ALRC NATIONAL CLASSIFICATION REVIEW SUBMISSION

The Arts Law Centre of Australia

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THE ARTS LAW CENTRE OF AUSTRALIA

The Arts Law Centre of Australia (**Arts Law**) is the national community legal centre for the arts. With the support of the Australia Council for the Arts, it was established in 1983 to provide specialist legal and business advice and referral services, professional development resources and advocacy for artists and arts organisations. We provide legal advice to over 2,500 Australian artists and arts organisations a year, operating across the arts and entertainment industries from literature and visual arts to music and film.

Arts Law envisages an arts community in which members understand their legal rights, have sufficient business and legal skills to achieve financial security, and carry out their arts practice in a non-exploitive and culturally aware environment. Over the years, we have made numerous submissions dealing with law and policy reform issues affecting the arts. Our submissions are informed through our unique role in bridging the worlds of both arts and law, and by working with clients' of varying profiles:

- earning limited incomes;
- both non-Indigenous and Indigenous, and remote and urban;
- limited in their ability to enforce their rights;
- dedicated to the creation of art across all disciplines;
- either established, new or emerging arts practitioners or arts organisations;
- operating arts businesses;
- working in both traditional and digital media,
- self-reliant in business;
- eager for accessible legal information, although they typically have limited legal education.

As an independent organisation giving legal advice to artists and arts organisations across Australia, Arts Law is well placed to comment on the legal and policy issues affecting the arts community from a national perspective. We welcome this opportunity to contribute to the Australian Law Reform Commission's Review of the National Classification Scheme.

THE IMPACT OF CLASSIFICATION ON ARTISTS

It is important for artists that they are able to communicate their work as widely and freely as possible. Such communication is vital for an artist's business and reputation because it enables them to earn income from their work. As such, they are directly impacted not only by the classification system's determination of how a publication, film or computer game can be exhibited or sold and communicated over the internet, but by the environment the classification system fosters in how audiences and the general community receive and respond to art.

Arts Law is keenly aware that 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 role of art as a means of expressing an opinion or belief, however, is vital in articulating public or social debate, and developing a culture reflecting and documenting the society in which we live.

In Australia there is an expectation that, as a nation, we will uphold basic human rights principles including the right to freedom of expression. This is set out in Article 19 of the Universal Declaration of Human Rights, and in the International Covenant on Civil and Political Rights (ICCPR), to which Australia is a signatory.

> **Article 19 (ICCPR)**
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> 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

Although the right to freedom of expression is not so absolute that laws cannot be made in relation to defamation, racial vilification as well as laws to protect national security, public order, health and morals, any such restriction must only be to the extent "necessary" in a democratic society. A well-tailored classification system, the purpose of which 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, is an effective mechanism to regulate freedom of expression provided it is not 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?

Yes, the ALRC should develop a new framework for classification which is more realistic about the digital environment. It is no longer possible to classify all content available in Australia given the volume of material, the plethora of platforms, and the immediacy of content creation and dissemination, often across international borders.

Whilst the current classification was reasonably functional for traditional content (books, film, early computer games), technological developments over the last 10 years have resulted in a huge array of content being created and distributed. The Australian arts industries have participated in these new opportunities and continue to develop new ways for artists to connect with each other and their audiences. According to the Australia Council report, *More than Bums on Seats: Australian Participation in the Arts*, a third of all people surveyed used the internet to research, view, or create artistic works and performances and 16% of all users had "creatively participated" in the production of such material.[1] The internet has dissolved the barriers between creator and viewer and is providing mechanisms for interaction. It is not possible, nor is it desirable to wind back the clock, to an environment that requires classification prior to public access.

The ALRC should take a practical approach to developing a classification framework which acknowledges it is not possible, nor necessary to classify all content, values freedom of expression, places a much greater onus on industries to self-regulate within industry developed guidelines, and supports the education of Australians that they can take responsibility for the content they and their children access.

WHY CLASSIFY AND REGULATE CONTENT?

