# Rethinking Classification for the 21st Century

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## Appendix A

# Introduction

Thank you for the opportunity to make this submission to the Australian Law Reform Commission regarding the National Classification Scheme Review.

This submission comprises two parts. Part A contains a general discussion on the challenges to classification in the 21st century and how I think we as a country should respond to them. Part B contains my comments in response to each specific question in your issues paper, and comments on some specific numbered points in your issues paper.

If further information or clarification is needed, I invite and encourage contact. It is understood that the nexus between technology and the law is a difficult one, with the law often struggling to keep up with rapidly changing technology and lawmakers failing to understand it, while of course technologists have limited understanding of the law.

# Part A

## Motivation for the review

The passage of time does not in and of itself motivate a review of the Classification Scheme. However if we were to wind the clock back 30 years and compare the media landscape then with the situation today, we find that a substantial number of relevant changes have occurred.

In 1981 we would find a series of distinct media sectors (print, radio, TV, cinema, video rental, telephone), each delivering its own limited types of content (text and still images, audio, video) and in its own unique way. We would find a nascent computer industry, with content only available on low-capacity removable media, limited essentially to computer software, and we would find little to no interconnection of computers.

Looking at today:

- We find that all computers are interconnected and can receive and process all types of content that would traditionally have been the domain of all the media sectors - in addition to processing computer software.
- We find computers that are also capable of acting as TV sets i.e. through the use of a TV tuner device (which may be built in or plugged in).
- We find that radio and TV are now digital, thereby increasing the potential "intelligence" that could be embedded within the received content.
- We find TV sets that are also capable of connecting to the internet, thereby supplementing the broadcast TV content with any content on the internet. (Even if a TV set lacks this capability, there are cheap and readily available add-on boxes that do the job.)
- We find DVD players that are capable of more than just playing a movie from start to finish i.e. the user influences and interacts with the movie.
- We find mobile telephones, which are now digital, and those telephones can send text and images (directly via the phone network), as well as access the internet.

In a sense the internet has unified all types of content into a single delivery mechanism, while at the same time the computer industry has also made the traditional media more like computers.

However there is not much point responding only to the world as we can see it today, thereby ensuring that any review is obsolete before its recommendations can be implemented. Hence looking to the near future:

- Broadcast TV can become more interactive.
- Electronic paper can allow print media to expand its range of content and to update its content dynamically.
- The NBN will make it more likely that private individuals publish from their home rather than or in addition to publishing via well-known sites like Facebook and Twitter.
- TV services can be delivered *directly* over the NBN (i.e. not over the internet but over the NBN), in addition to making it more practical to deliver TV-like services over the internet over the NBN.

## The $64,000 question

The $64,000 question that needs to be answered in respect of the Classification Scheme is ... what is its purpose? Is it for consumer advice? Is it for prohibition? Is it for both?

Traditionally it has been for both. However I will argue throughout this submission that the prohibition role should be dropped as far as it applies to adults.

This question is important because the two purposes are in fundamental tension.

- Prohibition is negative. Consumer advice is positive.
- Prohibition requires legal precision. Consumer advice is more forgiving.

The prohibition role undermines the consumer advice role, particularly if one attempts to extend the Classification Scheme to the internet. For example, content providers may seek to circumvent prohibition, thereby also reducing the effectiveness of consumer advice.

If the negative role of prohibition could be eliminated, there is even an opportunity for branding Australian classification and marketing it e.g. to other countries who may not have the resources to apply their own classifications.

## The challenge

It is superficially reasonable that we might expect the Classification Scheme to be neutral with respect to the means by which content is delivered. On the face of it, a movie should have the same classification whether it is exhibited in a cinema, sold or hired in a store, sold or hired using only the internet, or broadcast on TV.

However the internet challenges the Classification Scheme in some very significant ways.

- There are a billion publishers, almost all of them non-commercial.
- The internet is transnational.
- The internet is largely anonymous.
- The internet is huge and growing larger every second, and everchanging.
- A computer network is fundamentally difficult to control.
- The old model of "static content" no longer applies.

It stands to reason that if the internet is not able to be classified, there is no point talking about prohibition. Even if the internet could be classified, prohibition is likely to be unenforceable. Enforceability is an important issue because if prohibition is unenforceable on the internet, it is likely to have a number of negative outcomes.

- Reducing respect for the law generally.
- Inequity i.e. persons A and B do or attempt to do an identical act and one is able to, while the other is not.

- Selectivity i.e. person A is not permitted to do something only because the authorities want to get him/her for some other unrelated reason.

### Other challenges

One subtle difference that the internet introduces is in how content is identified. Identifying for classification purposes a particular movie that is slated for cinema release may be relatively straightforward. Identifying content on the internet is far from so. Indeed, this problem gives rise to the need for internet prohibition to take place in secret.

In recent years the Uniform Resource Locator (URL) has been taken to be the content identifier on the internet. However a URL is actually not a very good way of identifying content. It would be loosely akin to identifying *people* by their location (address).

A given URL may at one moment in time yield some content of some type and at another moment in time yield different content. Likewise, at a given moment in time, a given URL may yield for one user some content of some type and yield for another user different content. Indeed a URL may be strictly "one time" i.e. the URL yields content for one user at one moment in time and is then never valid again.

The same content may be available at many locations, or indeed at infinitely many locations.

It should also be borne in mind that URLs are only one way of identifying (in fact, locating) content and that URLs are only widely known about because they are used by HTTP (the main protocol of the web) but HTTP is only one way in which content can be accessed on the internet.

