# Australian Law Reform Commission
# National Classification Scheme Review
# Response to the Issues Paper

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## Background and Qualifications

I am a Senior Lecturer in the TC Beirne School of Law, The University of Queensland. Since 2001 I have specialised in intellectual property and technology law, publishing widely on related issues and teaching both undergraduate and postgraduate courses in technology law, information law and intellectual property. I have a longstanding interest in technology regulation, particularly in the online context.

## Executive Summary

I wish to make five short points in response to the ALRC's Issues Paper on the National Classification Scheme Review ('Issues Paper'):

1. In considering the regulatory approaches appropriate in the classification context, the ALRC should consider, not only the various regulatory forms set out in the *Best Practice Regulation Handbook*, but other mechanisms available to government to achieve the goals of the classification scheme, such as procurement.
2. The primary objectives of a national classification scheme should include reference to adults' right, not only to read, hear and see what they want, but also to *say and publish* what they want.
3. In the online context:
    a. Any proposal for a mandatory ISP-level filter should be rejected;
    b. The ALRC should take into account the lessons of internet regulation, and the way the internet itself is changing.
4. I support the submissions of the Arts Law Centre of Australia in relation to the treatment of artworks.
5. The ALRC should reaffirm that the exercise of judgment and discretion by a body independent from government is fundamental in any classification scheme. It should reject attempts to remove or significantly limit such discretion, as found in s 9A of the *Classification (Publications, Films and*

*Computer Games) Act 1995* (Cth), and in the recommendations of the Senate Legal and Constitutional Affairs References Committee.

## Designing a regulatory framework (Issues Paper paragraphs 38-48).

The ALRC has set out, in paragraphs 38-48 of the Issues Paper, a series of regulatory forms: self-regulation (industry-formulated rules), quasi-regulation (where government influences business to comply), co-regulation (industry regulation with government enforcement) and direct government regulation. I submit that the ALRC should also take into account other mechanisms available to government other than direct or cooperative regulation as envisaged in the ALRC/*Best Practice Regulation Handbook* typology.

The obvious example of an alternative mechanism is education – an important tool in this context given the need to equip members of the public to navigate the media landscape. But others exist too: for example, government can promote the objective of protecting children from exposure to inappropriate material through procurement. State governments have some influence over technology used in schools, influence that could be used to encourage competitive development of effective technologies for the protection of children. This approach has several benefits: not only could it serve the objectives underlying the classification scheme, it could also promote the more general goal, as set out in the *Digital Economy: Future Directions* Report of encouraging innovative businesses in the sphere of Information and Communications Technology (ICT).[1]

Further, the ALRC mentions 'self-regulation' as one form of regulation, characterised as 'industry-formulated rules and codes of conduct'. Later in this submission I refer to developments online towards *community* systems for monitoring and identifying offensive content.[2] It may be worth the ALRC bearing in mind that particularly in the online context, communities themselves may have a role to play in fulfilling roles traditionally provided for by the classification system – that is, providing the information necessary to inform viewer choice.

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[1] For a discussion of the commercial filtering market as it has developed in the US, which does not have any mandated system for internet censorship, see Catharine Lumby, Lelia Green and John Hartley, *Untangling the Net: The Scope of Content Caught by Mandatory Internet Filtering* (December 2009, available at http://www.cci.edu.au/publications/untangling-net-scope-content-caught-mandatory-internet-filteri), 18

[2] Below pages 6-7.

## Primary Objectives (Issues Paper Question 2)

The presently-stated primary objectives of the national classification scheme, as set out in clause 1 of the National Classification Code, reflect an outdated understanding of the media environment, in which individual members of society are imagined as passive recipients of mass culture, receiving content and information only. This does not reflect today's media environment, in which individuals from a very young age are active participants in broadly distributed and collectively created cultural expression.

In this changed media environment, classification and censorship decisions have the potential to impact on individual expression. This is most obviously true in the context of internet publications, including user-generated content of various kinds (blogs, user-created video etc). The particular issue of user-generated content is discussed further below.[3]

Given the increased potential for censorship decisions to impact on individual expression, particularly although not exclusively in the online environment, freedom of *expression* (and not just freedom to *receive* material) should be an objective which decision-makers are explicitly required to consider and balance with other concerns when making classification decisions. This is all the more important in the absence of any otherwise legally enshrined right to freedom of expression in the Australian legal system. This would enable both censorship decision-makers, and subsequently judges in judicial review of censorship decisions, explicitly to discuss the impact of a decision on freedom of expression, contributing to public debate and understanding of this issue.