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

The primary objectives of a national classification scheme should be underpinned by an explicit recognition of the fundamental human right to freedom of expression. Arts Law considers that the principles of the current NCS have been reasonably effective to date but need to be updated in view of the digital age. It is proposed that the current top level principles underlying the classification scheme should be:

[1] *More than Bums on Seats: Australian Participation in the Arts*, Australia Council for the Arts, 2011, http://www.australiacouncil.gov.au/__data/assets/pdf_file/0004/71257/Full_report_More_than_bums_on_seats_Australian_participation_in_the_arts2.pdf

- adults should be free to read, see, and hear what they want and should be provided with relevant information in order to make informed decisions;
- minors should be protected from material that is likely to harm or disturb them; and
- everyone should be protected from exposure to illegal material.

Arts Law's proposal is based on the value of free access to information and the idea that adults must take responsibility for themselves and their children and the content they are able to access. The classification scheme should only prohibit access to materials the Australian Government and State/Territory governments have determined are illegal to create, publish and disseminate under the criminal laws (e.g., child pornography, material inciting terrorist acts). The change Arts Law is proposing takes a more realistic approach to the world in which Australians live and the huge impact the internet has had on it. Whilst some sections of the community will disagree with this approach, it is not realistic to go back to the pre-internet era.

This approach takes into consideration the broad range of materials that Australians are currently accessing, primarily through the internet. Rather than trying to protect all Australians from material they may find "offensive", Arts Law's approach accepts that there currently is and will continue to be a broad range of materials accessible to those who seek it out. Whilst this is a broadening of the scope of materials which would subsequently not be Refused Classification (i.e., banned) through the classification scheme, realistically it is unlikely to broaden the scope of materials freely available in Australia at present. The change would also overcome the nebulous concept of what is "offensive" or "demeaning" and replace it with the more concrete concept of material which is illegal, primarily under the criminal laws. Any change in approach should be supported by an education campaign to encourage people, especially parents, to install voluntary filters to protect children from unsuitable and harmful material.

In providing Australians with information to enable them to make choices about the content they wish to access, the matters set out in section 11 of the *Classification Act* should still be applicable. In particular, when classifying creative work, it is important that 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.

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 should not be the definitive factor which determines whether content should be classified; rather the character of the content itself should be the determining factor. For example, it is illogical that an adult can purchase an R18+ film from a DVD store, yet be restricted from accessing the same film over the internet by an internet service provider level filter. Arts Law's approach is not to ban this content in Australia but to better educate people about how to use the internet so that they only read, see, and hear what they want.

It is clearly impractical and too costly for the Government to classify all content being delivered via the internet. This inevitably must lead to the conclusion that there should be less formal regulation of content in Australia. Concerns have been raised by those who do not wish to be exposed to content of a sexual or violent nature and who do not want children to be exposed to content which is harmful. However, although there is general agreement that as a society there is some content which should be prohibited completely (i.e., illegal) such as child pornography, there is no consensus on what constitutes 'offensive'. It therefore makes sense for the Government and any self classification scheme to focus on content at the extreme (and thus controversial) end of the spectrum in order to clearly identify content so that people can make informed decisions and choices.

The current system of classification does not impose significant burdens on the arts community, apart from artists whose work involves moving images such as screen creators. 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 or to much of Australian literature. Only a small number of works in the categories of visual arts, crafts and literature would ever need to be submitted to the Classification Board as 'submittable publications'. Musical works generally fall outside the NCS with the music industry providing a system of self-regulation, although music DVDs will be classified as films. However, classification is having an ever-increasing impact in media such as films, moving image art and the rapidly growing screen content industries such as computer games and apps as well as any work involving children.

Arts Law would recommend against any broadening of the current classification scheme. Instead, we would recommend that the classification be simplified and there be greater focus on:

- correctly identifying content suitable for children;
- correctly identifying mature and adult content that is legal but restricted;

- increased resources used to police illegal content which would be harmful to society as a whole;
- voluntary internet filters made available to all Australians to implement at the individual level;
- education of the community to take responsibility for what they and their children access; and
- consulting with content industries to develop appropriate standards for the purpose of self-regulation.

