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Submission to the National Classification Review

Thank you for this opportunity to comment on the ALRC's issues paper for the National Classification Review. In this submission I give responses to several of the questions asked in the issues paper and, at the end, suggest a plan for a workable new classification scheme.

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Summary

(i) The system of mandatory pre-publication classification ("pre-classification") of films and games provided for by the Commonwealth *Classification (Publications, Films and Computer Games) Act 1995* (the "Classification Act") and the various State and Territory enforcement Acts was designed to regulate traditional forms of commercial one-to-many publication. It is expensive, bureaucratic and onerous.

(ii) Most popular forms of online content distribution would be impossible to run in Australia under the current scheme, if it were enforced. Youtube would not be able to pay $1,000 to classify each video posted to it. An online game company would not be able to pay $1,000 each time it applied a minor update to its software. And the scheme is particularly burdensome on non-commercial publication.

(iii) The government cannot force overseas publishers to pre-classify material published online to Australians from outside Australia. Even the proposed Internet filter wouldn't help, as it would not be possible to filter out all overseas material that is inoffensive but unclassified.

(iv) If pre-classification were to be enforced for films and games hosted online within Australia, many publishers currently operating within Australia would be unable to comply and would either go out of business or relocate their servers overseas and restructure so as to protect themselves from enforcement. Consumers probably wouldn't notice much; they would just see less Australian content published in Australia.

(v) It may be possible to apply classification law to certain types of electronic communication which can be effectively regulated, for example pay-TV providers whose infrastructure is located in Australia, but if this is done inflexibly it will create an unprincipled patchwork of regulation that will become quickly out of date as technology changes.

(vi) The only workable form for a new national classification scheme will be one which allows simple self-classification, with standards enforced by free call-in and, where necessary, flexible codes for specific industries.

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

1. There needs to be a new framework for classification to accommodate online distribution. In particular, the interactions between the Classification Act, the enforcement Acts and the online services provisions of the *Broadcasting Services Act 1992* need to be reformed as they are unclear and often nonsensical.

2. The biggest problem with the present scheme for Australians wanting to create or publish material online is the requirement for pre-classification, which amounts to a de facto prohibition on many types of publication. In practice this requirement seems to be enforced only rarely, if ever, but the laws are on the books and any Australian intending to publish material online would be well advised to do as little as possible in Australia's jurisdiction.

3. Because of practical limits to the jurisdiction of the Australian scheme, foreign creators and publishers are able to publish material into Australia without having to comply at all. They have the advantages of not having to pay for classification and of being able to provide all of the services that are impossible under pre-classification. Consumers using their services are not given Australian classification information.

4. For example, the present mandatory pre-classification regime appears to make all of the following common forms of publication impossible in practice for Australians but does not apply when they are provided into Australia from overseas:

   - Content aggregators hosting classifiable material, such as Youtube with its millions of unclassified videos or Newgrounds with its giant collection of unclassified browser games;
   - Blogs which incorporate video outside the narrow categories of exempt film;
   - Classifiable material published non-commercially by individuals who can't afford classification fees and do not have access to approved assessors;
   - Online games which are updated from time to time (under s. 21 of the Classification Act a game that is modified becomes unclassified), as most online games are;
   - Games which are intended to be modified or extended by users who then post their modifications (mods) on servers hosted by the original publisher or independently on the Internet (as the publication of modified versions requires a license from the original publisher, the original publisher could be treated legally as the publisher of the modified versions and therefore subject to classification requirements; the creator of each mod is also apparently liable);
   - Films or other material published under Creative Commons licences and games published under open-source licences which allow free modification and redistribution (as with game mods, it is not clear whether the original licensor or the modifier would be liable – either way, pre-classification is unworkable);

- ISPs hosting free or open source software including games (for example, my ISP provides a mirror download service for Sourceforge, a US-based development site for open source software including many unclassified games);
- Subscription services which sell large numbers of cheap films or games by developers who could not afford to pay classification fees for each one. For example, the fact that Microsoft's "Xbox Live Indie Arcade" service, which publishes games by independent developers, is not available in Australia while the more mainstream "Xbox Live Arcade" is available is generally attributed to the costs of classifying material with niche appeal and the fact that Microsoft is not able to evade Australian classification law. Other services, run by companies outside Australia's jurisdiction (or by companies in Australia who are willing to risk prosecution), generally ignore the classification scheme altogether or comply only for games which have been classified for retail.