## The treatment of online content (Questions 3, 12-13)

The Issues Paper asks a number of related, difficult, questions: whether the technology or platform used to access content should affect how it is classified; what are the most effective methods for controlling access to online content; how can children's access to potentially inappropriate content be better controlled online.

It is not particularly useful to talk about activity 'online' or regulation for activities 'online' as if the internet were a (relatively) consistent and homogenous medium akin to 'newspapers' or 'television'. 'The internet' covers material on the web; material available via peer-to-peer protocols; internet relay chat and chat rooms, and more. The nature of activity and the nature of any regulatory needs or opportunities differ across these different types of communication. So too, I would submit, would citizen expectations about the role of government. I would expect (although this is an empirical question that could be examined) that Australian

[3] See page 5.

consumers would have different expectations as to regulation and classification as between, say, material hosted on the website of an Australian broadcaster (through 'catch up TV' or ABC's iView system) as opposed to material on a website hosting user-generated content or material on a social network. The ALRC should resist any suggestion that activities 'online' should be regulated according to a single scheme and enforcement system. Parts of the material available online resemble in certain ways the activities of the mass media and mass cultural distribution to which classification systems have traditionally attached (most obviously, newspaper websites or the websites of broadcasters); other parts are nothing like the mass media and are unlikely to be appropriate to regulate in the same way.

More generally, I would submit that the ALRC consider both the history of internet regulation in other content-related areas, and the changing nature of the internet itself and people's engagement with the online environment.

A number of lessons may be drawn from regulation of internet content to date. The first lesson concerns concepts such as 'parity of treatment' and 'technology neutral regulation' – concepts seen frequently in documents such as the recent Senate Legal and Constitutional References Committee report.[4] That Committee noted that although there were challenges in the online environment, it was

> *'strongly of the view that a uniform approach to the same or similar content is required, regardless of the medium of delivery. ...In general, the committee accepts that the equal treatment of content, regardless of the platform used to access that content, should be a guiding principle of a reformed National Classification Scheme.'*[5]

While these ideas are intuitively attractive, they lack the clarity and rigour necessary to form a useful guide to policy. As Bennett Moses has pointed out, 'parity' or 'equal treatment' could refer to a desire to have laws that are *formulated* using the same language, using the same systems, or that seek to achieve the same *outcome* in different technological contexts.[6] Indeed, even defining when content is 'similar or the same' is less straightforward than might appear. Is the focus only on the content itself (so that 'films on similar subjects' are the same, regardless of whether they are user-generated or mainstream commercial films) or are we talking about similarity as defined by nature, content, *and* producer (that is, *Batman Returns* whether shown on television or available online)? As regards the concept of 'technology neutrality', experience shows that laws designed to be 'technology neutral' have a tendency to be

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[4] Senate Legal and Constitutional References Committee, *Review of the National Classification Scheme: Achieving the Right Balance,* Final Report, June 2011, at [8.34] (quoting the Australian Mobile Telecommunications Association); [12.2];

[5] At [12.49] – [12.51].

[6] Lyria Bennett Moses, 'Creating Parallels in the Regulation of Content: Moving from Offline to Online' (2010) 33 *UNSWLJ* 581.

non-neutral in effect, simply because they are drafted with existing technology in mind.[7]

Second, the costs of internet regulation for business may be reduced through the development of rules that are consistent with those developed globally. In copyright regulation, for example, there has been a strong effort by countries to reduce the complex of rules impacting business (both copyright owners and intermediary businesses) by developing common approaches to regulation and enforcement of online infringement.[8] In the area of cybercrime generally, Australia is taking steps to accede to the Council of Europe's Cybercrime Convention, again, as part of a general effort to promote cooperation in global policing in the online environment.[9]

In the area of censorship online, the trend in developed nations internationally has been towards a focus on voluntary industry filtering of child pornography. This trend has been outlined in Lumby et al,[10] and is evidenced most recently by the apparent decision of the European Commission to abandon an early draft proposal for a directive that would have *required* internet filtering, to one that *allows* filtering within their territory, and only then subject to procedural requirements such as transparent procedures, the limiting of restrictions to 'what is necessary and proportionate', providing that users are informed, and the possibility of judicial redress.[11] If Australia were to develop a regulatory stance that encouraged this form of strictly limited voluntary filtering, Australian business would be able to make use of schemes, technology, and (if appropriate and where there is reason to trust their content) lists developed elsewhere (and Australian ICT business might be able to develop for a global market). Further, the Australian government would have a framework for ongoing cooperation with global law enforcement in relation to clearly criminal content (ie, child pornography). In a competitive global digital economy, Australia should hesitate before imposing significantly different, burdensome, additional regulation on its businesses.