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 into the future. This would require content providers to self-regulate and to provide a mechanism for members of the public to be able to make complaints about the extreme and offensive content. This fits with the current NCS objectives by ensuring that Australians are able to see, hear, and read what they like while also protecting children from harm. The relevant content industries should develop guidelines that best honour the current NCS objectives without jeopardizing freedom of expression. Additionally, arts industries will be responsive to market pressure; they have a vested interest in keeping their customers and the communities that support them satisfied. The government, for its part, will ensure any illegal content (e.g., material inciting terrorist acts) is appropriately dealt with under the criminal or other laws such as racial vilification.

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

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?

Arts Law refers to our response to **Q7**.

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

No, it is not necessary for artworks to be classified. The arts audience is a relatively small, niche market, where one could assume a level of education and knowledge about the content they seek to view. Unlike the concerns raised about the very public billboard advertising campaigns, the arts industry appears to have been condemned because of the work of one controversial artist, Bill Henson. Despite all the media interest and concerns raised by conservative sections of community, there is no evidence there is a problem with current classification system as it applies to artworks. Even Henson's work, when classified, was considered low impact and given an unrestricted rating.

There already is a trend of self-regulation in the arts industry with 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, a choice which is not available to people in regard to public advertising. Persons that do choose to attend galleries to view artworks are a discrete section of the community; these individuals are knowledgeable about the material they are going to view and attend by choice. Arts Law would therefore recommend that there be an explicit exemption to classification for works of art exhibited in a gallery space.

There appears to be several misconceptions about why the artworks of Bill Henson and other artists are able to be exhibited in gallery spaces, including:

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

Artworks are never required to be classified

It is incorrect to say that artworks are never required to be classified. Under the *Guidelines for the Classification of Publications*, bona fide artworks are not usually required to be submitted for 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; or

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.[2] As such, visual artworks, such as photographs, are publications under the Act. If they contain certain depictions or descriptions, these works may be considered 'submittable publications' and are therefore required to be classified by the Classification Board.

Works of art may also be brought under the Act if they contain classifiable material such as film or video. This includes multimedia works exhibited in gallery spaces. Such pieces have been increasing in popularity with the rise of digital technology in contemporary

[2] *Classification (Publications, Films and Computer Games) Act 1995* (Cth) section 5 Definitions

art. Arts Law has received several inquiries from multimedia artists regarding whether or not they are required to classify their work prior to exhibition.

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, in order to be exempt from classification, films must be of a certain type (i.e., those 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 of a professional nature, not a hobby.

To avoid falling afoul of the classification requirement for films, many artists who use film elements in their art would be required to submit their works for classification. In many cases this may beyond the artist's means. The fee for classification of a 0-60 minute film for public exhibition is $990, and a priority processing fee an additional $400. Arts Law recommends that the classification provisions for exempt films be clarified to accommodate films used in works of art exhibited in gallery or exhibition spaces.

Alternatively, if artworks are not exempted from classification, a change from the current approach to one of self-regulation is necessary. Such a move requires a change in classification guidelines as well. Although in Victoria the Director of Classification is able, on application, to direct that the Victorian classification enforcement legislation does not apply to an approved organisation or an organisation carrying on activities of an educational, cultural or artistic nature, in relation to the exhibition of a film at an event,[3] this merely shifts the burden and cost of classification to arts organisations. Requiring members of the arts industry to be trained and receive accreditation in classifying content could become prohibitive for the many artists who are already struggling financially without the additional burden of compliance with a classification system (see **Q19** response). Furthermore, the Victorian system produces comparable censorship problems because the guidelines themselves have remained the same. Self-regulation is a far preferable mechanism, and the arts industry (e.g., gallery and exhibition spaces) should, in consultation with the Classification Board, develop industry protocols that can foster an environment of healthy artistic expression while effectively communicating who the appropriate audience is for a given exhibition.