Another area where the internet challenges the Classification Scheme is security. In the beginning, the internet included essentially no security. Traffic on the internet had no integrity (no guarantee that it was authentic i.e. sent by the expected sender and no guarantee that it was not altered in transit by a third party) and no confidentiality / privacy (no guarantee that it was not viewed in transit by a third party). That may have been considered acceptable as the users were primarily cooperating academics, researchers and the military. In addition, much of the mathematical underpinning for the way security is implemented today was simply not available when the internet was being conceived of. In any case, the computer speed then available was extremely limited by comparison with today and would not have been sufficient. If the internet were being designed from scratch today, security might well be an essential and mandatory aspect, or at least enabled by default.

Security creates a problem for classification of the internet if government attempts to impose it on internet users, because government becomes that malicious third party, attempting to view or alter traffic in transit. On the other hand, it is clearly desirable to eliminate known existing security weaknesses in the internet.

Quite separately from the internet, the goal of neutrality with respect to content delivery mechanism is challenged by Australia's constitutional structure. Neither the States nor the Commonwealth have complete legislative authority over all the delivery mechanisms. However this is brought into perspective by the fact that really Australia's entire classification scheme is rendered somewhat parochial by globalisation, and specifically by the internet.

## Recommendations

### 1. No internet classification

The internet should not be classified.

The government should not even try to do so. The government should deploy its resources (really the people's resources) where those resources can be useful.

Giving effect to this recommendation would involve numerous changes to the *Broadcasting Services Act*.

I am accepting of a permanent inconsistency between internet content and content delivered via some other means. I have not come to this position lightly. I have been actively pondering these questions for several years and have deep knowledge and experience of computers and the internet.

Giving government the power to censor the internet would inevitably lead to expansion of the scope and to excess. Centralising that kind of control, whether in government or in an ISP, opens up the very real possibility of bribery and corruption. The secrecy that internet prohibition requires creates an environment in which corrupt conduct can thrive.

The only result of the government's attempts to classify and restrict the internet so far is to force service providers offshore. This has negative consequences for government revenue and for Australian jobs. The government should be making Australia an internet-friendly country and encouraging Australians to derive the benefits of this new frontier. This is consistent with building the NBN.

Sometimes it takes more courage for a government to decide *not* to do anything about the latest panic than it takes to do something.

Later in this submission I make recommendations for how consumers can obtain consumer advice for internet content.

**2. No games classification**

Games should not be classified. Games are not static content and it makes little sense to classify them in the same way that traditional static content like a VHS tape or a book might have been classified.

In attempting to classify a game, the government can never be sure that the government's experience of the game is either complete or representative. If you enter the Hall of Mirrors with a gun and your trousers on, the game may behave in one way. If you enter the Hall of Mirrors with neither, the experience might be quite different.

Now add to that the fact that games are increasingly becoming network-based. The experience might now additionally depend on whether anyone else, anywhere in the world, is in the Hall of Mirrors at the same time.

Now add to that the fact that games may update themselves (i.e. the game downloads a new version of the software) via the internet.

You will note that when games are advertised on TV, the following disclaimer (or similar) is often presented: *Online experience may differ*.

Users of Microsoft Excel may be familiar with the fact that with the right sequence of keystrokes you can cause it to launch a flight simulator. Noone outside of Microsoft can give a guarantee that Microsoft Excel is not in fact R-rated!

It should be noted that even the author of a computer game may not be able to anticipate all the possible experiences that could arise from the game i.e. once the software reaches a sufficient level of complexity or richness.

The *Classification (Publications, Films and Computer Games) Act* gives the feeling that computer games were added in as an after thought, without any real consideration of whether the old model of static

content was appropriate.

Some of these points are not quite so serious when the author of the game submits the game for classification in a cooperative manner. However in the internet world it can be assumed that most games will not be submitted willingly and many will be non-commercial.

This recommendation renders completely irrelevant the raging debate about whether there should be an R classification for games. The question disappears.

The same consideration applies to all active content, including but not limited to computer software, mobile phone apps and web content that is active.

In the context of mobile phone apps, this recommendation is almost a corollary of the previous recommendation - since mobile phone apps tend to be delivered via the internet. However government should be cautious about assuming that mobile phone apps can *only* be delivered via the internet, as there is no overriding technical reason why this need be the case.

**3. Use of descriptors**

Where the government does choose to classify content, rather than just giving G, MA, R, ... the government should provide descriptors that better inform consumers. This allows the consumer to make a more nuanced decision i.e. recognises that different things are important to different people. Examples: language, drug use, violence, nudity, sex scene, adult themes.

This is already widely used with TV content classification.

**4. Separation of "illegal"**

Illegal content should be largely separated out from the Classification Scheme. The government is not authorised to make a determination that content is illegal. Only a court can determine that content is illegal.

All mentions of legality should be removed from the Classification Scheme. However, there should be a provision whereby if the classifier suspects that content might be illegal then he or she can suspend classification and refer the matter to a court. If the court finds the content to be illegal then obviously further action by the law enforcement agencies would be warranted, leading ultimately to the destruction or takedown of the content and, in any case, the immediate termination of the classification process. The content would officially be classified as "Illegal" - but this classification is merely an echo of the court's finding. If the court finds the content to be legal then classification is resumed.

It would be rare that this provision would be used, since it would be rare that possibly illegal content would willingly be submitted for classification, particularly if internet content is not classified.

Notwithstanding this, if content available by some other means has already been determined to be legal, then it should be legal to access that content via the internet. This would avoid bringing the law into disrepute, such as occurred recently in respect of *The Pearl*. (See for example http://www.dailytelegraph.com.au/news/breaking-news/child-porn-book-the-pearl-still-being-sold-in-australia-after-tasmanian-man-convicted-for-downloading-it/story-e6freuyi-1226015291918 ) Indeed, if that report is accurate, you have to wonder whether this is an example of selective prosecution.

