

Review of the National Classification Scheme conducted by the Australian Law Reform Commission

Submission by: National Gallery of Australia, Canberra
Contact: Simon Elliott, Assistant Director, Curatorial and Educational Services

The National Gallery of Australia seeks this opportunity to contribute to the Australian Law Reform Commission's Review of the National Classification Scheme.

The National Gallery of Australia opened to the public in 1982, and is the Commonwealth Government's leading visual arts collecting and exhibiting agency. Each year the National Gallery hosts more than 500,000 visitors to its site in Canberra and over 120,000 visitors to its exhibitions touring Australia. Approximately 70,000 booked school-aged children visit the National Gallery every year and the website receives over 1 million visitors each year. The National Gallery believes it has many years of first-hand experience with the display and reception of art and wishes to submit a response specially focussed on the visual arts in relation to this review of the National Classification Scheme.

By way of context, throughout history artists and the works of art they produce have at times challenged the world. In turn society has challenged the art of its time. Artists in open societies have expressed their creative energies and often produced works that comment on issues that go to the heart of their community – commenting upon or challenging social, political, religious, or the moralities of their times. Works such as Michelangelo's towering nude of David, Edgar Degas's *14 year old dancer*, Francisco Goya's *The Naked (or Nude) Maja*, Édouard Manet's *Olympia* and *The Luncheon on the Grass*, Gustave Courbet's *The Origin of the World* and Pablo Picasso's *Les Femmes d'Alger (O. J. R. M.)* all have been criticised as being either "obscene", "pornographic", "sexually explicit", "degenerate" or "distasteful". Some of the most controversial works of art of their time now rest in pride of place in the most famous museums around the world, viewed and appreciated by thousands of people each day.

The of Australia and all state and regional cultural institutions are governed by boards of management who represent the public and exercise due diligence in what and how images are displayed and institutions have often used signage and display techniques to advise visitors of the appropriateness of images on display.

The National Gallery acknowledges that a review of any classification scheme is required over a period of time particularly given the dynamics of the digital world and the discrepancies between rulings from the Commonwealth, state and territories. It acknowledges that the act of classification is a balance between allowing adults to read, hear and see what they want, protecting minors from unsuitable material, and taking into account community concerns.

The National Gallery is concerned however that at some level this review is fuelled by the controversy surrounding the Bill Henson case of 2008 which created headline news and warranted a visit to the National Gallery of Australia by Australian Federal Police to view works by the artist in the collection. After the work in question was classified as PG, the controversy was found to be totally unwarranted with no case to answer. The Henson case was a recent and unpleasant reminder of how vulnerable artists are when an element in the community seeks to control what adults see and make.

Overall the National Gallery would not wish to see increased classifications that reduce the artists' right to express their creativity. The ability to use art as a means of expressing an opinion or belief is vital in articulating public or social debate, and developing a culture reflecting and documenting the society in which we live. If a national classification scheme is implemented it should assist the arts to flourish in Australia and regulate freedom of expression and not be used as a means to censor material that is otherwise legal.

APPROACHING THE INQUIRY

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

The current classification scheme is reasonably functional for traditional content (books, film, computer games). Developments in the digital world over the last 10 years however have resulted in a huge array of content being created and distributed and Australian artists have participated in these new opportunities and continue to develop new ways for artists to connect with their audiences.

The current system of classification does not impose significant burden on the arts community or cultural sector, apart from artists whose practice involves moving images or screen-based work. The requirement to classify a work prior to public exhibition under the *Federal Classification (Publications, Films and Computer Games) Act 1995* (the Act) does not traditionally extend to works of art that are exhibited in gallery spaces. This should remain that way.

The National Gallery of Australia understands and continues to support the provision of Australians with information so they can make choices about the content they wish to access as per section 11 of the Classification Act, which are still applicable. When considering the classification of creative works of art the matters set out in subsection 11(b), (c) and (d) continue to be considered:

b) the literary, artistic or educational merit (if any) of the publication, film or

- computer game;
- c) the general character of the publication, film or computer game, including whether it is of a medical, legal or scientific character; and
- d) the persons or class of persons to or amongst whom it is published or is intended or likely to be published.