A third lesson of the history of internet regulation to date is that notice-and-removal systems can be effective in the context of mainstream sites likely to be of

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[7] We have seen this, for example, in copyright, where the apparently technology-neutral 'reproduction right' in copyright creates vastly different results in the non-digital context (where reading is not a copyright-implicating act) and the digital context (where reading on a screen involves the making of a copy and hence *is* a copyright act). Similarly, the 'technology neutral' right of 'communication to the public' operates differently in relation to a static website versus, say, peer-to-peer communications.

[8] In copyright, this has led to very similar systems worldwide for 'notice and takedown' of copyright-infringing material.

[9] Cybercime Legislation Amendment Bill 2011 (Cth)

[10] Lumby et al, above n 1 at 15-17.

[11] OpenNet Initiative, 'EU: No Mandatory Internet Filtering Against Images of Child Abuse', 27 June 2011, at http://opennet.net/blog/2011/06/eu-no-mandatory-internet-filtering-against-images-child-abuse.

most concern to government, and have given rise to ongoing innovation in the management of material online. Copyright systems of 'notice-and-takedown' are heavily used, and more generally in intellectual property, mainstream sites like eBay and YouTube have gone beyond basic 'removal on report' systems to develop advanced systems for management of infringement concerns. In the area of offensive content, sites like YouTube have developed systems that empower individuals to manage their experience: from Safety Mode viewing (so that people can avoid having adult content appear on YouTube)[12] to community-based 'tagging' for the removal of material that contravenes content guidelines for the site. In short, the area of online content and access management is not one where the government must step in because nothing is happening – on the contrary, there have been significant innovations and developments in the larger, mainstream sites most likely to concern the Australian public.

In addition to the history of internet regulation, the ALRC also should pay attention to the way that the Internet, and in particular, the web, is changing. Two trends may be emphasised. The first is the ever-increasing ability of communities of internet users to construct their own systems to provide 'advice and information to other users to inform their viewing choices – including warning them of material they might find offensive'.[13] One aspect of Web 2.0 technology has been the rise of systems for 'tagging' and labelling material online. As noted above, YouTube makes use of such tagging to identify and remove offensive material. Users themselves are providing the information necessary to inform viewer choice – much more efficiently than a government could.[14]

A second relevant trend is the trend towards personalisation. It appears, from public statements including Minister Stephen Conroy's press release dated 15 December 2009, that a key concern of the government is the potential for people to encounter offensive material inadvertently.[15] While it was never clear this was a common problem, the way people interact with material online is changing to make it ever less likely. For better or worse, the present trend in internet technology is towards personalisation: people access material increasingly either through the lens of their social network (through links provided by their own friends and colleagues via sites such as Facebook) or through services, such as Google's search engine, which is increasingly moving towards 'personalised' search. In personalised search, the results of a search will tend to be different for different users, depending on the

[12] Similar technology exists in relation to Google searches, which can also be conducted in a 'Safe Search' mode.

[13] Stated as a goal of a classification system: Issues Paper at [50]

[14] Wikipedia, too, has quite advanced systems for the management of offensive content, both automated and based on community monitoring.

[15] It being acknowledged that persons determined to gain access to material will find ways to circumvent any such filter: see for example Enex Testlabs, above n 18 at 2.

history of searches and material on the computer that they use.[16] This commercial and social trend – tending to shape material to which people are exposed online as being more directly relevant to them – would seem likely to decrease the general likelihood of coming across offensive or troubling material unless the individual affirmatively seeks it out.

*General problems with the proposal for a mandatory ISP-level filter*

A key issue raised by the questions in the Issues Paper is the controversial issue of ISP-level filtering. As someone who has researched online regulation for a decade, I believe that the proposal to impose filtering at an ISP level, as outlined by the government, is undesirable for a range of technical and other reasons.

First, significant and expensive regulation should only be introduced on the basis of evidence. It has not, to my knowledge, been shown that twenty years of the uncensored web in Australia has led to significant or growing problems that would be addressed by the proposed filter.[17] The ALRC should examine (and evaluate) the available evidence in order to give authoritative advice to government as to the existence and nature of any 'problem'.