**5. Harmonisation of "illegal"**

It should be evident that there is little point for the Australian government to create laws that make certain content illegal when that content is legal in other countries. To that end, where common ground can be

found about what is illegal, the Australian government should focus on cooperation with other countries and destruction or takedown of the content in those countries.

To that end, I recommend some specific changes to the *Criminal Code Act* regarding the definition of child pornography.

- Limit the definition to situations where a court believes that a real person is depicted and that the image itself is real. This will immediately exclude fictional characters (e.g. avoid the farcical situation where a court can hear argument about how old one of the Simpsons is), cartoons, anime, computer-generated images, computer-altered images and pseudo-photographs.
- A reduction of the age from 18 to 16 (or perhaps a bit lower). This is in part to address "sexting" where the absurd situation arises that two people could legally engage in sexual activity but if one of them takes a photograph of that and sends it to the other then the former could be charged with distributing child pornography and the latter with possessing child pornography.
- Introduction of a defence regarding the age of the depicted person i.e. even if the person appears to be under-age, it is a defence if the person charged can show that the person depicted is in fact not under-age.
- Removal of the provisions that relate to descriptions (rather than images) i.e. removal of (c) and (d) from the definition of child pornography in section 473.1 (which might, by itself, fix the problem relating to *The Pearl*, mentioned above).
- If we were to retain the current definition, or even the tightened definition suggested here, then I recommend the inclusion of an artistic merit defence. Note however that this has no relevance to the Classification Scheme because a determination of illegality is made by the courts alone.

Australia could do worse than to adopt the Interpol criteria i.e. the first three bullet points of http://www.interpol.int/Public/THBInternetAccessBlocking/Criteria.asp With a definition as limited as defined in the Interpol criteria, there would then be no need to hand-wring over "artistic merit". This is preferable because obviously artistic merit is a very subjective area.

**6. Abolition of Refused Classification**

It seems an oxymoron to classify something as "Refused Classification". However this is mere word play.

I recommend that the RC classification be abolished.

RC today encompasses two types of content viz. illegal content and offensive content. (This fact alone should serve as a warning that something is wrong with RC.) Illegal content is dealt with in Recommendation 4. Offensive content should be rolled into R or X as appropriate - or, if the government can't stomach that, into a new classification, Y (even though this is not my preferred option).

The nub of this question is whether one believes that government has a role to play in determining or enforcing morality or taste. I believe that the answer is "no". If the content is not illegal then government should have no say in the matter. It is no longer a legal question.

There would likely be amendments required to the *Customs Regulations* in addition to other mentions of Refused Classification in legislation.

**7. Referenda**

The one option that your Issues Paper does not appear to canvas regarding the conflicting laws that apply in the different states and at the Commonwealth level is that of a referendum for a constitutional amendment that would give the Commonwealth unambiguous power to classify, regardless of the means of delivery. I recommend putting this proposition to the people.

It is true that Australians are notorious for rejecting referendum questions, the last being carried in 1977. In consideration of the cost involved, this question should be put along with a number of other questions, which are discussed in this recommendation, and other further questions not relevant here. We are perhaps overdue for a referendum, the last being held in 1999.

While the people may reject a referendum to give classification powers to the Commonwealth, that should be taken as indication that people *don't want* uniform classification and should therefore end efforts to implement by any easier means uniform classification (such as are listed in the Issues Paper). In a democracy a referendum never fails. Carried or not carried, it is a success because it gives expression to the will of the people.

More important than uniform classification though, other referendum questions should be put, with the aim of establishing a Bill of Rights i.e. a question for each proposed right. The people may be more sanguine about classification and censorship if they have a general right to freedom of expression that is constitutionally guaranteed.

**8. Age verification**

The essential problem with attempting to stop children from accessing adult content on the internet is not classifying the content, as difficult as that is, but that there is no means of age verification. The *Broadcasting Services Act* defines a thing called a "restricted access system" (RAS) but it is a legal fantasy, existing only in the minds of legislators. Attempting to create a RAS is difficult. It would be mired in privacy and other issues.

The problem with many current approaches to stopping children from accessing adult content is that they centre on attempting to make the internet appropriate for children. Not only is this completely impractical but it unreasonably impinges on the freedoms of adults. I propose here a more radical solution.

At the moment there is just one internet. I propose to create a second internet, one which would contain only content that is suitable for children.

Of course, we would not replicate any of the physical network links, servers or any of the other infrastructure. Instead this second internet would be "nested" within the existing internet. For this I use the term "nesternet".

The concept could and should be generalised in order to cater for different age ranges of children. For example we might create one nesternet for ages 0-11, one for ages 12-14 and one for ages 15-17. On the other hand, we could in principle create one nesternet for every single age in the range 0-17. (This precision would be misleading though.)

These child-suitable nesternets would not, by default, share any content with the existing internet.

Appendix A provides more detail regarding the technical and administrative arrangements of this proposal.

A household might choose to make their entire household internet connection to a child-suitable nesternet. Or they might choose particular computers or logins that automatically connect to a child-suitable nesternet (while other computers or logins connect to the normal internet), which is obviously a more flexible arrangement. A parent is not obliged to choose an age range that actually includes the child's age (for example, if the child is more mature or less mature than a typical child of that age).

This proposal would not as such require either the knowledge or cooperation of the household's ISP, although it would be enhanced by having the involvement of some ISPs, since ISPs effectively create together the existing internet. This cooperation is more likely to be forthcoming since it involves adding to the internet without taking away from the internet, as compared with existing proposals for censoring

the internet.