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[3] *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* (Vic) sections 64 and 66A

'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 of it traceable to the exhibition of Bill Henson photographs in 2008. The Classification Board rating of the Henson photographs in 2008 as PG indicates that the photographs were not 'submittable publications' under the Act, and there was no need for them to be classified. However, because of the negative reaction, from the public as well as 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 pre-empt any controversy or prosecution even though it was arguably not necessary to do so.[4]

Henson's work is a useful case study. 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. Under the NCS, 'artistic merit' is a factor that may tip the balance with work (generally films) that is borderline between Refused Classification (RC) and R18+. For example, the films *Salo*, *Mysterious Skins* and *9 Songs* were given R18+ ratings, while *Baise Moi* and *Ken Park* were classified RC. In other words, artistic merit is only really considered when the Classification Board is seeking to decide whether a high impact work should be banned from Australia entirely under a RC rating, or if can be allowed on a restricted basis under an R18+ rating. 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 a perception held by some that child pornography (or indeed, any offensive content) 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, 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 an be exhibited in public galleries under the guise of 'art'.(p168 12.2)*

Arts Law is not aware of a single example of an artwork on display in a public gallery or elsewhere that would be regarded as child pornography or child abuse material under the criminal laws of the Commonwealth or any state or territory. The above statement

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[4] 'Gallery submits Bill Henson's latest images to censors before new show', Brisbane Times, 25 April 2010 (http://www.brisbanetimes.com.au/entertainment/art-and-design/gallery-submits-bill-hensons-latest-images-to-censors-before-new-show-20100424-tkiu.html)

from the Report is not only inaccurate but also inflammatory and misleading as to how the child pornography laws work.

The Commonwealth *Criminal Code Act 1995* does not provide for a defence of artistic merit for child pornography, however a number of State and Territory jurisdictions including Victoria,[5] Queensland,[6] and Western Australia[7] do. As a criminal law defence, 'artistic merit' where applicable only comes into play if the police or Director of Public Prosecutions believes that an offence has been committed. In New South Wales, the one time in Arts Law's awareness when the artistic merit defence was raised in relation to a child pornography charge, the defence failed.[8] 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.

Arts Law notes that since the Bill Henson incident, New South Wales conducted a review of its child pornography laws[9] and has now amended its *Crimes Act 1900* to remove "artistic purpose" as a defence for child pornography. This amendment brought NSW into alignment with Commonwealth laws regarding child pornography. During the consultation for this change, Arts Law made a submission supporting the amendment as being positive for artists as it would require law enforcement agencies, and in turn the general public, to carefully consider whether or not a work falls within the definition of child pornography, and ensure that works with genuine artistic merit are not confused with child pornography. Despite this, Arts Law would stress that the overwhelming majority of artists do not wish to break the law or court controversy, and are in fact concerned by the public perception that any art involving or depicting children is automatically suspect and exploitative.

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

Arts Law supports maintenance of the self-regulation approach for the music industry. It is a cost-effective method of regulation and the evidence shows very few complaints arising (evidence of Ian Harvey, ARIA/AMRA and Una Lawrence, Recorded Music Labelling Complaints Ombudsman to Senate Ctee, *see* report p128). Harmonising the current labelling system with ratings of M (=level 1) MA (=level 2) R18+ (level 3) should

[5] *Crimes Act 1958 (Vic)* section 70(2)(b)
[6] *Criminal Code Act 1899 (Qld)* Schedule 1 section 228E
[7] *Classification (Publications, Films and Computer Games) Enforcement Act 1996 (WA)* section 58
[8] *R v Manson and Stamenkovic*, NSWCCA, 17 February 1993
[9] *Report of the child pornography working party*, NSW Department of Justice and Attorney General (8 January 2010) http://www.lawlink.nsw.gov.au/lawlink/clrd/ll_clrd.nsf/vwFiles/Final_Child_Pornography_Working_Party_Report_8Jan.pdf/$file/Final_Child_Pornography_Working_Party_Report_8Jan.pdf

only occur if there are compelling reasons to do so. Currently, there seems to be no such necessity. It may also be possible to introduce a higher impact rating of X18+ for recordings currently refused classification as long as content was not illegal.

