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National Classification Scheme Review: First Round Submission

This document responds to the invitation by the Australian Law Reform Commission (ALRC) to provide first round submissions regarding the Commission's 2011 Review of the National Classification Scheme.

The following paragraphs identify the basis of the submission, offer general comments and then address specific questions from the Commission. They follow prior comments on the Terms of Reference for the Review.

The submission is made on an individual basis rather than on behalf of the University of Canberra.

Authors

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Basis

The submission reflects work by the authors in industry, government and academia over the past twenty years.

It is informed by an awareness of Australian and overseas legal frameworks, on a current and historical basis, and an awareness of how those frameworks affect content producers, consumers and intermediaries. It is founded on familiarity with the legal, commercial and psychological literature regarding impacts on minors and adults of offensive or other content, including for example concerns regarding trade practices, hatespeech, cyberbullying and obscenity.

Approach to the Inquiry

The ALRC needs to keep an open mind about whether to reform the existing classification framework or suggest the development of a new one. This decision should be based on research and analysis, as there are a number of factors building a persuasive case either way.

As the ALRC notes, aspects of the existing framework are effective, particularly in recognition of classification levels and symbols and in the efficiency of the process with regard to some media (such as publications).

However, as the ALRC also notes, the framework predates the convergence of media (noted for example in a range of authoritative studies from industry, the Australian Communications & Media Authority and academic researchers). The framework accordingly treats content in terms of form rather than mode of delivery. In an era of media convergence – where consumers, distributors, content producers and regulators are ceasing to recognise traditional form-based demarcations and content is being delivered to global markets – it may well be desirable to develop a new classification model that will be consistent across platforms. On the other hand, devising such a consistent model may prove cumbersome and confusing, with a period of trial and error.

We note, however, that the existing "classifiable elements" in the Guidelines that determine the classification of particular content concern only features of the content itself - such as language, violence or nudity. They do not concern aspects of the way in which the content is delivered, or how it may continue to be linked to a particular platform. In an era of media convergence, it may be desirable to consider whether classification should in fact extend to such factors to properly advise both adults and children (and to facilitate appropriate action by intermediaries such as educational institutions, retailers and communication service providers who are expected in Australian law to act as gatekeepers).

Some examples of this connectivity or interactivity of content with platform would include, for example, opportunities for children to link from the content to the Internet, potentially in a way that a carer would not realise and therefore fail to supervise. A more pressing example would be video or computer games, particularly on hand-held devices such as iPads and mobile phones, through which children are able to spend money in the game because it is linked to the parent's payment system - such as a credit card, telecommunications account or iTunes account (though iTunes, for example, is password protected). Within such virtual spaces children are encouraged to spend money to build collections, advance to new levels or engage in other aspects of game play.

These aspects of such content would not fall within the "classifiable elements" of the current classification framework, which are biased towards offensive content. Yet, arguably, ‘spending’ by minors is something that parents should and could be notified of in deciding what content is appropriate for their children. Scope for parental guidance is consistent with Australian values regarding consumer protection. There may well be other aspects of content delivery that consumers should also be made aware of that do not fall within the current framework. This suggests that a new approach, rather than reform of the existing system, needs to be given careful consideration.

Why regulate and classify content?

In discussions of classification, content regulation and children, much reliance is placed on the concept of 'harm'. We agree that the prevention of harm to children should be a key purpose of the national classification system. However, we advise the ALRC to be wary of claims about the kinds of content, genre and platform delivery that are deemed to be harmful to children and that require a response that denies difference among minors or overrides the autonomy of parents/guardians. Such claims are often unfounded, based on neither independent research nor evidence. The concept of "offense" has come to be recognised as a value judgment, unpalatable in the postmodern, digital age. "Harm" has largely replaced "offense" as a justification for restricting access to particular kinds of content, sometimes without regard for whether or not there exists an evidentiary basis for deeming content "harmful".

We urge the ALRC to take a critical, analytic approach to such claims. In particular, the Commission should draw on the substantial body of independent empirical data from Australia and overseas regarding harms and regarding actual use of classification systems.

The ALRC may wish to take a hardheaded view of harms that are potentially experienced by minors and attributed to content (and thus addressed through establishment and policing of a classification scheme). Substantial authoritative research over the past 60 years has questioned emotive but politically persuasive claims that minors suffer fundamental harms through exposure to comics, the cinema, computer games or literature (including canonical texts such as the Bible, the Koran and works by masters such as Thomas Hardy that feature suicide, murder, rape, pillage, child marriage, infanticide and torture). Research has also suggested that the harms experienced by many contemporary Australian minors are attributable to domestic violence, poverty, stigmatization for an alternative sexuality, bullying or being unloved rather than attributable to exposure to ‘bad content’. As a society we choose to believe that the mass media – and advertising – is all powerful, even though evidence suggests otherwise.

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

The ALRC rightly points to the difficulties in regulating particular platforms, particularly the Internet, and the need to balance the benefits of attempting such regulation against both the costs involved and the likelihood that in practice classification schemes will be subverted or ignored.

In testimony to Parliament earlier this year for example we noted concerns about 'feelgood' classification. It is easy to put a parental advisory label on a website or on physical media such as a DVD. It is just as easy for an older sibling to 'share' content, for a parent to leave devices or physical media unprotected, or for people to disrespect content restrictions when they readily discern anomalies (for example that online content about suicide is prohibited but readily available in secondary school science classrooms, in municipal libraries or through a not very diligent reading of labels on pharmaceuticals and domestic products). Studies suggest that much infraction of content rules is oppositional, ie both minors and adults choose to disregard restrictions as a way of demonstrating their autonomy, their membership with peer groups and their status relative to authority figures. Over-classification results in classification fatigue and subversion.