Australia could in principle go it alone in pursuing this approach however it would work better if applied jointly with a number of like-minded countries. For example, a greater range of content could be attracted onto the various child-suitable nesternets.

This recommendation would be particularly helpful in the scenario that a device that is capable of connecting to the internet outside the home is issued to a child. Examples of devices: laptop with wireless internet capability, mobile phone with wireless internet capability, tablet with wireless internet capability. However it is always open to parents not to issue such a device to their child, or, to choose a device that does not have wireless internet capability.

**9. Cost of classification**

As the Classification Scheme is something that provides a service to the public (if for consumer advice) or something that is imposed by government on the public (if for prohibition), I recommend that the cost of classification be borne entirely by government i.e. by the taxpayer, not by the creator of the content.

**10. Classification Board appointments**

Particularly where classification is used for prohibition (censorship) purposes, there are concerns that the members of the Classification Board are appointed by the government, directly or indirectly.

I recommend therefore that membership of the Classification Board be made like jury service i.e. randomly selected from the community. This will ensure that classification decisions truly reflect the community, as well as ensuring that censorship is not a tool of the government.

A person serves for three years and having served once may not serve again. (Unlike jury service during a trial, Classification Board service would not be full-time. This may necessitate increasing the number of people involved.)

Similar considerations would apply to the Classification Review Board.

**11. X legal to sell**

While not within the authority of the Commonwealth government, and hence potentially outside the scope of this review, I recommend that X-rated content be legal to sell and exhibit throughout Australia.

A major anomaly with *legal* RC is that while it is legal to own, be in possession of, upload, download and access in most states of Australia, it is illegal to sell or exhibit. A similar anomaly exists with X-rated material. As a result of Recommendation 6, RC no longer exists and most of it is now X or R.

This is a very strange situation. The law allows a person to be in possession of RC and X content, thereby tacitly acknowledging that it must be possible to obtain it, but at the same time the law at least theoretically makes it illegal to obtain it (in most jurisdictions).

That which is legal to own, should be legal for adults to deal with in any manner.

To the extent that Commonwealth law is relevant, X-rated content should be legal to sell and exhibit (e.g. via the internet) but this recommendation specifically also intends to apply to content that is not dealt with via the internet.

With those improvements, there should be very little legal difference between R and X. Both are deemed unsuitable for children. Both are legal for adults to deal with in any manner. This tends to have the effect

of making irrelevant arguments about whether some content is R or X. The difference is purely for consumer advice and there is no need to insist on complete accuracy. (Hence, for example, noone needs to argue about whether some sex scene was real or simulated, or whether it was purely for the purposes of arousal or was justified by the context.) In other words, the distinction between R and X could be taken to be an extension of Recommendation 3.

While I do not advocate the creation of a new classification, Y, which is mentioned in Recommendation 6, if classification Y were to exist then this recommendation should be taken to include content that is classified Y i.e. X and Y legal to sell etc.

# Part B

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

**Realistic answer:** The ALRC should focus on improving key elements of the existing framework, principally by taking out the two problematic elements in the current framework (online content and games) and by seeking greater consistency elsewhere.

I urge you to have the courage to recommend that the government step back from ever-increasing regulation.

**Probably unrealistic answer:** Refer Question 27.

Regarding point 26, it is worthwhile to note that the geographical location of content is not always simple to define. Even within the scope of a URL (Uniform Resource *Locator*), this is sometimes tricky. However there are also resource naming schemes that do not rely on explicitly nominating the location of the resource at all.

Regarding point 50, bullet point 3, it is important to distinguish between illegal content and offensive content. The current system attempts to restrict all Australians from obtaining both types of content but the considerations are quite different.

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

Consumer advice.

Indeed, this should be the *sole* objective of a Classification Scheme as far as it relates to adults for content not accessed in public.

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

Yes.

Internet content should not be classified at all. Many of the reasons for this recommendation are to be found in Part A, primarily in the section entitled "The challenge". Your own point 77 also does a fairly good job of listing why online content is not amenable to classification.

The reader may be tempted to think that I am simply seeking a special case to be made for the internet. However, as compelling as the practical considerations are, it is more the case that I reject the patronising idea that government should be determining what adults may access. As such, I see no reason to extend a bad and unjustified idea from traditional delivery mechanisms to new delivery mechanisms.

In addition, all the existing delivery mechanisms are so wildly inconsistent in how they are dealt with from the point of view of classification and censorship, that it is hard to argue that the internet should be brought into line, because there is nothing to be brought into line with.

In view of this answer, it is reasonable to expect me to make suggestions as to how adults "*should be protected from exposure to unsolicited material that they find offensive*" - at least in the context of the internet.

It is worth noting though that in a free society the right to freedom of expression essentially implies that

noone has an absolute right not to be offended, no more than anyone has an absolute right to freedom of expression.

Firstly, an adult is free to avail him- or herself of the solution outlined in Recommendation 8, presuming that child-suitable nesternets are not off-limits to adults.

Secondly, it is suggested that adults who are concerned about encountering offensive material online, whether solicited or unsolicited, should run software on their computers that classifies (statically, supplemented with dynamic classification) and then selectively blocks material. While such software is not perfect, far from it, in this scenario it has the following redeeming features.

- Where it overblocks, the user can immediately and readily override the software to reveal the content.
- Where it underblocks, the user can immediately and readily give feedback to the software or adjust settings to suppress the content. (Over time, somewhat like a spam filter for email, the software will adjust itself better to the specific user's tastes.)
- It can be configured specifically for the user, blocking categories that are concerning to that user and not blocking categories that are not concerning to that user.
- The user is free to choose whichever software product best meets the user's requirements.
- Different users in a household can use different products and/or different settings.
- Settings might even depend on the *local* time of day.
- It is completely scalable, giving the same performance no matter how many users in Australia (or anywhere else) choose to use such software.
- It can deal with email whereas other existing proposals for internet censorship would struggle to deal with offensive email (for example, because of the major privacy issue raised). Email is probably the biggest source of *unsolicited* offensive content.