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

Arts Law refers to our response to **Q7**.

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

If it is accepted that the main purpose of classification is to provide information about content so that people can make informed choices and protect children from harm, then it is preferable for people to be provided with some information, regardless of where the content is being accessed. The main difficulties in this regard include:

- the volume of material being distributed online;
- the international dimension;
- the immediacy of its creation and distribution; and
- the use of peer to peer networks;

all of which contribute to make the classification of all content practically impossible. The preferable way for the Government to deal with this issue is to provide free filters, such as those made available under the NetAlert program under the Howard Government, so that people who will be distressed by content or wish to their protect children from content can install them on their computers on a voluntary basis. Internet content management (ICM) technology involves the use of "block lists" for websites reviewed by individuals and classified as explicit. Automated programs search the web daily and put new sites on a list for human review. The software programs are incredibly effective and can be customised to block material tailored to specific preferences of individual families, parents, and business owners. These technological solutions can be applied to other medium as well, such as television. Televisions manufactured for sale in the United States, for example, are required to have embedding of filtering systems called V-Chips, which can be turned on in order to provide control over accessible content.

Regulating all content publicly remains a problem for concerned parents. However, rather than have a government mandate that prohibits the production and dissemination of a broad swath of content that while controversial is not illegal, parents should decide and manage what their child can and cannot see.

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

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?

As discussed above, it is unrealistic to even conceive of classifying all of the content available on the Internet. Resources should instead be dedicated to providing ICM (filtering) software to those who would like it and educating the community about the best ways to take responsibility for themselves and their children. By delegating the cataloguing of graphically violent and sexually explicit websites to those that have the expertise and the capital, the government substantially cuts down on the amount of content it is responsible for classifying and creates the best possible mechanism for individuals to decide for what sort of content is best for their families.

The voluntary filtering scheme currently being implemented by internet service providers (**ISPs**) Telstra and Optus whereby illegal content, specifically child pornography, is automatically blocked is not detrimental in principle. Under the voluntary scheme, ISPs focus on a blacklist provided by international criminal police organisation Interpol. It is understood that for a site to be added to this blacklist, law enforcement agencies from at least two separate jurisdictions must validate the entry as illegal and not just objectionable. Anyone who seeks to access a site on the list is directed to an Interpol page explaining why the site has been blocked, and if the user believes the site has been blocked unfairly, the user can complain to the Australian Federal Police or Interpol to seek a review. Such a specific, restricted list, with clear lines for appeal, is supported by the Internet Industry Association of Australia, and would not impact artists or freedom of expression.

In comparison, a broader mandatory list to filter offensive or content refused classification has the strong potential to restrict the flow of content which is not illegal. Such plans would infringe on basic personal autonomy and freedom of expression, and are out of step with Australia's peers internationally. For example, neither the United States nor Canada require ISPs to engage in evaluations regarding the legality of content.

The proposed filtering plan to automatically block material that is refused classification threatens to significantly impede access to creative works and information. This regime is hard to reconcile with the reality of the internet. Australians can and regularly do seek access to legal content that is outside Australia and therefore created and disseminated in accordance to different laws. For example, if Australian law requires that all adult or potentially offensive material be placed behind an age verification system on the website, the lack of which would result in the website being added to a filter list, valuable content produced and regulated in other countries where there is no legal requirement to classify or age-restrict material would be completely blocked to Australian users. The benefits of global connectivity depend on a free flow of ideas; as

such, any plan to filter online content possesses tremendous potential to restrict access to content that, while not to everyone's taste, is completely legal and recognised by many individuals and the community as legitimate.

