adults may choose to view that are significantly more consistent with those in some or all other Western democratic countries. (The writer is under the impression, from recent but incomplete research, that few, if any, other such countries ban material based on notions of offensiveness, and that potential for harm is more typically the base criteria).

5.2 Matters contributing to excessive breadth of the RC Category

70. The excessive, inappropriate breadth of the RC category arises from a range of factors including, but not necessarily limited to, the following:

5.2.1 Mutually exclusive classification categories

71. Some material is refused classification not because it meets the Code or Guidelines criteria for RC, but because it is a film (not a publication) and exceeds the criteria for each of the R18+ and X18+ film categories which are mutually exclusive, i.e. some types of material not permitted in X18+ are permitted in R18+, and vice versa. Examples include the French films "Romance" classified RC then R18+ on review (2000), and "Baise-moi" classified R18+ then RC on review (2002). Similarly the film "9 Songs" by the highly-regarded British director Michael Winterbottom was classified X18+ (making it illegal to exhibit or

13 Protecting whom from what?, Gunnel Arrback, Director - Swedish National Film Classification Board, September 2003
http://pandora.nla.gov.au/pan/41535/20080828-1334/www.classification.gov.au/resource58fc.pdf?resource=259&filename=259.pdf

sell to adults in all States) although it contains scenes of bondage that are specifically not permitted in the X18+ category, then R18+ on review (2004), and subsequently X18+ in South Australia on classification by S.A. Classification Council. This film evidently breaches the criteria for each of R18+ and X18+ but no Boards were willing to ban/refuse classification to it, probably because of who the film director is and that an RC decision would have resulted in a high level of public criticism, almost certainly even greater than occurred in relation to the RC decisions on "Romance" and "Baise-moi".

72. If the R18+ category cannot be amended to clearly permit such films, then a new category needs to be created to enable adults to choose to see and hear what they want, including in public cinemas. Perhaps it should be named "Highly Confronting" or "Highly Controversial" so no-one can legitimately complain that they were not forewarned.

5.2.2 Impact

73. The Guidelines, since 2003, state that material will be refused classification when "impact" is assessed as being "very high". This extremely subjective criteria is an inappropriate basis for denying adults the freedom to decide for themselves what they will see, read or hear etc. As remarked by former Chief Censor, Janet Strickland:

> *"Why is it that we are not allowed to be shocked and offended? Where is it written? It's good to be shocked and offended. It means we can still feel. We are protecting ourselves from being choked, outraged and angered. These are emotions we are not allowed to feel and yet they are very useful emotions. They help to create a value system. If we have nothing that makes us feel shocked, how do we know what our value system is?"* [14]

5.2.3 Effects of violence

74. The Glossary in the Guidelines does not define "violence" but since 2003 has stated: "*Violence includes not only acts of violence, but also the threat or effects of violence*". This, combined with perceived "impact", evidently results in RC being applied to photos/images allegedly showing dismembered foetuses on anti-abortion advocacy web sites (see Section 5.2.10), and no doubt numerous other types of shocking images, e.g. images showing the results of war, road accidents, animal cruelty, genital mutilation practices, etc., on the grounds that images show the "effects of violence" and have too high an impact for adults to choose to view. It seems quite conceivable that shocking photos or videos showing the violent treatment of cattle in some overseas abattoirs, and photos showing the effects of war, e.g. similar to the photo of then child, Phan Thi Kim Phuc, during the Vietnam war (if taken today, i.e. probably not a prize winning photo already well known), would be refused classification when on a Web page.

5.2.4 Promote, incite or instruct in matters of crime or violence

75. The above broad and undefined criteria in the Code enables a broad brush approach to be used for the purpose of refusing classification to material. Moreover, although it is often said by some politicians that RC includes only "detailed instruction" in crime or violence, that is not factual. Such terminology in the Guidelines, which are only a tool intended to assist in classification, does not override the criteria in the Code.

76. This criteria has been responsible for a number of the most highly publicly controversial refused classification decisions, and is one of the aspects of RC criteria that is most capable of being used to refuse classification to political advocacy speech. This is perhaps unsurprising, given its origin was apparently not the result of a process of rational policy development. As Hume and Williams documented in a brief review of history[15], from 1983 until 1989 classification criteria referred to "terrorism" (not "crime or violence") which was linked to the definition then in the ASIO Act, which was deleted from that Act in 1986. In 1989 apparently someone realised that classification criteria referred to definition that no longer existed, so the phrase:

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14 "The Return of the Wowsers", Sydney Morning Herald, 6 July 1996 http://web.archive.org/web/19970113054119/www.smh.com.au/daily/content/Jul/6/features/960706-features.html

15 Hume, David; Williams, George. "Australian Censorship Policy and the Advocacy of Terrorism" [2009] SydLawRw 15; (2009) 31(3) Sydney Law Review 381 http://www.austlii.edu.au/au/journals/SydLRev/2009/15.html

"*promotes, incites or encourages terrorism*"[16] was replaced with:
"*promotes, incites or instructs in matters of crime or violence*"[17]

77. No reason or justification for this much broader criteria is provided in the Explanatory Statement to the 1989 Amendment Act, which merely states that "*As the word [terrorism] has now been removed from [the ASIO] Act it can no longer be used as a reference*"[18].

78. The undefined terms "promote", "instruct" and "crime" have been used to make highly publicly controversial RC decisions, particularly in cases of application for review by the Federal Attorney-General, after members of the Review Board have engaged in an apparently lengthy process (given the content of decision reports) of researching C'th, State and Territory laws to find crimes to fit the material, and researching case law to find definitions of "promote" or "instruct" that may suit their objective of banning, or not, material. Examples include:

- 2007 RC decision on "The Peaceful Pill Handbook" on the grounds that "it instructs in matters of crime relating to the manufacture of a prohibited drug (barbiturates)", etc, but did not "instruct in matters of the crime of assisting a suicide". (This 36 page decision report documenting and discussing criminal law is likely the lengthiest ever)[19].
- 2006 RC decision on a computer game, Marc Ecko's "Getting Up: Contents Under Pressure", made on the casting vote of the Convenor of the Review Board (who was a currently-serving NSW local government councillor), because allegedly it "provided elements of promotion of the crime of graffiti". (This decision report contains a lengthy discussion about definitions of "promote" and "instruct", and the relevance or not of fantasy)[20].
- 1995 RC decision on an edition of the newspaper *Rabelais*, published by the Students Representative Council of La Trobe University (Melbourne), because it contained an (arguably political and satirical) article titled "The Art of Shoplifting". The surrounding political circumstances at the time strongly suggest this was a case of political censorship and selective victimisation[21]. (The full Federal Court included a full copy of the banned article in a Schedule to its administrative review decision[22]).