An education campaign should be considered to encourage people to install voluntary filters to protect children from unsuitable material that may be found on the internet.

WHAT CONTENT SHOULD BE CLASSIFIED AND REGULATED?

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

The platform or technology of the message should not be the factor which determines whether content should be classified. Although the type of audience likely to consume this material – eg mass market or specialist, is an important consideration. In most cases it should be the content itself that is the determining factor. Educate people about how to use the internet so that they only read, see, and hear what they want.

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

There is a good argument that self regulation coupled with a complaints based system may be the most effective way to proceed. This would require content providers to self regulate and then for members of the public to be able to make complaints about the extreme and most offensive content. This sits with current NCS objectives of Australians being able to see, hear and read what they like coupled with children being protected from harm and Government ensuring any illegal content (eg. child pornography) be dealt with under criminal or other laws such as racial vilification.

On average, the National Gallery of Australia receives less than five letters of complaint each year regarding images displayed on its walls usually regarding nudity. Such complainants use terms such as the works being “obscene”, “pornographic”, or “sexually explicit”.

In the last five years these complaints have not been about photographic works of art as one might expect given it’s the medium of pornography, but in relation to painted images and sculptural works in metal. Indeed one person has written to the National Gallery complaining of works of art that were included in major exhibitions drawn from world-class art museums in France where these works have been on display for decades. Based on such complaints however any such external ruling by a classification body would not even come close to finding such imagery as pornographic. The current system of Government-funded institutions and self-regulation is operating well in this regard.

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

Please refer to the response to Q7.

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 is classified?

Please refer to the response to Q7.

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

It is not necessary for works of art to be classified. Generally the audience for art is seeking a particular interest in the visit and has a level of education and knowledge about what they are likely to see. For the most part, viewing art is a purposeful act, not an incidental one, such as the viewing of advertising on the street, which is not required to be classified.

As mentioned there seems to be a level of concern in the community as a result of the Henson case that artists and the arts sector is operating outside the 'law' of classification. Despite the media interest and concerns raised by specific sections of the community, there was no evidence that there is a problem with the current classification system as it applies to works of art.

Henson's work, when classified, was considered low impact and given an unrestricted rating. Self-regulation already exists in the arts industry with its many exhibitors and gallery curators providing information about their exhibitions for the purpose of allowing audiences to make informed choices about what they are going to view. Should anyone wish to avoid 'offensive' art, they can do so by simply choosing not to enter that gallery space.

The National Gallery of Australia would therefore recommend that there be an explicit exemption to classification for works of art exhibited in a gallery space. Borrowing from the submission from the Arts Law Centre of Australia on this review, the National Gallery endorses their legally informed view on the Henson case and how the current misconceptions need to be clarified:

There appears to be the following misconceptions about why the works of art of Bill Henson and other artists are able to be exhibited in gallery spaces:

- works of art are never required to be classified; or*
- because 'artistic merit' is a predominant factor taken into consideration when classifying material submitted for classification; or*
- 'artistic merit' is an excuse for child pornography.*

Works of art are never required to be classified

It is incorrect to say that works of art are never required to be classified. Under the Guidelines for the Classification of Publications bona fide works of art are not usually required to be submitted to classification as they are not generally considered to be 'submittable publications'. A 'submittable publication' is one that contains depictions or descriptions that:

- a) are likely to cause the publication to be refused classification;*
- b) are likely to cause offence to a reasonable adult to the extent that the publication should not be sold or displayed as an unrestricted publication;*
- c) are unsuitable for a minor to see or read.*

'Publication' is defined in the Act to include any "pictorial matter", not including a film, computer game or advertisement for a film or computer game. As such, visual works of art such as photographs are publications under the Act, and if they contain certain depictions or descriptions, may be considered as 'submittable publications' and are therefore required to be classified by the Classification Board.

Works of art may, however, be brought under the Act if it contains classifiable material such as film or video. This would include multimedia works such as installation art which frequently incorporates a video element, and are exhibited in gallery spaces. Such pieces have been increasing in popularity with the rise of digital technology as contemporary art.