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

See the comments to **Q1, Q10,** and **Q12.**

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

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 (e.g., 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 incredibly huge range of content being produced both online and offline, it is economically and practically unrealistic that a government body 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.

Arts Law's primary position is that given the size and nature of productions and audiences, the artworks and screen content created by small independent artists and

filmmakers, should be exempted from the classification scheme as per our recommendations in **Q7**.

However, if based on the nature of the content (e.g., sexually explicit) the Government determines the content should be classified, Arts Law supports a self-regulation model whereby content is classified in accordance with guidelines developed by both industry and Classification Board representatives. It is reiterated that the vast majority of content created by the arts industry would be uncontentious and should not need to be classified.

It is noted that the administrative and financial burden of imposing a classification system on the arts, even one of self-regulation, is enormous strain; many in the arts industry already struggle to make sufficient income. In October 2010, the Australia Council report *Do You Really Expect To Get Paid?* found that the distribution of artists' incomes is strongly skewed towards the lower end, with artists earning an average of $41,200 for the 2007/8 financial year.[10]

CLASSIFICATION FEES

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

Arts Law proposes that artworks 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. It is noted that the cost of classification of artworks was recommended by the Senate Committee report. (**Rec 7)**

The small number of artists who receive grants from the Australia Council can currently have works classified for free, by applying for classification through the Australia Council; however for the vast majority, the current costs of classification are simply prohibitive. The average income of a visual artist in Australia for the 2007/8 financial year, for example, was $34,900.[11] Arts Law is concerned that the costs of even an industry-run classification scheme that complies with the current government mandates would be problematic for most artists and art organisations which survive on miniscule budgets. Arts Law proposes that any self-classification scheme required for the arts

[10] Australia Council for the Arts, *Do You Really Expect To Get Paid?* (2010) , chapter 8 page 47 http://www.australiacouncil.gov.au/resources/reports_and_publications/subjects/artists/artist_careers/do_you_really_expect_to_get_paid

[11] Ibid 5

should be one created in cooperation with the arts industry. Arts Law agrees that the current cost of reviewing classification decisions by the Classification Review Board are prohibitive for small independent screen creators and fees should be waived. There is public interest in ensuring that merits of decisions affecting the arts and film communities can be properly considered, so a small independent filmmaker whose film has been Refused Classification should be exempt from fees in order to test the decision.

Similarly, there should be adequate Government support for any complaints process implemented to ensure the transparency of decision making is achieved.

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 (e.g., publications and music recordings), making the system simpler and increasing consumer understanding of the classification information. 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.

There is, however, some confusion as to the application and operation of 'artistic merit' in classification (see response to **Q7**). A common misconception is that artistic merit is a predominant factor when deciding what classification content should be given, when in practice artistic merit is only really taken into consideration by the Classification Board when content is sitting on the cusp of being refused classification (and thus banned) to instead justify a rating of R18+. (See treatment of artistic merit in Classification Review

Board decisions for *Baise Moi* (2002)[12], *Ken Park* (2003)[13], *9 Songs* (2005)[14], *Mysterious Skin* (2005)[15], and *Salo* (2010)[16].)

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?

Arts Law proposes that the current criteria are out of step with materials that Australians are able to access on- and offline. Arts Law accepts there should be limits on freedom of expression, such as:

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

Arts Law proposes that the classification and censorship laws should be revised to reflect the overarching principle that people should be able to read, see and hear what that want, and the belief that the current RC is out of step with the behaviour of everyday Australians. In many western democracies materials which are RC in Australia are readily available. In addition, currently in most jurisdictions in Australia, it is not illegal to possess much RC material (unless illegal pursuant to criminal laws) or view it on the internet. Proposals to prohibit this content appear to want to return to a pre-internet era which is unlikely to acceptable in Australia today (e.g., recommendation 13 of Senate Report).