This very same software can provide consumer advice, in addition to its blocking function.

I include in the above the case that material that the user finds offensive was *solicited* because when using the web it is not possible to know in advance with certainty what content will be presented when clicking on a link. The text associated with the link may deliberately or accidentally misdescribe the content, or there may be no associated text (or it may be in a foreign language). If you are easily offended, it would be wise to avail yourself of one or other of the above solutions.

Likewise, in view of this answer, it is reasonable to expect me to make suggestions as to how "*minors should be protected from material likely to harm or disturb them*" in the context of the internet.

Either of the solutions for adults discussed in answer to this question also apply to children. Clearly though the settings that would be applicable in the computer software for a child will likely differ from the settings that would be used by an adult.

**Other comments**

As superficially appealing as it may be to say that the delivery mechanism or technology or platform should make no difference as to whether the content is classified, this may be a case of the triumph of hope over reality.

1. For example, content that is produced and delivered in real-time simply can't be classified. Noone knows what is going to happen on live TV, live radio or indeed live streaming on the internet. Sometimes "inappropriate" content goes to air. The world is an imperfect place. The same content could obviously be prevented from being made available subsequently via DVD (at least in theory).

2. Likewise, the fact that the internet allows *anyone* to be a publisher changes the landscape fundamentally. The barriers to entry differ between different delivery mechanisms. That is simply the

reality.

While this clearly introduces practical considerations, in the case of Australian domestic internet publishing at least in theory the Australian government could make all such publishers illegal unless they have classification procedures in place. However it is doubtful that the people would tolerate that. (This is vaguely similar to what the South Australian government attempted to do regarding online political discussion in the lead-up to the last state election, much to its discredit.)

3. Noone is suggesting that telephone conversations be classified. The reality is that different delivery mechanisms do differ in their nature, and not just in their practical considerations. It probably *would* be practical to censor telephone conversations (I'm thinking Echelon-like technology). Likewise noone is suggesting that snail mail be classified, although that probably wouldn't be practical anyway.

4. The internet is the only delivery mechanism where it is proposed that classification and prohibition take place in secret. There is a reason for this viz. prohibition will be profoundly ineffective otherwise - but this does point to the fact that the internet is simply "different".

5. We more or less accept the idea that content broadcast by our TV channels is classified (and hence implicitly censored).

The government censors TV channels because it can. Broadcast frequency is a limited resource, hence the government licenses it. Because it licenses it, it can easily control the broadcasters. There will probably never be more than a modest number of TV broadcasters (because of the scarcity of broadcast frequency and because of the cost). This then has the effect that TV channels tend to be general in their nature.

Also, the limited number of channels means that, in the hypothetical scenario that adult content could be shown on TV, it is plausible that a person might accidentally tune in on offensive content.

However what if there were 100 million TV channels? Could it even be justified on a theoretical basis that TV channels be classified? If you choose to tune in to "Channel Real Spanking 89" then you get what you deserve (and what you wanted).

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

No.

For those delivery mechanisms that are subject to classification at all, it should not require a complaint first. The government can classify content without a complaint. That is not to say that complaints cannot be made, for example, where people disagree with the classification where self-assessment has occurred.

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

The first question requires interpretation.

If you mean that some types of content can be assumed *a priori* to have higher potential impact then that could be reasonable. For example, content that comprises only text could reasonably be assumed to have lower potential impact than video content.

Otherwise the first question would seem somewhat circular. If we have an idea of potential impact then to some extent (e.g. in an informal sense) the content has already been classified. Presumably this could apply if content is being willingly submitted for classification by its creator.

Regarding the second question, this is unlikely to be practical in respect of internet content. However in

*some* sense this is the effect of Recommendation 8.

**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?**

No and No.

I think making the rules dependent on the size or market position sets a bad precedent. It could also be subject to abuse e.g. distribute through a temporary $2 company for the purposes of flying under the radar.

I think making the rules dependent on the potential market reach of the material is problematic. The content producers themselves don't know this. If they could know this then business would be a lot less risky.

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

No.

Perusing of artworks exhibited in an art gallery should be presumed to be primarily an adult activity. If this is unacceptable to government then a system of self-assessment should apply. That is, if, in the opinion of the gallery operator, the exhibition has adult content, the operator should provide a posted warning at the entry to the gallery for the duration of the exhibition.

This at least avoids the government attempting to control the output of artists and make judgements about artistic merit.

Notwithstanding this, the law still applies. If content is genuinely illegal, or police reasonably believe this to be the case, then the normal processes of the justice system would apply. Note however that Recommendation 5 includes the proposal to allow an "artistic merit" defence.

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

No.

A significant amount of music is now distributed via the internet and this is likely to increase in the future. Consistent with Recommendation 1 it therefore doesn't make a lot of sense to spend too much effort reviewing the current music classification system. In particular, any music that is physically distributed and which is restricted or prohibited by virtue of its classification is likely simply to be distributed via the internet. You can add to that The Streisand Effect i.e. the act of attempted prohibition gives the content wider distribution than it would ever otherwise have had. A cynical distributor of music could even use attempted prohibition for marketing purposes. (This has occurred in the past.)

It is noted that Apple, as the operator of the most widely known online music distribution mechanism, voluntarily applies some kind of classification. Apple isn't likely to be interested in harmonising their classifications with Australia's. Indeed, this simply isn't practical, as doing so would open them up to demands by every single country for its specific classifications to apply.