5. These examples illustrate the essential problem of the current scheme – it was designed at a time when most media distribution was corporate, capital-intensive, one-to-many and geographically limited. It assumes that the cost of classification will be small compared to the costs of creation and distribution. It is inappropriate for the online world, where user-generated material, video parodies, game mods, open-source programs etc. are everywhere (and nobody can predict what types of material will be available in the future). If enforced it would put Australian creators and publishers at a significant disadvantage compared to foreign creators and publishers, while having little practical effect on what is available on the open Internet. It exists in an unfortunate dead zone of regulation that is capable only of driving the regulated activity out of its own jurisdiction and not of meaningfully controlling it. Online it is widely ignored, enforced only when convenient and generally regarded with contempt.

6. If mandatory pre-classification were removed from the scheme, at least for material published online, and the various enforcement regimes were changed to allow the publication of unclassified (or possibly self-classified) material, the present scheme might be adaptable to the Internet. But it would be better to rebuild it from the start.

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

7. The classification scheme as it applies to offline, one-to-many content distribution addresses two main questions: "What material should Australians have access to?" and "What material should publishers be able to publish in Australia?"

8. In its application to the open Internet, the classification scheme can no longer answer these questions.

9. It cannot address the first question because it cannot control people's access to material published into Australia from overseas.

10. It cannot address the second because most creators and publishers distributing online material into Australia are outside of the scheme's jurisdiction.

11. The only question it is capable of answering is "What material should creators and publishers within Australia's jurisdiction be able to publish?"

12. Any new national classification scheme must recognise that the only online material that it will apply to is material created or published by Australians or entities with a connection to Australia. To the extent that it imposes onerous obligations on local creators and publishers it will in effect act as a tax on Australian creativity. To the extent that it makes some forms of publication impossible in this country, it will prevent investment in Australia and just drive the hosting of material offshore where it will not be regulated at all.

13. There are two realistic ways that a new scheme could work:
    - No pre-classification, with classification standards enforced by a call-in process;
    - Free self-classification with broad, easily applied categories, also with a call-in process.

14. However, the possibility of having to comply with a call-in process is likely to act as almost as much of a disincentive as pre-classification if it is also punitively expensive and not subject to any procedural safeguards. There should not be a fee for classification on call-in, and it should be possible to seek administrative review of a decision to issue a call-in notice on the basis that the notice should not have been issued or that the recipient is not the appropriate person to apply for classification (currently it appears that the only recourse against an incorrectly issued call-in notice is Federal Court action under the *Administrative Decisions (Judicial Review) Act* or by attempting a defence against prosecution). The period for complying should be longer than the current three days.

15. The classification scheme should also clarify who is responsible for material published under licences that allow republication with or without modification, in particular Creative Commons licences and open-source software licences. For example, the Convergence Review's Framing Paper is copyrighted by the Department of Broadband, Communications and the Digital Economy (DBCDE) and is published under a Creative Commons Attribution licence that allows it to be modified and redistributed. Leaving aside the Commonwealth's immunity, if the Framing Paper were somehow turned into an offensive publication and rereleased under the CC licence, it is the republisher who should be subject to call-in requirements or liable for any classification offences or fees and not DBCDE even though DBCDE has licensed this activity.

16. Ideally the scheme should apply in the same way to online and offline material.

17. Finally, one of the most important objectives of the scheme should be flexibility and adaptability. There should be built-in mechanisms to allow the scheme to adapt to changes in technology and consumer behaviour. Because the scheme is an imposition on the basic right of freedom of speech it should be required to continually prove that it is necessary and reasonable, with full regard to economic and technical practicality. If it can't make this case, we shouldn't have to wait for the next ALRC review for it to be fixed.

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

18. Special rules for particular platforms or technologies are likely to become out-of-date and irrelevant very quickly, as has happened with the present scheme. Because of the difficulty and delay involved in changing State/Commonwealth cooperative schemes the classification scheme should be as technology-neutral and flexible as possible.

19. Unfortunately the Government may be unwilling to give up the classification fee revenue stream, so it may be necessary (but hardly principled or consistent) to maintain the expensive, bureaucratic pre-classification regime for some material sold in shops, exhibited in cinemas, broadcast on dedicated services located in Australia etc. If this is done, it should be done through flexible industry codes that can easily be kept up to date.

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

20. This would make more sense than universal pre-classification, but if there were a cost for classification of material subject to a complaint such a system would encourage frivolous and vindictive complaints and discourage the publication of artwork likely to offend anyone (you would expect to see every Bill Henson photograph subject to numerous complaints, for example). In a complaint-based regime, classification of material that turned out to be inoffensive, or that was self-classified appropriately, should not be charged for.

