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Submission in response to ALRC Discussion Paper 77

Table of Contents

1. Introduction

1. The writer of this submission is the content provider of the non-commercial web site "libertus.net": about censorship and freedom of expression, primarily in Australia, which has been online since late 1995.

2. This submission does contain responses to all ALRC proposals, and lack of response to various aspects of other proposals, or any other suggestions in DP77, does not necessarily signify agreement, nor lack of concern (lack of time is generally more likely).

> ***"The National Classification Scheme does not aim to censor free or political speech."***
> - Australian Communications and Media Authority,
> 'Prohibited Online Content' web page (Accessed 17 Nov 2011)[1]

3. It is suggested that the ALRC may like to ask the ACMA what they mean by the above statement on their web site. Since it is beyond any doubt that the National Classification Scheme does aim to, and does, censor freedom of speech, perhaps they mean that the National Classification Scheme does not aim to censor speech ("content") that is provided free of charge, nor (narrowly defined) political speech. (Or perhaps the ACMA's statement is just plain wrong).

2. Fundamental Reform

4. Having spent an inordinate amount of time trawling through the spaghetti[2] in the formidably sized DP77, in an effort to comprehend the ALRC's intentions, the writer is unable to discern any indication of proposed "fundamental reform" of the "National Classification Scheme".

5. It is clear however, that the ALRC proposes *massive* "reform" of the classification and censorship ***enforcement*** regime both offline and online. In the writer's view, many of these enforcement-related proposals are steps backward. Many of the proposals appear unlikely to be of much, if any, benefit to anyone other than industry/commercial content providers. Many appear to have adverse and undesirable impacts for some consumers (including parents) of *offline* commercially provided content (in comparison to the existing situation), and *most certainly* for non-commercial (and possibly some other) online content providers. In the foregoing regard, the writer finds the manner in which the ALRC has attempted to apply the mantra of "platform neutrality" quite odd, and demonstrative of why pursuing platform neutrality is not necessarily appropriate in any particular set of circumstances.

6. In the writer's view, the ALRC's *actual* "guiding principles" and objectives in developing proposals appear able to be summarised as follows:

(a) Making classification compliance easier, cheaper and quicker for commercial content providers, primarily big business, and businesses that have paid to become a member of an industry association that develops an industry code containing special rules, *desirable to its members*, in relation to classification compliance, with particularly special attention to making life easy for the computer games industry.

(b) Creating a scary new censorship enforcement regime applicable to online content providers; *including* online *non-commercial* content providers (i.e. average everyday Australians) whom the ALRC purports "should be able to...participate in media of their choice", "within the parameters of the law", which the ALRC proposes be extended to make individuals liable to criminal prosecution and penalty for inability to foresee various types of classification decisions that would be made by a panel of members of the Classification Board (which are not even required to be unanimous decisions). See Section 3.

(c) Enabling classification criteria in the National Classification Code and Guidelines for Classification, to be changed (to increase, or decrease, restrictions and censorship) vastly more easily by giving a single Minister of the Commonwealth Government the unilateral power to change the classification criteria, i.e. such changes would not require the approval of the Commonwealth Parliament, nor would the Commonwealth Parliament have the power to prevent any such changes.

1 http://www.acma.gov.au/WEB/STANDARD/773423/pc=PC_90102 (Accessed 17 Nov 2011)

2 DP77 at 5.5 states that existing media regulatory frameworks have been described by a commentator as "like a bowl of spaghetti". In this writer's opinion, the same thing can be said about the content of DP77.

[The ALRC suggests that the empowered Commonwealth Minister "might be" the Minister for Broadband, Communications and the Digital Economy (currently Senator Stephen Conroy) without mentioning any reason for suggested change from the long existing situation of the Attorney-General or Minister for Justice being responsible for the Commonwealth's participation in the existing National Classification Scheme]. See under Proposal 9-4 for further information.

3. A scary new censorship enforcement regime applicable to individuals

3.1 Non-commercial content providers (i.e. average everyday Australians)

7. The ALRC's proposals, if implemented, would significantly **extend** the breadth of existing Commonwealth law for the intended purpose of enabling criminal prosecution and penalisation of online **content providers,** including **non-commercial** content providers (i.e. average everyday Australians). Existing Commonwealth law concerning online content (sch. 7 of the BSA) does **not** apply to *content providers*, it applies to "designated content/hosting *service* providers".