Secondly, a filter is likely to be ineffective. The filters tested to date exclude peer-to-peer communications; can be circumvented using techniques that can readily be found online;[18] and even if based on a long list of URLs, cannot hope to be comprehensive in a context where publication of material can occur effectively instantaneously and both content and its location are mutable.[19]

Thirdly, a government-mandated filter may generate a false sense of security concerning the material likely to be encountered (for example by children) online.[20] One possible consequence is less active involvement by parents and care-givers in managing young persons' access to internet content. Alternatively, parents who believe that the government has 'made the internet safe' and are (as may be inevitable) disappointed in that expectation may well blame government – tending to decrease public faith in our system of government.

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[16] See 'Personalized Search for Everyone', Google Blog, 4 December 2009, at http://googleblog.blogspot.com/2009/12/personalized-search-for-everyone.html.

[17] In fact, to the extent that there is evidence, it tends to suggest the opposite. The low take-up, for example, of filters provided by ISPs under existing law suggests that parents, for example, are not experiencing real, practical difficulties.

[18] Enex Testlab, *Internet Service Provider Content Filtering Pilot Report* (October 2009) available at http://www.dbcde.gov.au/__data/assets/pdf_file/0004/123862/Enex_Testlab_report_into_ISP-level_filtering_-_Full_report_-_Low_res.pdf, at 25-26.

[19] Ibid at page 13.

[20] Lumby et al above n 1.

I would argue further that there could be further, negative flow-on effects: parents and others who believe that the 'government has made the Internet safe' are less likely to investigate, acquire, or use commercial tools for managing children's Internet access. Thus government intervention has the potential to undermine the incentives for commercial parties to develop new, better-targeted and more effective, tools for managing internet access.[21]

Fourthly, tests to date suggest (a) that a filter will have a negative impact on Internet access speed[22] in relation to high traffic sites; and (b) that over-blocking will occur.[23] This runs directly counter to the government's policy of building faster networks and facilitating Australian social and economic opportunities online.

Fifthly, application of an ISP-level filter with a peculiarly Australian set of restrictions is a decisive move away from the ideal, as stated by US Secretary of State Hillary Rodham Clinton, of 'a single internet where all of humanity has equal access to knowledge and ideas',[24] towards a fragmented internet where governments decide what their citizens should have access to. Australia should not be seen to stand with nations that seek to limit citizens' access to information[25] and the benefits of open debate and open information.

Sixthly, an internet filter contradicts the government's professed desire to nurture a 'digitally literate and empowered' community.[26] Such a desire would suggest that government efforts in the online environment should be focused on providing the tools to enable citizens to understand and manage their own internet access. As Stephen Fry once said,

> *The internet is a city and, like any great city, it has monumental libraries and theatres and museums and places in which you can learn and pick up information*

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[21] It seems at least likely – although again this is an empirical question – that commercial producers of filtering products for home use will be effective than an ISP-level filter imposed on a nation-wide basis. The commercial products are competing for custom and market themselves as adjusting to new developments and circumvention techniques.

[22] Enex Testlab, above n 18 at page 19.

[23] In Enex Testlab's tests, the tested filters incorrectly blocked 2.5% - 3% of innocent material: ibid at 13, which Enex considered 'high' (at 14).

[24] Hillary Rodham Clinton, US Secretary of State, 'Remarks on Internet Freedom', 21 January 2010, available at http://www.state.gov/secretary/rm/2010/01/135519.htm.

[25] For some discussion of Australia's company in the list of filtering countries, see Lumby et al, above n 20, at 20ff (naming the UAE, Yemen, Azerbaijan, Jordan, Pakistan, Tajikistan, Thailand, Bahrain, Ethiopia, Singapore, South Korea, Syria, Uzbekistan and Vietnam). As noted elsewhere in this submission, the European Commission has recently *rejected* a draft directive provision. Germany too appears to have abandoned plans for a mandatory filter: see OpenNet Initiative, 'German Government Gives Up Internet Filter Law', 7 April 2011, available at http://opennet.net/blog/2011/04/german-government-gives-internet-filter-law.