79. Since 2007, it appears that the primary criteria for appointment to the Review Board is a law degree, given since then all appointees have had a law degree or have been studying for one (according to Board Annual Reports). At July 2011, of the 4 members of the Review Board, 3 appointed since 2007 have a law degree, and the other member was appointed in 2006. How is this "broadly representative of the Australian community"? (s48, C'th Classification Act).

80. The criteria: "promote, incite or instruct in matters of crime or violence" should be significantly narrowed, and in such a way that classifiers do not need to have law degrees, and members of the public can readily comprehend what types of material are proscribed.

81. In addition, if broad terms continue to be used, they should be defined to limit breadth. For example, it is arguable that a significant number of TV programs "promote" and/or "instruct" in crime and while reputable commercial publishers/distributors of films are unlikely to be prosecuted on any such ground, the same

16 Classification of Publications Ordinance 1983 (A.C.T.)
http://www.legislation.act.gov.au/ord/1983-59/default.asp

17 Classification of Publications (Amendment) Ordinance 1989 (A.C.T.), and Explanatory Statement
http://www.legislation.act.gov.au/ord/1989-2/default.asp

18 See above.

19 Classification Review Board's Decision Report, "The Peaceful Pill Handbook", February 2007
http://www.classification.gov.au/www/cob/rwpattach.nsf/VAP/(084A3429FD57AC0744737F8EA134BACB)~989+-+Decision+7+February+2007+-+The+Peaceful+Pill+Handbook.pdf/$file/989+-+Decision+7+February+2007+-+The+Peaceful+Pill+Handbook.pdf

20 Classification Review Board's Decision Report, "Getting Up: Contents Under Pressure", February 2006
http://www.classification.gov.au/www/cob/rwpattach.nsf/VAP/(084A3429FD57AC0744737F8EA134BACB)~794.pdf/$file/794.pdf

21 See Graham, I, "The Rabelais Case", Last modified 21 Aug 1999
http://libertus.net/censor/rdocs/rabelais.html

22 Michael Brown & Ors v Members of the Classification Review Board of the Office of Film and Literature [1998] 319 FCA
http://www.austlii.edu.au/au/cases/cth/federal_ct/1998/319.html

cannot be said for ordinary members of the public who make content available online and could find they've upset some politician and become a victim of selective enforcement of the law.

82. Also, it should be noted, in relation to online content, that the effectiveness of Australian classification and censorship laws in limiting availability of speech about matters of crime or violence is, and will continue to be, affected by the situation in the U.S.A., which is that stated by the U.S. Supreme Court in *Brandenburg v. Ohio* (1969):

> *"[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."* [23]

5.2.5 Directly or indirectly "advocates" and/or "praises" a "terrorist" act

83. Section 9A of the C'th Classification Act, added in 2007, should be repealed. The provisions are not reasonably appropriate and adapted to achieving a legitimate end, were enacted unilaterally by the Federal Government (while it held the balance of power in the Senate and House) and in breach of the co-operative classification scheme agreement. The amendments were (and are) the subject of significant public and political opposition including (but not limited to) because:

- the Commonwealth Government failed to demonstrate a need for the amendments;
- following a public consultation process and consideration of matters raised in submissions received, State and Territory Censorship Ministers refused to amend the Classification Code and Guidelines to implement the Commonwealth Government's proposals;
- the criteria for refusing classification relies on definitions of “advocate” and “terrorist act” in the C'th Criminal Code which had already been the subject of substantial criticism due to being overly broad and vague, etc;
- the threshold for refusing classification is extremely low as a result, among other things, of the requirement that the Classification Boards stand in the shoes of persons with a “mental impairment” and attempt to decide how they might react after viewing/reading material that “praises” a “terrorist act” (“mental impairment” as defined in the C'th Criminal Code “includes senility, intellectual disability, mental illness, brain damage and severe personality disorder”);
- the Classification Review Board stated they would have difficulty interpreting and applying the definitions and provisions;
- A Senate Committee considered the amendments involved "...considerable scope for confusion. As a result, the Bill may have an effect well beyond its stated aim.";
- the Australian Human Rights and Equal Opportunity Commission opposed the provisions due to unclear and overly broad definitions which "*may unjustifiably and disproportionately restrict the right to freedom of expression in some circumstances*" and that “*the current censorship laws already require[d] materials to be refused classification if they 'promote, incite or instruct in matters of crime or violence'*".
- the definitions lack legal certainty and hence increase, rather than decrease, uncertainty about what may be refused classification.

84. Section 9A of the C'th Classification Act should be repealed.

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23 Brandenburg v. Ohio 395 U.S. 444 (1969)
http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=US&vol=395&invol=444
Some examples of types of speech not protected in the USA can be found in: "Hate speech online", David L. Hudson Jr., First Amendment scholar, First Amendment Center (Last Updated Sep 2009)
http://www.firstamendmentcenter.com/speech/internet/topic.aspx?topic=internet_hate_speech)

5.2.6 Increased restrictions on X18+ category effective from 2000

85. The criteria for the X18+ film category was amended in 2000 (after a 4 year political circus and saga[24]) to prohibit depictions of lawful consenting-adult "fetishes", and the slightest implication of violence (including non-sexual violence), solely because all sexually explicit material is offensive to **some** adults. There had not been a relevant change in general "community standards", and this was the first time (since at least 1988) that mere offensiveness to **some** adults was the claimed justification for changing classification criteria to refuse classification to particular types of material. The Federal Attorney-General stated in a speech that government's (then intended) amendments would "*remove depictions which some groups in the community find offensive such as...certain offensive fetishes...*"[25] and, in Parliament, that "*The government does not believe that the portrayal of explicit, but lawful, adult sex on film where there is no coercion or sexualised violence of any kind falls within [the category of material about which there is a general community consensus that it should not be permitted to be sold or distributed]. The government's decision should be seen as a genuine and reasoned attempt to balance conflicting views ...*"[26]

86. The government's decision did not, however, balance conflicting views. It changed the status quo in favour of the views of persons wanting increased censorship, without regard for the views of groups in the community who considered the status quo in relation to X18+ was already too restrictive. A balanced decision would have retained the status quo.