It is unlikely that films such as those used in multimedia works of art are exempt from the classification requirement. Under section 5B of the Act, films that are exempt from classification must be of a certain type used in the course of business, accounting, professional, scientific, educational, current affairs, or a documentary record of an event such as sporting, family, religious or community. Some multimedia art films may be exempt as a musical presentation or record of a hobby or live performance, however these would be required to wholly be a documentary record of that hobby or live performance. A film used in a work of art that exists as a piece of art, not a documentary record, would not be automatically exempt from the classification requirement. More importantly, for many artists their artistic activities are a professional activity, not a hobby activity.

'Artistic merit' is a predominant factor taken into consideration when classifying material submitted for classification

There appears to be a huge amount of confusion in the arts and broader communities as to how the classification system works, much created because of the views expressed by sections of community about the exhibition of Bill Henson photographs in 2008. The Classification Board rating of the Henson photographs in 2008 as PG indicates that the photograph was not a 'submittable publication' under the Act, and there was no need for it to be classified. However, because of the negative public reaction to the photograph including from members of state and federal parliaments, it was deemed necessary to submit the work for classification in order to prove it was

not offensive. More recent Henson works of art have been submitted for classification to ensure against any controversy or prosecution even though it was arguably not necessary to do so.

Henson's work is a useful case study in this regard as the work ended up being classified and was given an unrestricted rating. In these circumstances the 'artistic merit' of the work was not a significant factor as the work was not found to be offensive and the nudity was low impact. There is no need to seriously consider artistic merit for works likely to be classified MA15+ or lower.

'Artistic merit' is an excuse for child pornography

There is some perception by the general public that child pornography (or indeed, any offensive art) can be excused or justified so long as it is labelled 'art'. This confusion is evident in the recent Senate Committee Review of the National Classification Scheme, the report for which stated:

'Artistic merit' remains a defence to child pornography and child abuse material offences in many states, meaning that sexualised images of naked children can be exhibited in public galleries under the guise of 'art'. (p168 12.2)

In criminal law, the 'artistic merit' defence where it exists only comes into play if the police or Director of Public Prosecutions considers that an offence has been committed. In the case of the Bill Henson photographs in 2008 the NSW Director of Public Prosecutions determined that the Henson photographs were not child pornography and no charges were laid. As such, there was never any need for 'artistic merit' to be considered or applied to the Henson photographs.

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

No comment

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

Please refer to response to Q7.

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

The main purpose of classification is to provide information about content so that people can make informed choices and protect children from harm, so where the content is being accessed is not the point. The preferable way for the Government to deal with this issue is to provide free filters. It is the responsibility of parents to decide and manage what their child can and cannot see. It is not the role of Government to prohibit the production and dissemination of content that might be controversial but not illegal.

Q11. What other factors should influence whether content should be classified?

No comment beyond Q7

HOW SHOULD CONTENT BE CONTROLLED?

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

It is not realistic to classify all of the content available on the Internet. Resources should instead be dedicated to providing 1CM (filtering) software to those who would like it and educating the community about the best ways to take responsibility for themselves and their children.

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

See the comments to Q12.

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

No comment.

Q15. When should content be required to display classification markings, ratings or consumer advice?

The arts community creates millions of images every year, from physical works to purely digital images. It would be practically impossible to require every single image to be classified and display a formal classification marking. If there were a mandatory requirement for content to display classification markings or consumer advice, it should apply only to content of higher impact (eg., MA15+, R18+, X18+).

WHO SHOULD CLASSIFY AND REGULATE CONTENT

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

Q17. Would co-regulatory models under which the industry itself is responsible for classifying content, and government works with industry on a suitable code, be more effective and practical than current arrangements?

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

With the huge range of content being produced both online and offline, it is economically and practically unrealistic for a governmental body to be charged with the classification of all content. Increasingly, the government must rely on industries to self-classify. The government's role should be to work with industry to develop a suitable Code and Guidelines for industry use.

The government could also have a role in resolving complaints about classification decisions.

The National Gallery's primary position is that the works of art and screen content created by small independent artists and filmmakers, given the size and nature of productions and audiences, should be exempted from the classification scheme as per our recommendations in Q7.