[26] Department of Broadband, Communications and the Digital Economy, *Australia's Digital Economy: Future Directions (Final Report)* (2009), 3

> *and there are facilities for you that are astounding - specialised museums, not just general ones.*
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> *But there are also slums and there are red light districts and there are really sleazy areas where you wouldn't want your children wandering alone. And you say, "But how do I know which shops are selling good gear in the city and how do I know which are bad? How do I know which streets are safe and how do I know which aren't?" Well you find out.*
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> *What you don't need is a huge authority or a series of identity cards and police escorts to take you round the city because you can't be trusted to do it yourself or for your children to do it.*[27]

As a seventh matter, an ISP-level filter does not discriminate according to the identity or purpose of the end-user. Assuming, as proposed, the filter extends beyond child pornography to all RC material, it could impact on legitimate access to material. Most RC content is not illegal to possess in most Australian jurisdictions. Examples of legitimate access include access by university researchers to terrorist material by university researchers seeking access to such material to inform their research. More broadly, reasonable and informed adults wishing to understand politics and the events of the day should not be denied access to such information on the basis that it may be harmful in some hands: limiting access to such material has a disproportionate negative impact. Australia ought not to seek to insulate its population from difficult political issues, debates, and information.

### *Specific problems in relation to user-generated content*

Another specific problem of an ISP-level filter relates to user-generated sites. The Australian government has elsewhere extolled the benefits of user-generated content, asserting that '[t]he community can be empowered through digital economy platforms to collaborate, create, and communicate in ways that are socially and personally enriching.'[28]

Such sites however carry some risk of having material that would fall within the category of RC and hence being subject to filtering. Organisations such as the Organization for Transformative Works,[29] a US-based non-profit focused on protecting and preserving non-commercial fan fiction and similar works, has, as part of its text-only website, a clearly labelled, separate section with erotic material (a known subset of fan fiction). As a result, it has had two instances in which filters declared their entire site off limits to users, one in the US and one in the UK. In the

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[27] Stephen Fry, 'The internet and me', BBC News, 10 March 2009, available at http://news.bbc.co.uk/2/hi/7926509.stm.

[28] *Australia's Digital Economy: Future Directions Report*, above n 26, 53

[29] http://transformativeworks.org/about

US case, the filter applied in a blanket way to transformativeworks.org, the site that offers legal analysis and historical and academic projects related to fan cultures, even though it is entirely separate from the fan fiction archive.

If on the other hand specific content on such sites is blocked, tests to date also suggest that there will be significant impacts on network performance.[30]

Content changes constantly on user-generated content sites, making filtering even less appropriate. A blocking decision today might be completely irrelevant tomorrow, owing to the actions of such sites' uisers. This, too, makes the likely effects of filtering even more random, and both over- and underinclusive.

There have been some suggestions in material from the Australian government that sites like YouTube or Wikipedia and other such high-traffic websites might be able to be placed on a 'White List' and avoid the impact of the filter. It should be noted that not all user-generated sites are high traffic sites, and a system that favoured certain large, highly-trafficked sites over smaller or newer sites would seem to run counter to the government's stated policies of encouraging innovation in the online space, as set out in the *Future Directions* Report.[31]

User-generated content also raises procedural issues, should a filter be adopted. The government's documentation on the *Outcome of public consultation on measures to increase accountability and transparency for refused classification material* refers to proposals to provide for notification of, and appeal procedures for, content service providers and content owners, with these statements qualified by the need for these people to be 'readily contactable and identifiable'. It would not be at all unusual for contact details of a creator to be absent from a user-generated content site (or indeed much online content), suggesting that blocking may suppress communication without being awareness on the part of the communicator.[32]

### *The scope of RC content*

Of particular concern is the proposal to filter not only the most dangerous and harmful material which it is illegal to possess - child pornography – but to filter the full range of material Refused Classification (RC), as proposed by the government.

The RC category is overbroad. It includes, not only child pornography and material involving sexual violence, but a wide range of material which it is not illegal to possess, including material that includes 'instruction on drug use' and 'instruction

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[30] Enex Testlab Report, above n 22, 19.

[31] Above n 26. Further, there have been some suggestions that this kind of 'special treatment' would be conditional on the relevant sites complying with requests to remove material from access. It is entirely conceivable that overseas-based sites, rather than comply with Australian rules, will allow filtering to stand – potentially reducing Australian access to legal material.