I would also regard audio content as being low impact, similar to purely textual content. That is, I am not aware that anyone has ever objected to the music itself on classification grounds (*Finlandia* and the like, notwithstanding). It is only the lyrics that can plausibly attract controversy and lyrics are basically textual content. (For those not familiar with the history of *Finlandia*, link:

http://www.fordham.edu/halsall/mod/NATMUSIC.html .)

The current classification system for physically distributed music seems to work well. It is noted however that the actual classifications are completely inconsistent with e.g. broadcast TV.

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

No. Refer Question 6.

It seems likely that, after the fact, a large audience reach for some controversial material will be reflected in political pressure on the government to "do something". However this isn't good government.

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

Yes, but it is not really clear what you mean by "accessed in public".

The only content that is obviously and exclusively accessed in public is billboard content. I am not opposed to the classification of such content or to applying more stringent standards as to what is acceptable in that case (as compared with content accessed in private). It is assumed that billboards are generally sited on private property but visible from public property.

However I don't think that billboard content should be limited to G-rated content. We have already seen an advertising campaign with public health benefits (Rip and Roll condoms promoted to gays) withdrawn due to campaigning by extremist Christian groups. Link: http://blaze.gaynewsnetwork.com.au/news/adshel-caves-to-homophobic-pressure-004518.html

Likewise there are billboards that these groups have complained about that depict nothing more than what one could legally see in public in real life e.g. scantily clad women. As such, in the case of billboards, greater clarity over what is acceptable and what is not acceptable would help.

I don't regard movies that are exhibited in cinemas as being accessed in public. Any person present in the cinema is doing so entirely by their own choice and there are procedures in place to ensure that children are not admitted to the cinema where the content is only suitable for adults. That is, while the cinema may be available to serve members of the public, the content is not accessed in public.

In some limited situations, a cinema may meet the definition of "accessed in public" e.g. an open-air cinema either without physical access restrictions or with physical access restrictions but clearly visible from areas outside the open-air cinema. Again, it would be reasonable to apply far more stringent standards as to what is acceptable to exhibit in an open-air cinema, as compared with a normal cinema. An open-air cinema should almost certainly be prevented from exhibiting R-rated content, and possibly even more stringently controlled, while a normal cinema should be permitted to exhibit any legal content.

Clearly a TV could also be accessed in public. Some caution is needed as to whether accessed in public means strictly accessed in a public area (e.g. visible from the street) or accessed only in a privately owed area but where members of the public could reasonably be expected to be found (e.g. visible inside a store). However since TV content is in general classified anyway, there probably aren't any additional considerations if the TV content is accessed in public.

A complication arises in that a TV or similar device may not in fact be displaying broadcast TV content. It may be displaying recorded content (e.g. from a DVD) or streaming live from a camera (i.e. closed-circuit TV) or accessing content from the internet.

In some limited situations, the internet may be accessed in public (e.g. internet cafe, free public kiosk or

other public kiosk). However since it is completely impractical to classify the internet, classification should not apply here. It may be more reasonable to require the operators of those facilities to make efforts to ensure that one person's use of the internet is not readily visible to other users of the facility or to passers-by.

It is also readily possible for any member of the public to access the internet in public, using a range of devices e.g. laptop, mobile phone, tablet. Rather than treat this as a classification issue, I would leave this to be addressed as a public nuisance issue. That said, I have not heard of any complaints of this nature.

Other than that, I don't regard the internet as being accessed in public.

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

No additional comments.

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

The Classification Scheme should not attempt to control access to online content. At the very least it should not simply be *assumed* that access to online content should be controlled. If this assumption is not questioned then this is just a continuation of the patronising idea that adults are not capable of determining what they should access.

There are no effective methods of controlling access to online content. Attempts to control access to online content are likely to be counterproductive i.e. new, more subtle mechanisms for circumvention will appear. This is in addition to The Streisand Effect.

Naturally, where content is actually illegal, that fact is somewhat effective at controlling access i.e. acts as a deterrent. (However new, more effective circumvention mechanisms may reduce the deterrent effect.)

Regarding point 77, the figure of 500,000 for the number of mobile phone apps may be an underestimate. Traditionally, mobile device providers have sought to control the distribution of apps so that only approved apps can be downloaded. (Whether this is in the interests of consumers is outside the scope here.) However that control is not perfect. Apps can be obtained from other (online) sources. Those "unofficial" apps may not show up in the official statistics produced by the various providers.

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

It is not really clear what "better" means in this question. I have taken "better" to mean "better than now".

Recommendation 8 above addresses that from a technical and administrative perspective. This question is also addressed in my answer to Question 3.

However we shouldn't lose sight of the fact that action by government or industry is not a substitute for parenting. There is no substitute for parental supervision, and there is no substitute for education, whether in the context of parental supervision or in other contexts. Indeed, technical or administrative measures *could* have the effect of discouraging parental supervision and making parents complacent.

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

Access to sexually explicit magazines should be controlled less, not more, by allowing X-rated content to be legally sold throughout Australia.

With that stated, it may be appropriate to require physical separation of content that cannot be sold (or hired) to children from all other content. As such it may be more important to provide markings or warnings or consumer advice on the area (or the shop) than on the product. Selling in opaque plastic doesn't seem like a good idea as the consumer should be able to get information about what he or she is buying.

I feel the need to object to many of the suggestions in point 75.

- Owning a film containing child abuse is already against the law but this is not a matter for the Classification Scheme. Illegal content should be dealt with by the justice system.
- RC should be abolished as a classification.
- Anything that is legal to be in possession of should be legal for adults to buy, sell, import or see in a cinema etc.