5 CLASSIFICATION FEES

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

The National Gallery of Australia proposes that works of art and small independent films with limited distribution should be exempted from NCS completely. However, if more contentious content was required to be classified, then the cost of this classification should be subsidised completely by the Government.

CLASSIFICATION CATEGORIES AND CRITERIA

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

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

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?

Q23. Should the classification criteria - the Classification (Publications, Films and Computer Games) Act 1995, National Classification Code, Guidelines for Classification of Publications and Guidelines for Classification of Films and Computers Games - be consolidated?

The current classification categories are well-promoted and appear to be well understood. It may be useful if the classification categories which apply to films and computer games applied to all content (eg. publications and music recordings), making the system simpler and should increase understanding of the classification information provided for consumer benefit. It would also be useful to consolidate the various codes and guidelines so there was one set of rules or guidelines that applied to classifiable content, regardless of the platform by which it was delivered.

REFUSED CLASSIFICATION

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

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

The National Gallery of Australia accepts there should be limits on freedom of expression, such as:

- prohibition on access to illegal material such as child pornography;
- defamation laws;
- racial discrimination vilification laws;
- sex discrimination and harassment laws; and
- limits on use of some Indigenous intellectual property.

Arts Law Centre of Australia in their draft submission highlights a crucial gap in the evaluation and treatment of artistic merit in Australia relative to the international community. It notes that Australia operates a more conservative restriction classification system than many western democracies.

In the United States for example, “serious” artistic works are protected from blanket prohibition based on the freedom of expression guaranteed by the First Amendment. In the United Kingdom, works would only be refused classification if they were to corrupt and deprave those likely to come in contact with the work, effectively exempting art exhibited in galleries and art house theatres. Additionally, artistic merit is a defence against legal action taken to ban the material as well as against criminal obscenity charges. Given this global cultural climate and that in most jurisdictions in Australia it is not illegal to possess or view privately much RC material (unless illegal pursuant to criminal laws eg. child pornography)

The Arts Law submission continues correctly that:

The difficulty for the many people in the arts and broader community is not with the prohibition on material which is illegal under the criminal laws such as child pornography, but the much broader category of “offensive” materials. The idea of an agreed “community standard of morality, decency and propriety” is fraught as these are very subjective notions and will differ enormously amongst different sections of the community.

REFORM OF COOPERATIVE SCHEME

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?

The National Gallery recommends that the States refer powers to the Commonwealth to enable the introduction of a nation-wide framework for the classification of content in Australia. There is a need for standardisation in

classification laws. Currently it is legal in the Australian Capital Territory for all DVDs and videos classified X18+ to be sold but it is illegal to do so in all six States. We have not witnessed any concern on this situation in Canberra nor do we think that Territorians are in anyway harmed by this situation.

CONCLUSION

Over the decades in Australia, the issue of censorship and freedom of expression is an often discussed. It is the sign of a healthy and open democratic society to have such debates. The recent Bill Henson case however seems to have created a view to expand the range of materials that should be banned, restricted or classified in Australia. As mentioned earlier the controversy surrounded the Bill Henson photographs were found to be ill-informed and completely without grounding.

The National Gallery of Australia asserts that professional artists working in Australia are continually making ethical decisions about what is made and displayed; the works displayed in galleries and online can be challenging but not exploitive or pornographic and selected for display with due diligence.

At a time of significant fiscal challenge for public galleries and in the absence of real challenges in relation to the classification scheme, the National Gallery of Australia believes the present classification system to be appropriate.

The purpose of classification is primarily to enable adults to make an informed choice as to what they want to see, hear and read, and what to allow their children to have access to. It is not and should not be used as a means to censor material that is otherwise legal.

FURTHER INFORMATION

The National Gallery of Australia wishes to acknowledge the work undertaken by The Arts Law Centre of Australia and their draft submission in providing an informative framework for the Gallery's own submission.

Please contact Simon Elliott at the National Gallery of Australia on 02 6240 6733 if you would like me to expand on any aspect of this submission, verbally or in writing.

Yours faithfully



Simon Elliott
Assistant Director
Curatorial and Educational Services
National Gallery of Australia
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