87. Moreover, the amendment which changed "No depiction of sexual violence..." to "No depiction of violence..." has had predictable and ridiculous outcomes. For example, one of the first films refused classification as a result of the amendments was an award winning adult fantasy film"[27], because it contains unseen, implied violence in the course of rescuing a woman from her captors (implied hitting of a guard with a club). The Review Board's decision contains a lengthy discussion of the then recent amendment, including the lack of a "clearer" definition of violence than exists in classification criteria - which then (in 2000) stated "includes not only acts of violence, but also the threat or result of violence" (Note: In March 2003, Censorship Ministers changed "result of" to "effects of", arguably further broadening it). The Review Board concluded that it had no choice other than to ban the film "*despite the level of violence being significantly less than that contained in many films which are classified M, MA or R*"[28].

88. Furthermore, although the above restrictions apply to X18+ films, and online content (which is classified as if a film even when it consists of text and static images), they do not apply to printed publications. The Film Guidelines for X18+, effective from 2000, state (among other things):

> "*Fetishes such as body piercing, application of substances such as candle wax, 'golden showers', bondage, spanking or fisting are not permitted."*
>
> "*Fetish: An object, an action or a non-sexual part of the body which gives sexual gratification.*"
>
> "*No depiction of violence, sexual violence, sexualised violence or coercion is allowed in the category.*"

Therefore sexually explicit films and online static images containing such depictions are refused classification. In contrast, the Guidelines for (offline) Publications, before and since 2000, state (among other things):

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24 For historical details, see Graham, I, "The banning of fetish depictions deemed 'undesirable' by Australian politicians", 23 Feb 2010. http://libertus.net/censor/rdocs/censor_bill_2000-banfetishes-etc.html

25 Federal Attorney-General (Daryl Williams), Speech titled "From Censorship to Classification" at Murdoch University, 31 October 1997. http://www.murdoch.edu.au/elaw/issues/v4n4/will441.html

26 Federal Attorney-General (Daryl Williams), Second Reading speech, Classification (Publications, Films and Computer Games) Amendment Bill (No. 2) 1999, 8 December 1999. http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansardr%2F1999-12-08%2F0029%22

27 "Dream Quest" which won the 2001 AVN Awards (U.S.) for Best Cinematography, Best Selling Tape, Best Renting Tape http://en.wikipedia.org/wiki/AVN_Award

28 Classification Review Board's decision report on 'Dream Quest', 25 Jan 2001 http://www.classification.gov.au/www/cob/rwpattach.nsf/VAP/(084A3429FD57AC0744737F8EA134BACB)~96+-+33rd+Meeting+-+9,+10,+17+November+2000+-+8+December+2000+(by+Teleconference).pdf/$file/96+-+33rd+Meeting+-+9,+10,+17+November+2000+-+8+December+2000+(by+Teleconference).pdf

Glossary: "*Mild fetishes include stylised domination and rubberwear. Stronger fetishes include bondage and discipline*".

Category 1 Restricted: "*Descriptions of fetishes may contain detail. Depictions of mild fetishes may be permitted*"' and with regard to violence: "*...The treatment of realistic violence may be detailed...Descriptions and depictions of sexual violence should not be detailed...*"

Category 2 Restricted: "*Descriptions and depictions of stronger fetishes may be permitted*" and "*Violence: as for 'Category 1 - Restricted'*.

89. The amendments to X18+ category, which were implemented effective from September 2000, should be deleted, so that X18+ criteria is the same as before those amendments.

5.2.7 Offends against the standards of morality, decency and propriety generally accepted by reasonable adults

90. All instances of "morality, decency and propriety" in the Act, Code and Guidelines should be deleted. The views and standards of "reasonable adults" in Australia's multi-cultural and multi-religious society vary widely such that a "generally accepted" standard cannot be determined.

91. Reference to "standards of morality, decency and propriety" did not exist in the Classification of Publications Ordinance 1983 or 1989. It seems highly likely the phrase found its way into the 1996 Classification Act as a result of the frequent complaints of the Senate Select Committee on Community Standards Relevant to the Supply of Services Utilising Electronic Technologies, about adult consenting non-violent sexually explicit material, in conjunction with the 1996 more censorious classification guidelines that were implemented in the absence of evidence of changes in general community standards and attitudes[29].

5.2.8 "Reasonable adults" and "a reasonable adult"

92. The above terms is used in various places in the Act, Code and Guidelines, but it is entirely unclear why two different terms are used.

93. The Review Board's remarks in their decision report on the film "Mysterious Skin"[30] are of major concern in relation to Code Principle 1(a) "adults should be able to read, hear and see what they want". The report states (emphasis in original):

> *The use of the term "a reasonable adult" differs from the phrase "reasonable adults" found in Item 3(1)(a) of the Code. Legal advice from the Australian Government Solicitor has stated that a description or depiction would fall within Item 3(1)(b) if the description or depiction is likely to cause offence to a single reasonable adult. The Convenor asked for submissions on whether, if the description or depiction causes offence to a single member of the Review Board, the Review Board must as a matter of law classify the film RC, on the basis that each member of the Review Board must be considered a reasonable adult.*

and

> *Presumably, it would be easier to determine that "a reasonable adult" would find a depiction offensive than to determine that the same depiction would be offensive to "reasonable adults". The second term indicates a class of persons or possibly even a majority of such persons.*

94. While subsequently, in an unrelated case, the Federal Court discussed the terms "reasonable adults" and "a reasonable adult" in the administrative review case "Adultshop.Com Ltd v Members of the Classification Review Board"[31], in the writer's opinion, that discussion and decision adds to confusion, increases concern

29 Graham, I, "Not the Community's Guidelines: the history of the film classification guidelines that banned 'Romance'", 3 Feb 2000
http://libertus.net/censor/rdocs/history_filmgd1.html

30 Classification Review Board Report on "Mysterious Skin", August 2005
http://www.classification.gov.au/www/cob/rwpattach.nsf/VAP/(084A3429FD57AC0744737F8EA134BACB)~597.pdf/$file/597.pdf

31 Adultshop.Com Ltd v Members of the Classification Review Board [2007] FCA 1871, 29 November 2007
http://www.austlii.edu.au/au/cases/cth/FCA/2007/1871.html

about the potential for RC decisions based on assumption about the views of just one hypothetical reasonable adult, and shows that both terms are effectively meaningless.

95. If reference to "reasonable adult/s" is to remain in classification law/criteria, all references to "a reasonable adult" must be replaced with "reasonable adults".