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

21. No comment.

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

22. The current classification scheme reflects a preoccupation with the status of different forms of expression. Fine arts, literature, music, documentaries and exempt films of a cultural nature can be published freely without pre-classification, while mass electronic entertainment is considered harmful until classified either by the government or, for television, by internal censors. Games are at the bottom of the pile.

23. This approach leads to absurdities like the unclear status of artworks or web pages incorporating video, the lack of an R rating for games and the different standards applied to online and offline publications

24. Much better would be a unified scheme which has regard to the form in which material is delivered (film, book, game etc.) only as a consideration in assessing the impact of the material. This would be more consistent and better able to deal with changes in communication technology.

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

25. Artworks should be subject to the same classification rules as everything else; to the extent that the rules are inappropriate for artworks they should not be applied to other forms of cultural expression.

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

26. Sound recordings should be subject to the same classification rules as everything else.

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

27. See the answer to question 6, above.

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

28. Ideally not, but if (as discussed previously) the Government is unwilling to give up the classification revenue stream it may be necessary to maintain the expensive, bureaucratic pre-classification regime for some material sold or exhibited in shops, cinemas etc.

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

29. No comment.

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

30. The type of restricted access system for online MA material provided for by ACMA's Restricted Access Systems Declaration 2007, which basically requires a warning to be issued and for a user to declare that he or she is 15 years or older, is reasonable.

31. However, the type of restricted access system for online R material provided for by the declaration is unworkable and inappropriate as it contemplates a user submitting identifying personal information to a website – the explanatory statement for the declaration suggests a copy of a passport, driver's licence or credit card. Few Internet users will have electronic copies of documents such as passports or driver's licences and the government should not be suggesting that it is a good idea to provide these to websites specialising in R material. It would be interesting to know whether any Internet content providers have actually implemented a compliant system for R material – it seems more likely that any Australian wishing to publish R material online would arrange to have it hosted overseas rather than implement a restricted access system that would drive away 99% of visitors. This type of restricted access system may, however, be appropriate for commercial subscription services or services provided over dedicated devices.

32. There doesn't seem to be any point in this submission repeating the arguments against mandatory ISP-based Internet filtering; it's easy enough to find simple explanations of why it would be pointless and harmful.

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

33. By parents. Even the government's current proposal for an Internet filter is only intended to filter out RC material and would let through vast amounts of material that would be inappropriate for children. It would not be appropriate, even if it were technically possible, to apply a government-mandated "suitable for children" test to all Internet content.

34. There are numerous PC-based Internet filters available, and some ISPs provide filtered Internet accounts. Any parent who wishes to control their children's access to inappropriate content already has the best technical means available to them.

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

35. No comment.

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

36. Youtube is full of short films, movie trailers, game advertisements and gameplay videos displaying no classification markings, or displaying markings from US or European classification schemes. There is no chance that more than a tiny minority of these will ever display Australian classification markings. It is silly to expect a foreign company publishing or advertising material to a foreign market or to the world at large to display Australian classification markings just because Australians might be able to access the material, but this is what the current classification scheme appears to require if the company has enough presence in Australia to come within Australia's jurisdiction. It is not surprising that this rule does not appear to be enforced.

37. Any requirement to display markings, warnings or advice on material published online should be limited to, at most, material hosted in Australia or intended to be accessed predominantly by Australians.

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

38. Questions 16 to 18 presuppose that all material is produced or published by "industries", but if this was ever the case it certainly isn't now. It's not clear what industry a blogger belongs to, or an individual uploading videos to a video sharing site, or a programmer submitting a patch to be incorporated into an open-source game. These people are probably not working as members of any industry, and the sites that host their material are unlikely to be within Australia's jurisdiction. Neither the creators nor the hosting sites will have access to approved assessors.

39. Because (as discussed in the answer to question 2 above) mandatory pre-classification and expensive call-in amount to a de facto prohibition on non-commercial publication, the only workable approaches to the classification of material to be published non-commercially are self-classification or classification by free call-in only.

40. Even where material is published as part of a commercial endeavour it may not be appropriate to require pre-classification. Many of the most popular sites on the web (Youtube, Facebook etc) are commercial publishers of user-created material and have their own systems for removing offensive content. None of these sites are likely to be interested in complying with Australian industry codes – and many would refuse to comply because they are run by people who regard censorship as offensive. In order to avoid stifling Australian creativity and preventing investment in new forms of media distribution, any mandatory industry self-regulation should be similar to the voluntary self-regulation practised by these and similar overseas publishers.

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

41. This may be appropriate where industries actually exist. It is not reasonable to expect individuals creating and publishing non-commercial work to comply with an industry code.

42. As most Internet content is provided by entities that would have no reason to comply with an Australian industry code, any codes would need to be flexible enough to avoid preventing Australian creators and publishers from effectively competing with creators and publishers not covered by the codes.