With regard to platforms, we see no reason why the same content should be classified differently depending on the platform of delivery. For example, the current approach of classifying films and DVDs through the National Classification Scheme but allowing television to self-classify the same films, using different criteria and different consumer advice, represents an inconsistent approach that has no basis in reason or logic. Indeed, the exemption of television from the National Classification Scheme and allowing it to self-regulate according to its own criteria is an anomaly in the current framework. There appears to be no justification for allowing this form of audio-visual media to self-regulate when films and computer games are subject to the NCS.

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

In considering this question, the ALRC should critically analyze the concept of "impact" and its relationship to classification.

At the moment, there are assumptions underpinning the NCS, particularly the Guidelines concerning classifiable elements and decisions regarding ratings, that certain forms of content (such as films and especially computer games) have a higher level of impact than others (publications, which are largely unclassified and assumed to have no impact at all). The different treatment of these forms of content on the basis of "impact" does not appear to have an evidential base.

Furthermore, the consideration of "impact" and other factors in classification decisions can produce confusing and inconsistent classification of what many consumers may see as the same content. Take for example a work such as *Harry Potter and the Goblet of Fire*. This work begins with a murder of an elderly man, follows a narrative of conspiracy against the central protagonist and concludes with the murder of a young boy. Under the current framework, the novel is not classified at all, the film is classified M at the cinema and on DVD and PG on television (the subject of an unsubstantiated complaint to ACMA) and the computer game is classified G. This is an inconsistent and potentially confusing outcome for consumers who may perceive this to be essentially the same content, adapted to different media.

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

We suggest that the regime for visual and literary works should continue to rely on the common sense of publishers, galleries, bookshops and other entities involved in distribution and display of content. Australian law features strong and effective sanctions regarding sexual or other abuse of children. A robust democracy neither requires nor can afford a system in which all visual content – whether characterised as art or as the domestic photographs of the family toddler romping in the backyard – needs to be vetted by a government agency or by agents with a bloodshot or prurient eye.

Exhibition practice in Australia over the past fifty years is founded on a recognition that on occasion people will be offended by images of unclothed adults, children, accident scenes, religious figures or war reporting. Some degree of confrontation is inevitable; some people choose to be shocked and in the past have expressed outrage over anodyne images by Michelangelo or Norman Lindsay. They may well be offended in

future by images of religious figures or icons such as the Australian flag. Exhibitors can and should use discretion in warning that some images may offend and can therefore be avoided. Their exercise of discretion means that vetting by a government agency is neither necessary nor appropriate. Action by police in New South Wales and South Australia in recent years (eg seizure of photographs by Bill Henson) indicates that those organizations have an uncertain grasp of what images are illicit and, arguably, an inappropriately proactive censorship strategy that reflects political opportunism rather than principle. They are not equipped to quickly and authoritatively vet what images – and what text or other content – is acceptable on the basis of 'artistic merit' or similar criteria. An institutionalised vetting process chills the communication that is a fundamental aspect of Australian democracy.

Given our interest in a principle-based and platform-neutral classification regime we suggest that it is anomalous that concern is expressed over images that are on display in commercial/noncommercial art galleries but not in religious institutions or in content provided to secondary school art students. Those images include depictions that – absent a religious reference – would be described as egregious expressions of sado-masochism (piercing with arrows and spears, flagellation, decapitations, the rictus of the crucified Christ, the impaling or incineration of a martyr, Bernini's *The Ecstasy of St Teresa* and so forth). If a vetting scheme is to be introduced we assume that it will be consistently applied, protecting all audiences and covering all venues. Installation of a 'parental advisory' warning (directed at both minors and adults) at the entry to churches and galleries alike is undesirable. Restriction to galleries displaying contemporary art and 'old masters' is equally undesirable but is presumably contemplated by the authors of some submissions to the ALRC.

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

In relation to this question we suggest that the ALRC address conflicting claims by undertaking independent empirical research and critically evaluating literature regarding how different demographics (including adults, teenagers, children and people from Non English Speaking Backgrounds) 'read' – or fail to read – the classification categories.

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?

As stated above, the different classification of the same content, according to different criteria, across cinema and DVD as compared to television is inconsistent and confusing.

Television's self-regulation and use of different classifiable elements and consumer advice warnings for what is audio-visual media of essentially the same kind as cinema or DVD is illogical. Indeed, the need for greater intervention in classification of content on television may be increased by its comparative ease of accessibility by children. We suggest that television also be included in the NCS or future regulatory framework to ensure consistency.

There is also inconsistency in the National Classification Code regarding classification categories for films and computer games. There is no R18+ category for computer games, and there are different criteria for determining whether films and computer games should be Refused Classification, requiring computer games that are "unsuitable for a minor to play or see" be classified RC. This has the effect of creating a meaningful and deleterious discrepancy between Australian and international classification regimes.

That discrepancy has the potential to harm the computer game industry in Australia. Additionally, it leads to games that in other jurisdictions are classified R18+ being classified MA15+ here, on the basis that they do not merit an RC classification. The creation of an R18+ classification would increase consistency across content and also allow for more appropriate categorisation of computer games in Australia.

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?

This is the only way to ensure consistency of classification and decision-making throughout the nation. It is a practical response to challenges posed by convergence, in particular the distribution of content over the internet and increasing participation by people across Australia in virtual spaces that disregard state/territory borders but are susceptible to control at the national level (a control founded on the telecommunications and customs powers). In 2011 it is anomalous that placing a foot over a state/territory border invokes a different

classification scheme and invites action by police or other government actors who potentially have little understanding of classification rationales and processes. We should not treat residents of Queensland or Tasmania as lacking the discernment and opportunities that evident among residents of other jurisdictions and that have not resulted in demonstrably greater harms to the adults/minors of those places.

Sarah Ailwood 14 July 2011

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