96. In addition, the writer suggests the ALRC inquire into why the following definition, which had existed since at least 11 July 1996, was deleted from the Film Classification Guidelines Glossary effective from March 2003, but not from the Publications Guidelines:

> *"Reasonable Adult: Possessing common sense and an open mind, and able to balance personal opinion with generally accepted community standards."*

and why, from March 2003, the phrase "to most people" was deleted from the Film Guidelines Glossary.

> *"Offensive: Material which causes outrage or extreme disgust ~~to most people~~."*

although the Publications Guidelines state:

> *"Offensive: Material which causes outrage or extreme disgust. The Guidelines distinguish between material which may offend some sections of the adult community, and material which offends against generally accepted standards, and is therefore likely to offend most people."*

5.2.9 Revolting or abhorrent phenomena

97. Undefined, incomprehensible, terminology should be deleted from the Code and Guidelines and especially when classification requires subjective determination of whether "phenomena" is "dealt with...in such a way that [the material] offend[s] against the standards of morality, decency and propriety generally accepted by [hypothetical] reasonable adults".

5.2.10 RC as applied to online content

98. The RC category can encompass online content that would not be RC offline as a result of factors which include the following:

- **Inappropriate treatment of online text and static images:** RC can apply to online content due to application of classification criteria for moving images to online content that comprises entirely text, or text and static images, and application of a classification scheme that was designed to regulate offline commercial sale/distribution of material produced for entertainment purposes to online material (including non-commercial material) produced and provided for political advocacy, informational, educational, etc, purposes.

- **Inadequate regard for context:** Although classifiers are required to take the context of any particular images and/or textual material into account, the narrow interpretation of the term "context" that is deemed to apply to online content enables refusing classification to online content that would not be, and/or is less likely to be, RC if published offline. In the case of a printed publication, the context of particular images or text includes the whole magazine, newspaper, or book, not a single page. However, the context of a web page is deemed to be the single web page, regardless of the overall context and purpose of publication that is evident from the web site name and other pages on the site. This enables political advocacy material to be refused classification. For example, when members of a Senate Committee questioned the ACMA about its opinion/decision that a page on an anti-abortion advocacy web site would be "RC", ACMA representatives advised:

  > *"...it was a single page. From memory, it was a page that contained no text, just pictures. The pictures were of aborted and dismembered foetuses. The graphic nature of the presentation without any contextualisation of the images meant that the images were judged on their own merits for their impact and their severity. ... our decisions were about that particular imagery on that particular URL ... [If] there been text, I cannot say what decision we would have come to. ... the images were considered to be graphic and to have a high impact. ..."* [32]

32 Senate ECA Committee Estimates hearings transcript, 23 February 2009 http://www.aph.gov.au/hansard/senate/commttee/S11635.pdf

The potential breadth of RC resulting from such an approach to "classification" of online content was highlighted by one of the Senators who asked:

> *"...have there been other sites that have featured broken and dismembered bodies that you have listed on the blacklist? I ask that because I am a motorcycle rider and lots of sites show the consequences of motorcycle accidents as a deterrent."* [33]

Apparently there has not been any change in practice since the above occurred in 2009, given the Classification Board has suggested that the ALRC "*[e]xamine whether material referred to the Board for classification by the ACMA...should be provided to the Board in context*"[34]. (Unless practices have change recently, when ACMA applies for a classification, the ACMA typically takes a screen shot image of a web page and sends that to the Board for classification).

6. Reform of the cooperative scheme (Q26 - Q28)

Q26. Is consistency of state and territory classification laws important, and, if so, how should it be promoted?

99. Consistency is important to some extent, particularly where varying classification enforcement requirements among jurisdictions have the effect of increasing the cost of compliance by nation-wide distributors and therefore increase cost to purchasers/consumers.

100. However, consistency should not be pursued to the extent that the outcome would reduce the existing rights/freedom of adults residing in any particular State or Territory to read, see, hear and say what they want, which would occur if a lowest common denominator approach was found to be the only means of achieving "consistency".

101. Consistency of state and territory classification laws could be promoted by encouraging all jurisdictions, particularly States, to amend their classification enforcement legislation so that it is consistent with Article 19 of the International Covenant on Civil and Political Rights (ICCPR)[35].

102. (Note: Although the International Convention on the Rights of the Child (ICRC)[36] is mentioned by some people when advocating for increased censorship of what *adults* may view, Article 13 of the ICRC is substantially similar to Article 19 of the ICCPR).

Q27. If the current Commonwealth, state and territory cooperative scheme for classification should be replaced, what legislative scheme should be introduced?

> *[ALRC para 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.*

103. An applied law scheme appears to be the most preferable alternative, provided that there would be effective limits on modification, including on the Commonwealth Government's/Parliament's power to unilaterally implement increased censorship in defiance of the views of State/Territory Censorship Ministers, and without evidence of public support, etc. (e.g. as occurred in 2007, see Section 5.2.5).

104. Limits on modification, and the process for achieving a modification, could be somewhat similar to those in the Intergovernmental Agreement for the Australian Consumer Law (IAACL)[37] (which among other things states: "Except as agreed by the Parties, a Party will not submit a Bill to its legislature which would be inconsistent with or alter the effect of the Australian Consumer Law.").

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33 See above.

34 Classification Board response to QoN from the Senate Legal and Constitutional Affairs Committee Inquiry into the Australian film and literature classification scheme, 6 May 2011 https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=a49cb6d1-1cfb-45a8-a410-53a7aff503fc

35 http://www2.ohchr.org/english/law/ccpr.htm

36 http://www2.ohchr.org/english/law/crc.htm

37 http://www.coag.gov.au/coag_meeting_outcomes/2009-07-02/docs/IGA_australian_consumer_law.pdf

105. However, the number and type of parties required to be in support of an amendment/modification should be different. Under the IAACL, the support of the Commonwealth and "four other parties (including at least three States)" is required. That is not appropriate in relation to classification/censorship, in part because it would provide the C'th and States with power to terminate the business operations of persons who operate in a regulated, lawful manner in the Territories, and put employees of such businesses out of work, by means of banning the X18+ classification. The number required to be in support of an amendment should include 75% of the States and Territories (i.e. 6) of which at least one is a Territory and specifically the A.C.T. because it has a greater level of self-government than the N.T. and (the writer is under the impression) more citizens whose business and/or employment could/would be adversely affected than does the N.T. Hence, amendments should require the support of the Commonwealth and 6 other parties including at least 5 States and the A.C.T. (i.e. 7 of 9). Alternatively, amendments should require the support of the Commonwealth and 6 other parties including at least 5 States, **except** in instances where the amendment/s would have the effect of adding more types of material to a "Refused Classification" type category (i.e. banned from sale/distribution), in which case the amendment/s should require unanimous support of all parties.