[32] Nor can it be assumed that people publishing online worldwide will be familiar with the rules, details, or processes of the Australian censorship system.

on how to commit a crime'. Given the extraordinary range of activities that are proscribed by criminal provisions in Australian law, these categories within RC are potentially extremely broad. Graffiti can be a crime. Some copyright infringement is a crime. Shoplifting is a crime.[33]

As Lumby et al point out, under these categories, the material could feasibly be deemed RC includes material that may have social value, and which ought to be protected as free expression (in some cases political expression):

- "A site devoted to debating the merits of euthanasia in which some participants exchanged information about actual euthanasia practices.
- A site set up by a community organisation to promote harm minimisation in recreational drug use.
- A site designed to give a safe space for young gay and lesbians to meet and discuss their sexuality in which some members of the community narrated explicit sexual experiences.
- A site that included dialogue and excerpts from literary classic such as Nabokov's *Lolita* or sociological studies into sexual experiences, such as Dr Alfred Kinsey's famous *Adult Sexual Behaviour in the Human Male*.
- A site devoted to discussing the geo-political causes of terrorism that published material outlining the views of terrorist organisations as reference material."[34]

## The treatment of art (Question 7)

The requirement to classify a work prior to public exhibition does not traditionally extend to works of art exhibited in gallery spaces, except in relation to classifiable material such as film or video. In the context of the recent Senate Legal and Constitutional References Committee review, there was discussion of the possibility that artworks should be classified before exhibition, with an exemption from classification fees.

Such proposals are not supported by evidence of a problem. Galleries and museums have already developed practices of providing for separate spaces and warnings in the case of potentially troubling material or material not suitable for children, and some artists (including Bill Henson) have submitted material prior to

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[33] And, indeed, censorship laws have been applied in the case of a (satirical) article giving instructions on shoplifting: *Michael Brown & Ors v Members of the Classification Review Board of the Office of Film and Literature* [1998] FCA 319.

[34] Catharine Lumby, Lelia Green and John Hartley, *Untangling the Net: The Scope of Content Caught by Mandatory Internet Filtering* (December 2009, available at http://www.cci.edu.au/publications/untangling-net-scope-content-caught-mandatory-internet-filteri) at iii. See also David Hume and George Williams, 'Australian Censorship Policy and the Advocacy of Terrorism' (2009) 31 *Sydney Law Review* 382,

display. Inclusion in the general censorship system is likely also to lead to self-censorship by artists, as, indeed, the submission of the Arts Law Centre of Australia suggests has already happened in relation to the depiction of children in art following events surrounding Bill Henson's exhibitions.

I am very concerned about the impact of censorship on artists and artistic practice, and on Australian culture more generally. In relation to the treatment of artistic works, therefore, I refer to and support the submission of the Arts Law Centre of Australia.

## The role of judgment and discretion in classification decisions (Issues Paper 16, 20)

While historically it has been recognised that classification is 'a matter of judgment', recent developments and proposals evince a desire to limit the exercise of discretion and judgment by classification decision-makers. One example is found in s 9A of the *Classification (Publications, Films and Computer Games) Act 1995* (Cth), requires that publications, films, or computer games that advocate the doing of a terrorist act 'must be classified RC' (refused classification). I note also that in its recent report, the Senate Legal and Constitutional Affairs References Committee argued that 'impact and context should not be a consideration in the making of classification decisions', and that the preamble to classification guidelines should 'expressly state that the methodology and manner of decision-making should be based on a strict interpretation of the words in the guidelines' (Final Report, page 171; see Recommendations 4 and 5). This recommendation appeared to be the result of complaints by some stakeholders that factors such as 'impact' and 'artistic merit' had been applied in ways that led to unjustifiably 'low' ratings.

In my view, both the removal of discretion in s 9A, and the Senate Committee's recommendation, fail to take into account the critical historical role of judgment in classification.

First, as Williams and Hume have pointed out,[35] the setting of rules *absent* discretion, judgment, and context assumes that the lawmaker has perfect information: that they can conceive, and determine *ex ante*, all the possibilities that may occur and the appropriate solution. In the area of cultural output, this is demonstrably not true. Secondly, context is critical to the message communicated by any scene, event, or the like included in a book, film, game or other cultural output. Classification *inevitably* requires the decision-maker to engage in a balancing of complex, context-dependent factors. Thirdly, community values and the social context change over time: clear rules explicitly set out now are likely to become

[35] David Hume and George Williams, 'Australian Censorship Policy and the Advocacy of Terrorism' (2009) 31 *Sydney Law Review* 382, 397ff

obsolete and anachronistic over time. Fourthly, there are very good reasons to maintain the independence of classification decisions from government, which may be subject to (vocal) minority pressure to particular issues, regardless of broader community values or perception.

The ALRC should emphasise the importance of both discretion and judgment, and independence, in classification decisions and procedures.