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[12] http://www.ag.gov.au/www/cob/rwpattach.nsf/VAP/(084A3429FD57AC0744737F8EA134BACB)~92+-+Classification+Review+Board+-+10+May+2002.pdf/$file/92+-+Classification+Review+Board+-+10+May+2002.pdf

[13] http://www.ag.gov.au/www/cob/rwpattach.nsf/VAP/(084A3429FD57AC0744737F8EA134BACB)~230+-+Classificatoin+Review+Board+6+June+2003.pdf/$file/230+-+Classificatoin+Review+Board+6+June+2003.pdf

[14] http://www.ag.gov.au/www/cob/rwpattach.nsf/VAP/(084A3429FD57AC0744737F8EA134BACB)~392.pdf/$file/392.pdf

[15] http://www.ag.gov.au/www/cob/rwpattach.nsf/VAP/(084A3429FD57AC0744737F8EA134BACB)~597.pdf/$file/597.pdf

[16] http://www.ag.gov.au/www/cob/rwpattach.nsf/VAP/(9A5D88DBA63D32A661E6369859739356)~Salo+review+-+Decision+reasons+-+Final+-+17+May+2010.pdf/$file/Salo+review+-+Decision+reasons+-+Final+-+17+May+2010.pdf

This highlights a crucial gap in the evaluation and treatment of artistic merit in Australia relative to the international community. 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), proposals to prohibit this content appear to be detached from the realities of the internet era.

The ALRC discussion paper initially describes RC content (i.e., banned content) as including "child abuse material such as child pornography, extreme violence including rape, bestiality, the incitement of a terrorist act, detailed instruction in crime or drug use, and …'live portrayals of certain sexual fetishes'"(issues paper p.38 paragraph 118). It goes on to state that "the acts comprising the subject of some of this content – e.g., rape – are prohibited by the criminal law. The criminal law recognises that such acts harm society and by way of an extension, the RC classification could be seen to recognise the harm that may or can be caused by the dissemination of certain information and images." In addition to the banning of material which would be deemed illegal under the criminal law, the RC classification covers material which would:

- deal with matters of sex, drug misuse or addiction, crime, cruelty, violence or revolting or abhorrent phenomena in such a way that they offend against the standards of morality, decency and propriety generally accepted by reasonable adults to the extent that they should be classified; or
- describe or depict in a way likely to cause offence to a reasonable adult, a person who is, or appears to be, a child under 18 (whether the person is engaged in sexual activity or not); or
- promote, incite or instruct in matters of crime or violence.

The difficulty for many people in the arts and broader community is not with the prohibition on material which is illegal under the criminal laws, but the much broader category of "offensive" materials. An agreed upon "community standard of morality, decency and propriety" is inherently subjective and will differ enormously across communities. This diversity is clearly evident from the numerous opinions expressed in the Senate Inquiry into the NCS.

If the Government retains the amorphous RC concept within the classification scheme, there will be ongoing issues as to the establishment of and compliance with standards of morality, decency and propriety. The Senate Report calls for the introduction of Community Assessment Panels (rec 6) to determine "community standards" for the

purposes of classification decisions. It is clear that the composition of any Community Assessment Panel would significantly affect what would be considered the current community standards; if it were comprised mostly of libertarians the outcomes would likely be more anti-censorship, whereas if it were comprised mostly of conservatives then the outcomes would likely to be the opposite. It may be more useful to require ongoing research by qualified staff or academics to determine community standards at any given point in time, in order to more properly reflect current attitudes towards what is or is not "offensive." Even so, there would still remain the question of, "which community's standards?"

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?

Arts Law recommends that the States refer powers to the Commonwealth to enable the introduction of a new national framework for the classification of content in Australia. There is a need for standardisation in classification laws. Although State and Territory classification legislation is supposed to complement the Commonwealth legislation, they vary in detail. The result is one in which content that is perfectly legal to sell and/or publicly exhibit in one State is illegal in another. For example:

- All DVDs and videos classified X18+ are illegal to sell to adults in all six States, but can be legally sold in parts of the Northern Territory and throughout the Australian Capital Territory.
- In Queensland it is illegal to sell publications that have been classified as unsuitable for minors to adults,[17] even if it is in a sealed package.
- In Western Australia a person must not publicly display with the intention to sell, a computer game rated MA15+ or the container, wrapping or casing for a computer game classified MA15+, unless it is in a restricted area.[18] The public display of a computer game rated MA15+ without restrictions is legal in all other States and Territories.