106. In addition, any new or revised Intergovernmental Agreement must retain the existing provision which states the Code or Classification Guidelines are not to be amended unless an amendment proposal has been the subject of a process of public consultation which at least involves the invitation of submissions by the public[38].

Q28. 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?

107. No.

108. The power to make amendments to classification and censorship laws, which are almost always highly politically and publicly controversial, should not be vested in a single government/parliament. In the case of the Federal Government/Parliament there is too much potential for increased censorship to be enacted to gain the support/favour of an independent Senator, or minority parties, who hold the balance of the power in the Senate at any particular time (as is widely perceived to have been the case when Internet censorship legislation was announced and rushed through Parliament in 1999 when an independent Senator held the balance of power), and/or to be enacted by a Federal Government political party that holds the balance of power at any particular time (e.g. as occurred in 2007, see Section 5.2.5).

109. Furthermore, any one government (or opposition party with election prospects) is likely to decide to ban, or promise to ban, some type of material to which vocal minority groups object, with the aim of being elected in swinging seats they believe to be highly conservative. This occurred at the Federal level in 1996 but implementation of the highly publicly controversial promise to "ban the X-rated classification" did not eventuate due, in large part, to some parties to the Intergovernmental Agreement declining to agree to the proposed ban, and some others being in disagreement about what "should" be done[39].

110. The Federal Government should not be granted any more power to censor than it already has - ideally it should have less (e.g. it should not be able to unilaterally over-ride the Code and Guidelines by amending the C'th Classification Act, as occurred in 2007).

7. Other issues (Q29)

Q29. In what other ways might the framework for the classification of media content in Australia be improved?

7.1 Classification criteria: Normal female anatomy deemed to have too much "detail"

111. Criteria in the Guidelines for Publications must be changed so that normal female anatomy cannot be deemed to have too much "detail". Criteria such as "genital detail" has long been interpreted by classifiers to mean visibility of labia minora, which is normal and common in adult females. This classification criteria causes a practice in the publications industry known as "healing it to a crease", i.e. airbrushing/

38 Intergovernmental Agreement. http://www.lawlink.nsw.gov.au/lawlink/SCAG/ll_scag.nsf/vwFiles/SCAG_Censorship_Intergovernmental_agreement.pdf/$file/SCAG_Censorship_Intergovernmental_agreement.pdf

39 For detail see: Graham, I, "The banning of fetish depictions deemed 'undesirable' by Australian politicians", 23 Feb 2010. http://libertus.net/censor/rdocs/censor_bill_2000-banfetishes-etc.html

"photoshopping" photographs of normal adult female genitalia to delete the labia minora, resulting in highly unrealistic photos of adult female anatomy. Furthermore, this interpretation of "genital detail" is applied not only to "men's magazines" (which it should not be) but also to publishers' attempts to publish health and medical educational articles in women's magazines.

112. For example, in 2001 Australian Women's Forum magazine sought to publish an educational article including photographs of normal female genitalia because Australian plastic surgeons had said that an increasing number of women were seeking genital plastic surgery, most of whom *incorrectly* believed their genitalia was abnormal[40]. However, a majority of the members of Classification Board who viewed the educational article deemed that the photos (the equivalent of photos of body parts in medical books):

> *"do not constitute discreet genital detail. Furthermore, the depictions are prominent and contain a genital emphasis"* [41].

113. The classification decision meant that the edition of Australian Women's Forum magazine could not be sold with the magazine's usual classification (i.e. "Unrestricted"/with Consumer Advice "M - not recommended for readers under 15 years"). It could only be classified and sold as a Category 1 Restricted publication, which was and still is illegal to sell in Queensland to adults.

114. Classification criteria in relation to "genital detail" etc. has not changed since 2001, nor has classification in practice.

115. Classification criteria must be changed to clearly and unquestionably require classifiers to permit photographs of normal adult female genitalia in publications classified "Unrestricted"/Consumer Advice "M - not recommended for readers under 15 years". It is entirely inappropriate that the existing classification criteria, and/or interpretation of same by classifiers, results in teenagers, as well as adult men and women, acquiring a completely distorted impression of what is typical/normal for adult female anatomy. It is also disgraceful that normal adult female anatomy is deemed, under censorship/classification criteria, to be pornographic in and of itself. (Note: The "genital detail" criteria is not applied to photographs of men's genitalia, only women's).

7.2 Existing online content regulatory framework

7.2.1 Almost incomprehensible legislative provisions

116. Whether or not changes are made to the policy aspects of the existing online content regulatory framework, the relevant legislation requires major overhaul, i.e. re-writing, to result in legislation that is readily comprehensible. Schedule 5 of the Broadcasting Services Act enacted in 1999 was complex, and the amendments enacted in 2007 (which amended Schedule 5, and added Schedule 7) resulted in highly complex and confusing legislation that is almost incomprehensible. The writer has intermittently been contacted[42] by several lawyers seeking information and/or opinion on whether their conclusions, after their efforts to comprehend the legislation (for the purpose of advising content provider clients what is, or is not, lawful to make available online and in what circumstances) were correct.

7.2.2 Restricted Access System requirements

117. Existing legislative provisions which require the ACMA to issue take-down notices and link-deletion orders in response to complaints about commercial MA15+ and all R18+ content, unless access is restricted by an ACMA-approved Restricted Access System, should be reviewed and either repealed/deleted, or revised and narrowed **and** the ACMA provided with sufficient funding and staffing to investigate complaints and issue orders in a timely manner.

118. Matters that should be taken into consideration in reviewing the Restricted Access System ("RAS") scheme/requirements include the following:

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40 "Magazine in row over genital surgery article", The Age, 8 Jan 2001 http://web.archive.org/web/20010124145100/http://www.theage.com.au/news/2001/01/08/FFXV7Z7LNHC.html "Doctors warn women over unreal images", Sydney Morning Herald, 8 Jan 2001 http://web.archive.org/web/20011107174912/http://www.smh.com.au/news/0101/08/national/national12.html

41 Extract from Classification Board report, quoted in "Snatched: Sex and Censorship in Australia" by Helen Vnuk (former editor of Australian Women's Forum), published by Random House Australia P/L, 2003

42 Inquiries received via the writer's personal web site, and also previously in her former capacity as Executive Director of EFA.