It may be worth noting that in a digital media world there are additional challenges to restricting imports. A microSDHC card (smaller than my thumbnail) holds 32 GB, while SDXC cards (standard SDHC size of 32mm x 24mm) currently go up to 128 GB. These kinds of cards are found in all of the more sophisticated mobile phones and essentially all digital cameras and quite a few other devices besides. 128 GB is enough for around 25,000 reasonably high resolution still images or 250,000 lower resolution still images, or around 50 hours of standard definition video. Capacities are only going to increase!

This all suggests that **governments need to start focusing on what is important and abandon what is just legacy moralising**.

The moralising aspects of the current classification scheme are a legacy from an even more patronising era, when the lower classes could not be expected to decide for themselves what they see.

Regarding point 78, many of the ways in which the current system is ineffective relate to the fact that the system is trying to do silly things. If you abolish RC and relax the restrictions on X-rated material then it will hardly matter whether sexually explicit magazines are correctly labelled. As long as it is understood that the content is for adults (i.e. labelled as such) and as long as the content is not sold to children, the government can stop worrying about the lack of compliance with *existing* laws.

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

No additional comments

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

No additional comments.

**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?**

Any mention of "industry" strongly suggests that you are considering only traditional delivery mechanisms and not the internet. Noone should be responsible for classifying the internet, least of all the ISP industry. Most internet content is not supplied on a commercial basis and much internet content is not supplied by commercial entities.

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

Industry classification seems to work well enough for music and TV, and I have suggested above (Question 7) that art galleries might self-assess.

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

The full cost of classification should be borne by government i.e. the taxpayer. This would avoid argument about what a "small independent film" is.

See also Recommendation 9.

It is also noted that with the introduction of more sanity into the Classification Scheme (i.e. less moral panic), costs could be lower.

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

I think the categories for TV and film are overall reasonably well understood. The difference between PG and M may be too subtle. MA15+ clearly only applies where accompaniment is possible.

The classification Refused Classification would almost certainly not be understood in the community. Notwithstanding its intrinsically confusing name, part of the confusion stems from the Rudd/Gillard government's deliberate attempt to confuse the community about RC, in particular the government's attempt to leave the community with the impression that RC can be equated with illegal. For example, Stephen Conroy, the relevant minister, speaking on ABC TV's *Q&A* said:

*... there is a compelling argument to deal with Refused Classification material. That's material like websites that promote incest; websites that promote rape; websites that promote child pornography*

and speaking on SBS TV's *Insight* program:

*I have only ever identified Refused Classification in terms of child porn, bestiality, rape, incest sites - those sorts of things.*

While rape is obviously illegal it is far from clear that a website containing videos of a rape would be illegal to access, particularly where the rape may be simulated. The same would apply to incest. The minister deliberately fails to distinguish between an act and a real or fictional depiction of an act. The minister deliberately fails to mention material that is Refused Classification where even the act is legal.

Links: http://www.abc.net.au/tv/qanda/txt/s2521164.htm and
http://www.sbs.com.au/insight/episode/index/id/59/Blocking-the-Net

I propose the following simplified scheme, which would apply to all types of content that are classified.

| Classification | Abbreviation for | Suitable for... | Sale, entry to cinema [1] allowed to |
|---|---|---|---|
| G | General | everyone | everyone |
| 12 | | children aged 12 and over, and adults | children aged 12 and over, and adults [2] |
| 15 | | children aged 15 and over, and adults | children aged 15 and over, and adults [2] |
| A | Adult | adults, not suitable for children | adults only |
| I | Illegal | noone | noone (a crime to be in possession of, access, exhibit, etc.) |

[1] While not actually restricted on TV, the classification may imply restrictions regarding the *local* time at which the content can be broadcast. Classification may also imply restrictions regarding access in public.

[2] There is room for debate whether these restrictions, as they apply to children, should be absolute, or could be waived if the child is accompanied by an adult. On the one hand, this gives greater flexibility and a greater role for parenting. On the other hand, it undermines the goal of applying the same rules to all content delivery mechanisms - since there are some delivery mechanisms where accompaniment is not possible to verify.

In all cases other than G, descriptors should be used to provide more information about what has led to the classification. (That is not to say that descriptors could not also be used where the classification is G.)

Regarding point 105, section 9A of the *Classification Act* is too broad. One man's terrorist is another man's freedom fighter. I recommend repealing (2)(c) and I also question the meaning of "or indirectly" in (2)(a) and (2)(b) i.e. I think "or indirectly" is too vague and should be removed.

Regarding point 106, I don't think that introducing too many new classifications will be helpful. It could just confuse consumers and hence be counterproductive. Also, it should not be done where it creates a sense of false precision. In other words, we should not pretend that there is a rigorous and objective test that determines that content is suitable for a 12-year-old and even if there were, not all 12-year-olds are identical.

**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?**

Refer answer to Question 20.

**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?**

A referendum giving the Commonwealth the power to classify all types of media would help.

However games and internet content should not be subject to classification.

Also, I see limited merit in classifying content that is purely textual.

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

Yes.

If possible, the classifications and their associated criteria that apply to TV, films and publications should be the same and should be covered by a single Act. To the extent that classification applies to music and/or billboards, likewise.

The simplified classification scheme proposed above also helps.

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

That depends on what you mean by "prohibited".