Additionally, while State and Territory classification laws largely rely on classification decisions made under the federal Act, some states have reserved censorship powers enabling them to override classifications made by the Classification Board:

[17] *Classification of Publications Act 1991* (Qld) section 12
[18] *Classification (Publications, Films and Computer Games) Enforcement Act 1996* (Western Australia) section 85A

- **South Australia**: legislation establishes a state Classification Council which is empowered to classify publications, films and computer games regardless of whether they have been already classified by the Classification Board. Classification decisions made by the South Australian Classification Council override those of the federal Classification Board. (*Classification (Publications, Films and Computer Games) Act 1995* (SA)).
- **Queensland**: state legislation provides for a 'publications classification officer'[19] and a 'computer games classification officer'[20] who are able to classify publications and computer games that have not already been classified by the Classification Board. If such publications and games have already been classified under the Classification Board the Queensland classification officers are able to reclassify and override decisions of the Classification Board.
- **Tasmania:** state legislation provides for the establishment of a Review Committee to review a film classified by the federal Classification Board if it "unduly emphasises matters of cruelty and violence".[21] A reclassification of a film by the Tasmanian Review Committee overrides the previous classification by the federal Classification Board.

Such discrepancies are confusing for those artists who may sell or distribute their work in several jurisdictions. An example may include an artist whose work is touring across several states, an independent filmmaker whose MA15+ film screened at a festival in Victoria is reclassified as R18+ when taken to Adelaide, or an author whose book is classified as category 2 restricted sold in New South Wales is banned from sale in Queensland. The ability of state and territory officers to reclassify and override ratings decided by the Classification Board also creates uncertainty as to the finality of ratings decisions from the Classification Board for artists and creators who may apply to it in order to be able to distribute their work.

CONCLUSION

Since 2008 the arts industry has been disproportionately targeted in relation to censorship and classification issues primarily due to the high profile controversy generated over the work of one artist, Bill Henson. Despite the fact that both the Classification Board and the prosecuting authorities determined that his work was fairly mild in terms of the content (the Classification Board rated the images PG, and no charges were ever laid by prosecutors), there have been ongoing calls for the

[19] *Classification of Publications Act 1991* (Qld) sections 6 and 9
[20] *Classification of Computer Games and Images Act 1995* (Qld) sections 5 and 7A
[21] *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (Tasmania) section 41A.

classification of artworks and the removal of allowances for the artistic merit of creative work. It is clear that this has had a chilling effect on the arts with some artists choosing to avoid controversial themes, particularly if they involve children. To some extent this has been exacerbated by the creation of additional bureaucratic layers, such as the protocols for working with children implemented by the Australia Council for the Arts.

Given the number of inquiries devoted to censorship and media attention afforded to these issues, it is fair to conclude that freedom of expression is currently under threat, especially in view of the calls to expand the range of materials that should be banned, restricted or classified in Australia. In this context Arts Law reiterates that not only do the creative arts provide an important means of expressing a wide variety of opinions and beliefs vital to the articulation of public or social debate, but the arts also assist Australians to develop a culture which reflects and documents the society in which we live. 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. Arts Law seeks a national classification system which assists the arts to flourish in Australia, to provide people with information about the arts content they want to access, rather than have the opposite affect.

FURTHER INFORMATION

Please contact Robyn Ayres or Jo Teng if you would like us to expand on any aspect of this submission, verbally or in writing. Arts Law can be contacted at artslaw@artslaw.com.au or on (02) 9356 2566.

Yours faithfully,

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