- The existing RAS scheme is an entirely ineffective means of protecting children, or anyone else, because there is a massive amount of content on the Internet that would be classified MA15+ and R18+ and no other Western democratic country requires such content to be subject to a restricted access system.

- Reportedly, it took the ACMA seven months to deal with a complaint about sale of films classified MA15+, by the Australian Apple iTunes online store, access to which was not restricted by an RAS. Seven months after receiving the complaint, the ACMA "ruled that for Australian customers, iTunes may no longer offer the 'Gift this Movie' function", thereby preventing adults from using the Australian-based shop to gift movies to other adults. However, "the films are still available, 12-year-olds can still use prepaid credit cards bought at their local Caltex service stations, or iTunes gift cards bought at Woolies to obtain them"[43]. Similarly a complaint about Bigpond Movies selling an R18+ film without an age verification system was not responded to by the ACMA until six months later, at which time the ACMA reportedly advised that their investigation had been discontinued because the content was no longer available at the location[44].

- In relation to commercial providers of content, the means, if any, by which they could ascertain whether a person requesting access to content is an adult, given provision of a payment card number is even less likely to "prove" that the person is an adult than it was when RAS requirements were initially enacted in 1999. In relatively recent years, pre-paid cards issued by major credit card companies have become available for purchase by anyone, including children, in shops, post offices, etc.

- In relation to **non-**commercial providers of content, the means, if any, by which they could ascertain whether a person is an adult, given typically they would not even have access to services provided by payment card issuers to verify whether or not a card number is an **issued** card number or an invented/fake number, nor have ability to verify whether a photocopy or electronic/scanned copy of a driver licence or birth certificate is fake or not.

- The security and privacy risks inherent in legislative provisions that require adults to provide payment card number/details, or a copy of their driver licence or birth certificate, etc, in order to access R18+ content provided by individuals and other non-business entities, which are not required to comply with the Privacy Act 1988. In addition, the ACMA Restricted Access System Declaration 2007[45] requires content providers to keep so-called age verification records for 2 years and provide same to the ACMA on request. While the Declaration states that such records "must be kept in accordance with the National Privacy Principles and the Privacy Act 1988", such requirements are completely unenforceable by the ACMA, or the Privacy Commissioner, or the Internet user, against individuals and other entities that the Federal Government/Parliament specifically and intentionally exempted from compliance with the NPPS and Privacy Act 1988 (which includes most Australian businesses with an annual turnover of less than $3 million). The increasing frequency of media reports about hackers having broken into the record keeping systems of even very large companies (which "should" have sufficient financial resources to ensure their systems are secure) shows the dangers and inappropriateness of legislative provisions that require adults to provide personal information for a purpose other than paying to access commercial content, i.e. that is provided only on payment of a fee.

7.2.3 Link deletion orders issuable by the ACMA

119. The ACMA's powers, effective from 1 January 2008, to issue "link deletion" orders should be reviewed and deleted or narrowed.

120. Currently such powers require the ACMA, in response to a complaint, to order deletion of a specified "link" to a web page on an overseas hosted web site, including when the overseas hosted page has been or would be likely to be classified R18+ or, in the case of commercial content, MA15+, unless either the Australian hosted page that contains the link, or the linked page hosted overseas, is subject to an ACMA-approved RAS.

43 ACMA iTunes and the failure of net filtering, 14 September 2009 http://www.crikey.com.au/2009/09/14/acma-itunes-and-the-failure-of-net-filtering/

44 See above.

45 http://www.acma.gov.au/webwr/_assets/main/lib310563/ras_declaration_2007.pdf

121. Matters that should be taken into consideration in reviewing "link deletion" powers and orders, include the following:

- all of the matters referred to in Section 7.2.2 above concerning the ACMA-approved Restricted Access System;
- that significant achievements of "link deletion" powers include:
  - various Australian news sites deleting links to overseas-hosted videos showing the death of Neda Agha-Soltan during the Iranian election protests in 2009 (which shocked the world) after it became publicly known that the ACMA had applied an R18+ classification to those overseas-hosted videos[46]. It is unknown whether link deletion orders were issued to Australian news sites, or whether they self-censored to avoid receiving ACMA orders, due to the impracticality and costs of implementing and maintaining an onerous and reader-privacy invasive ACMA-approved restricted access system.
  - issue of link deletion notices ordering removal of links from web pages discussing and criticising existing censorship legislation, e.g. ordering the hosting service provider of the popular Australian discussion forum "Whirlpool" to delete a link to a page on an anti-abortion advocacy web site deemed "prohibited" or "potential prohibited" content by the ACMA[47]. (Note: The ACMA had initially guessed the overseas hosted page would be classified "RC", but when the ACMA submitted the page to the Classification Board for classification, it was classified R18+. At a later date, a different page on the same anti-abortion advocacy site was classified RC by the Classification Board.)

7.2.4 Undesirable consequences of prohibition on Australian based hosting of X18+ material

122. Provisions of the online content regulatory regime which deem material classified X18+ to be prohibited content online, whether or not access is restricted by an RAS, should be repealed, and provisions should be enacted that enable Australian-hosting/provision of X18+ material to adults.

123. The existing prohibition has the undesirable consequence of resulting in adults, who want to view X18+ material online, visiting overseas hosted web sites, the overwhelming majority of which would include material that is a criminal offence to access because it would match the "appears to be under 18 years" criteria in the Commonwealth Criminal Code definition of "child pornography material", which is broader than definitions in the laws of a variety of overseas countries.

124. For example, the USA definition does not include depictions of persons who "appear" to be under 18 years, and US legislation permits publication of sexually explicit material showing persons who were in fact 18 years or more at the time a photograph was taken, subject to legislated requirements that publishers etc obtain evidence that the person is/was at least 18 years and comply with the related recording keeping requirements of United States Code, Title 18, Section 2257.

125. Hence there are many web sites that state all content thereon is "legal" and that the site provider complies with Title 18, USC 2257.

126. The writer has occasionally received, via her web site, communications from individuals asking questions along the lines of: "I'm in Australia and an adult, and I want to know whether it's safe for me to access web sites that say their content is legal and complies with Title 18, USC 2257. I don't want to access any illegal content". The answer is no, it is not safe, even if a particular web site is provided by very large, internationally well known, providers of sexually explicit material, because some of the content is very likely to show persons who "appear" to be under 18 years, although they are not.