On the one hand, prohibited can mean that it is illegal to access i.e. a crime to access. Under this interpretation, I will tautologically answer ... that which is illegal to access i.e. as defined elsewhere in law. Child pornography would obviously be included. However refer to Recommendation 5. It *might* include detailed instruction in crime (which, if so, clearly could include detailed instruction in carrying out a terrorist act). However we should be cautious about extending the range of illegal material. Even "detailed instruction in crime" is controversial because detailed instructions for euthanasing yourself could be construed as detailed instruction in crime (and have been, on the grounds of drug manufacture). Link to decision: http://www.classification.gov.au/www/cob/rwpattach.nsf/VAP/%28084A3429FD57AC0744737F8EA134BACB%29~989+-+Decision+7+February+2007+-+The+Peaceful+Pill+Handbook.pdf/$file/989+-+Decision+7+February+2007+-+The+Peaceful+Pill+Handbook.pdf

On the other hand, prohibited can in addition mean that a person is proactively prevented from committing that crime i.e. as proposed under the Gillard government's controversial internet censorship plan (although that plan would have been much broader than only illegal content). Free societies are generally wary of this level of government control. It verges on introducing the idea of "thought crime". Under this interpretation ... no material should be prohibited. (This is a hypothetical discussion point since any expert can tell you that there is no effective means of proactively preventing access to illegal online content. There is no substitute for careful and patient policing.)

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

No.

Refused Classification should be abolished. The part of what is currently RC that is illegal to access should be moved into a new "classification", Illegal. Having moved illegal content out of RC, there is no justification for RC continuing to exist.

If online content is illegal to access then it's a matter for the criminal justice system. If online content is not illegal to access then it's not a matter for the Classification Scheme, in the sense of attempting to prohibit access by adults.

Regarding point 121, the quoted text is legacy moralising, and patronising to adults. Everyone's idea of "decent" or "moral" differs and this should have no bearing on how government attempts to control personal viewing decisions by adults.

To put it another way, you are the Australian *Law* Reform Commission., not the Australian *Moral* Reform Commission. Countries like Iran and Taliban-controlled Afghanistan may have a *Ministry for the Propagation of Virtue and the Prevention of Vice* but that is not a direction that Australia should be moving in.

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

It may be desirable.

Whether it is important, whether the citizens are clamouring for it, is debatable.

There are arguments against Australia-wide consistency e.g.

- decision-making that is closer to the people affected by it may result in more public support for it
- inconsistent state approaches allow a variety of approaches to be tested against each other

However any such consistency should also be put in perspective by realising that we live in a globalised world, as most directly demonstrated by the internet.

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

A constitutional amendment should be put to the people that would give the Commonwealth the power to classify content and to restrict on the basis of classification. A new Commonwealth Act should be introduced that provides a single and consistent source of classification and restriction. (A significant amount of existing legislation would have to be repealed.) However the opportunity should also be taken to remove the legacy moralising, and to limit classification to:

- providing consumer advice, and,
- restricting sale to children.

The new Act should exclude internet content (even though clearly the Commonwealth currently has the legal power to do so and would most likely continue to do so under the above hypothetical amendment).

The new Act should exclude games (even though the Commonwealth would most likely gain the explicit power to do so under the above hypothetical amendment).

Illegal content would be defined and administered outside the scope of the Classification Scheme, at least to the extent that only a court can find content to be illegal.

The new Act should take a tough stance on rogue states of Australia by preventing any state from passing *any* law in this area.

Regarding point 138, use of the corporations power or, for that matter, the external affairs power would almost certainly be an abuse. That is not to say that it wouldn't be given a tick by the High Court.

**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?**

That could work provided that

- all states waive their right to undermine the consistency (e.g. undermining as South Australia currently does)
- the referral also includes any restrictions that spring from classification, if any, i.e. there is little point having consistent classification if the effect is still inconsistency.

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

No additional comments.

# Appendix A - Nesternets

The registration of nesternets would be controlled by the operator of the *containing* internet. The purpose of this is to ensure that each nesternet is uniquely identified. It would be reasonable to identify each nesternet within a containing internet by a unique number. (In any reasonable actual design there could be a very large number of nesternets, if not a potentially infinite number, nested in the internet. In addition, there could be nesternets nested within nesternets, to any level of nesting.)

All *other* aspects of the nesternet would be controlled by the operator of the nesternet, the party who registers it, unless otherwise specified. These aspects include:

- IP addressing
- routing
- whether access is restricted or open
- how access is obtained
- how authorisation is obtained if access is restricted
- the DNS server arrangements
- the rules controlling domain registration

Note on IP addressing: The IP addressing on the nesternet is independent of the IP address on the containing internet. The two sets of IP addresses may or may not overlap. However in general a nesternet should avoid using the three ranges of private IP addresses and this would almost certainly apply to a child-suitable nesternet.

Special considerations apply to nesternets that are registered with the intention of providing child-suitable nesternets.

- These nesternets would probably be administered by the same entities who administer the existing internet.
- Obviously there are restrictions concerning what content can be made available on the nesternet - since this is the whole point of it.
- In order to encourage child-suitable content, anyone who has a valid registered domain in the existing internet, *and* who passes the content test, should be allowed to register the same domain, at nominal or zero extra cost, in a child-suitable nesternet. Conversely, one would not be permitted to register a domain in a child-suitable nesternet unless one already had the same domain registered in the existing internet.

The flip side of restricting nesternet content to that which is child-suitable is that one *might* also attempt to keep all adults out of a child-suitable nesternet e.g. in order to combat grooming. However there are difficulties with that e.g.

- Major content providers will be adults.
- By definition this implies that connecting to a nesternet requires authorisation of some kind (which in turn creates administrative and privacy issues).
- There are clearly legitimate scenarios where adults communicate with children.
- Parents may want to check out some content at a time when they are not supervised by their children.

On balance I don't think we should attempt to keep all adults out of a child-suitable nesternet.