8. The writer is shocked by ALRC proposals which, in effect, would make **non-commercial** online content providers criminally liable for inability to foresee a classification decision that would be made by a panel of members of the Classification Board (which is not even required to be unanimous, and a panel making a classification decision can be as few as 2 members). That and related issues were raised by this writer on the ALRC's web discussion forum on 7 November 2011, to which a person posting under the name "ALRC legal team" responded "...*You raise a number of important issues....*"[3].

9. As was the case, during 1999 to 2002, when near identical proposals were issued by State and Territory Censorship Ministers/Governments for public consultation and/or Bills were tabled in Parliaments, (only one of which (S.A) ended up implementing such laws), the ALRC's legislative reform proposals appear to have been made without adequate, if any, consideration of criminal justice and other serious issues.

10. The writer suggests that the ALRC dispense with any pretence that "classification" proposals are about regulating "content". So-called "content" cannot, of itself, be regulated; only people's conduct can be.

11. In the writer's opinion, the ALRC should reconsider many of its proposals from a first principles position of determining whose conduct should be regulated, for what purpose/s and in what circumstances, and, what methods any particular types of online content providers would, in fact, have available to them to enable them to comply with ALRC's proposed new laws (other than by self-censorship to avoid risk of being charged with an offence, or any other sanction or penalty).

12. The following relatively short outline/analysis is provided with a view to assisting comprehension of why the writer is shocked and disturbed. The ALRC's proposal to make online content providers, *including non-commercial* content providers, liable to prosecution and penalties:

(a) has been made without providing one iota of evidence, nor even suggesting, that the ACMA's existing enforcement powers under Sch. 7 of the BSA (which are not applicable to content providers) are not sufficient and adequate in relation to removing unrestricted R18+ content and/or any other type of so-called "prohibited content" from Australian hosted web sites;

(b) was not canvassed in prior ALRC paper IP40, and has not been the subject of public consultation, nor public and/or parliamentary debates, since a decade ago;

(c) raises a raft of criminal and other justice issues that are not mentioned in DP77, let alone addressed, - including, **but not limited to**, making average everyday Australians liable to criminal prosecution and penalty for inability to foresee a classification decision that would be made by a panel of members of the Classification Board (which is not even required to be a unanimous decision);

(d) offers no means by which non-commercial content providers could protect themselves from (c) above due to the exorbitant cost of classification by the Classification Board ($550[4] for a short, or any length, web page consisting solely of text, or a single image, or a video of 0-60 minutes running time) which the ALRC does not propose be made less expensive, let alone free of charge for content

3 http://www.alrc.gov.au/public-forum/classification-forum/3-restricted-access-systems/#comment-245

4 Fee for classification of "Film - Other" (0-60mins) because images and text on a web page are deemed to be a film. http://www.classification.gov.au/www/cob/classification.nsf/Page/Industry_FeesforClassification_FeesforClassification-DVDincludingACAandATSASchemes

providers who do not sell their content, nor in any other way gain monetary profit from producing and providing it.

(e) recognises that training is necessary to "properly" apply classification criteria, in proposing to make classification cheaper and quicker for industry/business by allowing more types of content to be classified by businesses' employees, but only if they have "*completed training approved by the Director of the [Classification] Board*" in order "*[t]o ensure that all industry classifiers are classifying content consistently and properly applying the statutory classification criteria*" (para 7.76), but does not regard training as necessarily sufficient and therefore proposes that the industry classifiers' decisions be subject to audit and review by the Classification Board.

(f) proposes that "*providers of content that is likely to be R 18+ should not need to be trained to determine the likely classification of content. If access to the content is restricted, the objectives of the law—particularly the protection of minors from adult content—are met*" (para 8.12). In other words, the ALRC proposes that non-commercial content providers, who cannot afford to pay the Classification Board's exorbitant fees to find out whether their speech and/or other creative works would in fact be classified R18+, implement a restricted access system and hide their content behind it;

(g) does not suggest even one example of a "restricted access system" that non-commercial online content providers could, even assertedly, implement to restrict access (i.e. prevent access by minors), let alone any that would be affordable and technologically and administratively practical for non-commercial content providers;

(h) proposes to make compliance with restricted access system requirements easier for industry/ businesses by proposing that "*methods of restricting access...should be set out in industry codes*" because "*as submissions have highlighted, methods of restricting access have a number of commercial and technical complexities*" (para 6.53). The probability that any such industry code would or could contain methods possible and practical for most non-commercial online content providers is zero.