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46 ACMA Blacklists Iran Protest Video & Boing Boing, 28 August 2009
http://www.orzeszek.org/blog/2009/08/28/acma-blacklists-iran-protest-video-boing-boing/
(Note: Some Australian news sites contain, or link to, much shorter edited versions of the videos that were classified R18+, while others which previously provided link/s to the unedited versions have deleted the link.)

47 Blacklist: Government cracks down on Whirlpool.net.au, APC Magazine, 17 March 2009
http://apcmag.com/whirlpool-threatened-by-govt-over-blacklist.htm
"Web watchdog changes tack after blacklist leak", The Australian, 17 March 2009
http://www.theaustralian.com.au/australian-it/web-watchdog-in-a-spot-on-leak/story-e6frgalo-1111119151835

127. Legislative amendments should be enacted to permit Australian-based hosting of X18+ material to adults under specified conditions, and thereby enable adults who wish to view such material to do so via regulated Australian sites, instead of risking unintentionally accessing material on overseas sites that is lawful to publish in the hosting country, but illegal to access under Australian criminal laws.

7.3 Classification Boards: Appointment and Operational Procedures

128. The writer considers it is more politically likely than not that statutory Classification Boards will continue to exist for some purposes. Assuming so, there are a number of changes that could be made to member appointment processes and operational procedures of the Classification Boards, to reduce the potential for inconsistent classification decisions and the potential for political interference and/or bias, and thereby increase public confidence in the capabilities and "independence" of the Classification Boards, as outlined below.

7.3.1 Inadequate staggering of appointment dates

129. The dates/times when new members are appointed, and/or the period (number of years) for which members are appointed at any particular time, should be reviewed and changed with the objective of eliminating the situation where a large number of new full-time members are appointed (on the same or near date) for 3 years, and then 3 years later a large number of Board members are replaced by new Board members for another 3 years. The lack of staggering in appointment times can result in classification decisions being made by a Board consisting of largely new and inexperienced members, and/or temporary members being selected to vote instead of permanent members. For example, when the 9:8 decision was made to refuse classification to the film "Romance", 17 members voted. Of the 17, 9 had been appointed to the Board two months previously, and 3 were temporary and acting members[48]. (Two weeks later, the film "Romance" was classified R18+ by the Review Board, all members of which had been appointed over 2 years previously).

130. As at July 2011, 6 of the 12 members of the Classification Board were newly appointed on 31 January 2011 for 3 years[49].

7.3.2 Length of term of appointment to Classification Boards

131. The maximum term of appointment of members should not be extended beyond the existing 7 years, and probably should be reduced to 4 years, unless legislative changes are made to prevent the situation referred to in Section 7.3.3 below. (See also Section 7.3.5 concerning the definition of maximum term etc).

7.3.3 Procedures for appointing permanent members

132. Changes (legislative or via an intergovernmental agreement) should be made to reduce (ideally prevent) the unilateral ability of the Federal Government of the day to appoint (via recommendation to the Governor General) their political party mates and/or friends (e.g. former and/or current politicians of the same political party; persons who have stood for election or pre-selection for the same political party; etc) to the Classification Boards (as was common during 1999-2007)[50].

133. The Federal Minister should not be able to recommend (to the Governor General) that a person be appointed to either of the Classification Boards unless at least 4 of the 8 State and Territory Censorship Ministers support the proposed appointment. Reportedly, all States' relevant Ministers refused to approve the appointment of the Director of the Classification Board appointed in April 2007 for 4 years[51]. Furthermore, as remarked by the Shadow Minister for Homeland Security in Parliament in August 2007:

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48 For detail see: Graham, I, "Who Voted on Classification of the Film Romance?", 27 Feb 2000.
http://libertus.net/censor/rdocs/romancevote.html

49
http://classification.gov.au/www/cob/classification.nsf/Page/ClassificationinAustralia_Whoweare_ClassificationBoard_ClassificationBoardMembers

50 See: Graham, I, "Broadly representative of the Australian community?", Last Modified: 28 Feb 2010
http://libertus.net/censor/aboutcboards.html#represent

51 "Censure as PM's pal turns censor", The Age, 14 April 2007
"...All state attorneys-general refused to approve the appointment..."
http://www.theage.com.au/news/national/censure-as-pms-pal-turns-censor/2007/04/13/1175971353181.html

"...We have now reached the stage where four out of seven members of the review board have either direct or very close links to the Liberal Party. In other words, we have a board that, in large part, is representative not of the community at large but of a narrow political ideology represented in the Liberal Party. How can the Australian community have confidence in the classification watchdog when more than half of its members are representative of such a narrow constituency? The government...has transformed the Classification Review Board into a source of jobs for Liberal Party mates." [52]

7.3.4 Procedures for appointing, and use of, temporary members

134. Appointment processes and term of appointment of temporary members should be reviewed and changed. The existing situation gives rise to public perceptions, and actual possibility, that voting panels making decisions on controversial material are topped up with specially selected temporary members to increase the potential for a decision desirable to the Federal Government, e.g. Refused Classification. Such public perceptions, and associated allegations in the media, occurred for example in 2000[53] and no changes to legislative provisions have been made to prevent or reduce the possibility of a similar situation.

135. The Federal Minister should not have the power to unilaterally select persons for appointment as temporary members (nor delegate such a power to e.g. the Director of the Classification Board). Temporary member positions should be advertised and the Federal Minister should be required to consult with State and Territory Censorship Ministers concerning the selection of persons who may be appointed as temporary members, the same as required in appointing "permanent" members. Such a process would not adversely affect ability to actually appoint a temporary member quickly during periods of unexpectedly heavy workload given "a register of people suitable for temporary appointments is maintained"[54]. It is the process for adding persons to that register that should be changed.