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

43. A streamlined classification system, with only a few simple levels of classification and simple rules for applying them, would allow almost all content to be classified by creators or publishers.

44. Two examples of simple games given in the issues paper (Tetris and Snake) were once state-of-the-art and are only regarded as simple today because technology has moved on. Computer chess (another example) is not simple at all. A simplicity test, or a rule which only required pre-classification of material likely to be rated at a certain level, would just force Australian creators and publishers to infantilise their products. It would be ridiculous for Australians to be able to publish endless Sudoku clones but not games which displayed any creativity.

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

45. If there is to be mandatory bureaucratic pre-classification of some material, the categories in section 91 of the Classification Act for which waiver can be granted and the principles made under that section are out of date and too narrow. In particular, restrictions (as in the principles made under that section) on the number of copies that can be made are pointless for material published online.

46. Waiver would be necessary for all material in any format that is to be published non-commercially by or on behalf of individuals (the word "waiver" is more appropriate than "subsidise"; it seems disingenuous to pretend that imposing unreasonable censorship obligations then offering a minor exemption is somehow a gift).

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

47. I doubt that it's generally understood that many MA-rated games are rated the equivalent of R in other countries that have adult ratings for games.

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

48. If there is to be pre-classification of online content published by people with no expertise in classification, the categories will need to be very broad. For example, they could be:

    G – suitable for anyone

    M – for more mature people (say, 15+)

    A – for adults

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

49. The best way would be a unified scheme that has regard to the form in which material is delivered (film, book, game etc.) only as a consideration in assessing the impact of the material. This would be more consistent and more able to deal with developments in communications technology.

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

50. Yes. Consolidating these in a single document would improve the chances of the concepts used in each being interpreted, applied and amended consistently.

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

51. Only material that is absolutely illegal. Prohibiting and penalising "access", as opposed to controlling publication, is not an appropriate role for a classification scheme.

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

52. No. Only content that is illegal to possess should be refused classification.

53. There should be an R rating for games.

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

54. The Internet pays little attention to national borders and none to State or Territory borders. Any rules which are inconsistent between States and Territories will just end up being ignored.

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

55. A unified scheme, with the Commonwealth taking responsibility for all classification and enforcement legislation and State agencies involved in enforcing these laws where necessary.

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

56. For offline content – yes, although in the absence of a referral of powers from the States the Commonwealth could use its trade and commerce power or its corporations power to regulate most of the relevant material.

57. For online content – there is no need for the States to refer any powers. The Commonwealth should use its telecommunications power to establish a single national scheme. Ideally this scheme would be consistent with the scheme for offline content, but if there is a negotiated cooperative scheme for offline content which is not appropriate for online content it may need to be different.

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

58. The following is a basic plan for a scheme that would address the issues identified above.

59. All material published in Australia would be either self-classified or submitted to the Classification Board.

60. Board classification would be similar to the present system. Fees could be charged for voluntary submissions.

61. Self-classifiers would be able to give their material the following ratings (and display appropriate markings) on the basis of simple, easily applied rules:

    - SC-G – for everyone;
    - SC-M – for mature audiences;
    - SC-A – for adults;
    - UC – unclassified.

62. The UC rating would be appropriate for material that could not be classified because of its dynamic nature, or where the publisher was not in a position to self-classify (e.g. videos

uploaded to Youtube, which are not pre-approved by anyone working for Youtube), or where the publisher did not wish to provide a classification (e.g. literature sold in bookshops or artwork displayed in a gallery). It would not require a marking – in the absence of a marking, material would be assumed to be UC. It would not cover material that had been given a rating, or refused classification, by the Board.

63. The Board would be able to call in material that it thought may have been self-classified incorrectly. UC material could be called in if the Board thought it should be RC (or possibly X). No fee would be charged unless the material was seriously misclassified or was actually illegal.

64. Both Board-classified and self-classified material would be able to be published in any medium. But, to the extent that this would be politically difficult, some commercial publication industries could be covered by codes requiring certain levels of classification. For example, a cinema might only be able to show films classified by the Board. A TV network might be able to broadcast programs with every rating except UC, X or RC. A bookshop would be able to sell UC books (and probably wouldn't need a code). These codes could be enforced using existing measures for the enforcement of industry codes.

65. Individuals would be able to publish material (at least non-commercially) with any of the self-applied classifications, including UC.

66. This scheme would, with appropriate codes, be able to provide an equivalent of the present level of availability of classification information while not unduly restricting the ability of Australians to create, publish and consume culture.

Thank you for considering this submission.