7.3.5 Definitions of maximum term/period of appointment of members

136. Legislative changes should be made to ensure that the maximum term of any member (whether temporary or permanent) means calender years (not days served) since the date of first appointment as either type of member, whichever occurred first. The writer is under the impression that has historically been the applied interpretation of existing law, but there are indications of a relatively recent change in interpretation and practice (including but not limited to the Classification Board's suggestion to the ALRC that the ALRC "[e]xamine how the term of temporary Board members is to be calculated"[55]). For the first time in history, the Classification Board Annual Report 2009/2010 stated the number of days of service in that particular year for each of 8 named temporary members, whereas previously rare mention of any person having served as a temporary member has stated e.g. "for almost two years". (Prior to the 2007/2008 Annual Report, the names of temporary members were kept secret, i.e. not publicly disclosed). However, the 2009/2010 Report does not state the number of years nor the first date of appointment in the case of at least 4 temporary members who were first appointed either during or before the 2007/2008 year, giving rise to the question of whether they were first appointed seven or more years ago and it has now been decided to use days of service instead of calendar years. Note: This issue would be of less concern if the selection/appointment process and selective use of temporary members was significantly more publicly transparent and less susceptible to political influence/bias.

137. In relation to temporary members, the legislative provision that the appointment of a temporary member "is to be for a maximum period of 3 months" (s50(2)) should be amended to prevent back-to-back re-appointments by the Federal Minister and limit the total number of days in each calendar year. Currently a temporary member could be appointed and reappointed 4 times in year for a 3 month period, i.e. be a temporary member for the whole of a year (or more). In addition, unless changes are made to the selection process for temporary members (as discussed above in Section 7.34), the maximum number of years during

52 Shadow Minister for Homeland Security (Arch Bevis), House of Representatives Hansard, 15 Aug 2007 http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansardr%2F2007-08-15%2F0020%22

53 For detail, see: Graham, I, "Is the OFLC Dysfunctional?", 27 Feb 2000 http://libertus.net/censor/rdocs/oflc1pageone.html

54 Classification Boards Annual Report, 2009/2010

55 Classification Board response to question on notice from the Senate Legal and Constitutional Affairs Committee Inquiry into the Australian film and literature classification scheme, 6 May 2011 https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=a49cb6d1-1cfb-45a8-a410-53a7aff503fc

which a person can serve as a temporary member should be significantly reduced from 7 years, for example, to 1 year.

7.3.6 Use, as classifiers, of employees of the Attorney-General's Department

> *[ALRC Para 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.*

138. Such delegation powers, which presumably result from amendments made in 2007, (when the Attorney-General's Department took over *administrative* support functions that were previously provided to the Boards by the independent Office of Film and Literature Classification), should be deleted. Persons making classification decisions should be, and be seen to be, entirely independent of a government department. Furthermore, appointment/selection of members of the Classification Boards is supposed to result in the Boards being "broadly representative of the Australian community" - delegating classification decisions to persons who happen to be employees of a government department undermines that legislated objective.

7.3.7 Classification Boards' Decision Making Processes

139. Existing legislative provisions which enable a person presiding at a meeting of either Board (e.g. the Director of the Classification Board, the Convenor of the Review Board, or another member) to have a casting vote (in addition to an ordinary vote) on classification decisions should be deleted, in order to reduce the potential for bias, both actual and/or public perception/suspicions of same. For example, the computer game "Marc Ecko's Getting Up: Contents Under Pressure" was refused classification by the Review Board, on the grounds that it "provided elements of promotion of the crime of graffiti" on the casting vote of the Convenor when the Review Board was deadlocked 2:2[56], although there were at least 6 members of the Review Board at the time (according to Board Annual Reports). The application for review was made by the Federal Attorney General and The Local Government Association of Queensland, and the Convenor of the Review Board was a currently-serving NSW local government councillor[57].

140. A casting vote should not be available in making classification/censorship decisions. The Boards should always consist of an uneven number of members (to the extent possible given members may resign unexpectedly) and it should be required that voting panels consist of an uneven number (and a temporary member should not be used to make an uneven number). During most of the last 10 years, persons with casting votes (e.g. Directors and Convenor) had the appearance of being "political" appointees (see Section 7.3.3 earlier herein).

141. If the right to a casting vote is not removed, then persons with a casting vote who have the appearance of conflict of interest/potential for bias, in making a classification decision about a particular item, should not be permitted to vote.

142. Consideration should be given to changing the number and proportion of votes necessary to refuse classification. Currently the Director and Convenor are entitled to select a sub-set of members of their Boards to vote, and a refused classification decision can be made on a bare majority of votes in favour of RC by that sub-set. While it would be impractical (and costly) to require all members of the Classification Board to vote in all instances of refusing classification, consideration should be given to requiring a unanimous vote of all members of the Classification Board in, for example, cases of refusing classification to movies that have already been approved for public exhibition to adults in countries such as the U.K, Canada, etc..

143. In the case of the Review Board (which typically consists of 4-7 *part-time* members), consideration should be given to the "legitimacy" if any of that Board's, un-reviewable, power to refuse classification (whether or not by unanimous vote) to material that the Classification Board did not. The Review Board has ceased to have any appearance of being "broadly representative of the Australian community" since 2007, when the primary criteria for initial appointment apparently became a law degree (or being in the course of

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56 "Australia bans graffiti game", The Age, 16 Feb 2006
http://www.theage.com.au/news/breaking/australia-bans-graffiti-game/2006/02/15/1139890798010.html

57 As mentioned in the Review Board's decision:
http://www.classification.gov.au/www/cob/rwpattach.nsf/VAP/(084A3429FD57AC0744737F8EA134BACB)~794.pdf/$file/794.pdf

studying for one). No other persons have been initially appointed to Review Board since 2007[58], and as at mid July 2011 the only one of the 4 members who does not have a law degree was first appointed in 2006[59].

7.4 Censorship Ministers' powers to force review of a classification

144. The existing power of a single Censorship Minister to force a review of a classification (in the case of States/Territories, via the Federal Censorship Minister) should be amended to require support for a review by at least 6 of the 9 Commonwealth, State and Territory Censorship Ministers. As Victorian Attorney-General Rob Hulls remarked in relation to the controversial review decision to refuse classification to the French film, "Baise-moi":

> *"From all reports it's a pretty ordinary film, but I think there's a bigger question here - and that is the right of Victorians to see a film that's gone through the appropriate classification procedures ... We are part of a national classification scheme and that means cooperation and collaboration rather than just Daryl Williams unilaterally going off and appealing the decision"* [60].

58 According to information in Classification Review Board Annual Reports since then.

59 Classification Review Board Members page, accessed 12 July 2011 http://classification.gov.au/www/cob/classification.nsf/Page/ClassificationinAustralia_Whoweare_ClassificationBoard_ClassificationReviewBoardMembers

60 State 'powerless' to undo Baise Moi ban, The Age, 14 May 2002 http://www.theage.com.au/articles/2002/05/13/1021002430136.html