(i) proposes that the Regulator be given new powers (i.e. that the ACMA does not have). For example: "*if the Regulator...considers that a piece of content is likely to be R 18+, the Regulator should issue a notice to the content provider requiring it to restrict access to the content or have the content classified. This notice might be called a 'restrict or classify notice'. The proposed Classification of Media Content Act ... should* ***provide for an offence of failing to comply with a 'restrict or classify notice'***". For many, probably most, non-commercial online content providers a so-called "restrict or classify notice" would actually be a "stop distributing the content or be prosecuted notice" because they cannot afford to pay the Classification Board's exorbitant fees to find out whether the Regulator's **guess** about the likely classification is correct, and implementing a restricted access system is either impossible or financially and administratively impractical. Therefore a "restrict or classify notice" will operate as a compulsory take-down notice.

(j) proposes that: "*Offences under the new Classification of Media Content Act should be subject to criminal, civil and administrative penalties similar to those currently in place in relation to online and mobile content under sch 7 of the Broadcasting Services Act 1992 (Cth).*" (Proposal 14-4). Offence penalties under sch 7 of the BSA apply to "designated content/hosting service providers", not content providers, and the penalty for failure to comply with an ACMA-issued take-down notice by 6.00pm the next business day is up to 100 penalty units (AU$11,000) for each day during which the failure to comply continues. Very unfortunate for a non-commercial content provider who's away on holiday, or in hospital, etc. If the ALRC was not proposing that penalties "similar" to that apply to content providers, including non-commercial content providers, it could have said so.

(k) has been made in the absence of any indication that the Commonwealth Government wishes to attempt to have C'th, or any, legislation enacted that imposes penalties on non-commercial online content providers, i.e. average everyday Australians (nor any other online content providers). Both major Federal political parties have had ample opportunity to propose to do so, and/or table such a Bill in parliament, since the online content regulation provisions of the BSA were enacted in 1999, including when those provisions were amended in 2007;

(l) is directly contrary to the evident decisions since 1999 to date of all State/Territory Parliaments and Governments (except S.A.) that it is undesirable to make their citizens liable to criminal prosecution

for providing unrestricted R18+ content online, nor for various other conduct that would become a criminal offence if the ALRC proposals are enacted in law.

13. In relation to (l) above, in 1999, State/Territory Censorship Ministers issued draft model legislation, intended to "complement" the (then new) online content censorship provisions of the Commonwealth BSA. The draft legislation proposed to apply criminal penalties to citizens/content providers in each State/Territory that were almost identical to the ALRC's proposals, including criminal offences for providing content that is or would be R18+ without implementing a restricted access system, and content that "may be" RC etc. Since issue of the draft model legislation in 1999 for public consultation, only one Australian jurisdiction (S.A.) has enacted such legislation.

14. New South Wales initially intended to implement legislation similar to the 1999 model legislation but subsequently rejected it following parliamentary committee inquiry. NSW does not have online content regulation laws applicable to content providers in operation as a result of the findings and recommendations of the NSW Parliament Standing Committee on Social Issues report: "Safety Net? Inquiry into the Classification (Publications, Films and Computer Games) Enforcement Amendment Bill 2001, Final Report: On-line Matters"[5]. Among numerous other things, the Committee found that:

- "the proposed model for regulation of on-line content contained in Schedule 2 of the Act could have a significant effect on the legitimate use of the Internet and may affect the fair reporting of news and current affairs,
- the major negative social impact of the on-line regulatory regime established by the Act is that legitimate use of the Internet by residents of NSW may be deterred,
- the provisions contained in Schedule 2 may have the unintended consequence of criminalising a wide range of academic or other material which would be legal to publish off-line, and
- Schedule 2 is more likely to have an impact on non-commercial providers of Internet content than commercial providers. This may restrict the range of material that is available on the Internet"

15. Now, a decade later, the Australian Law Reform Commission proposes that the Commonwealth over-ride State/Territory decisions that such types of laws and liability should not apply to their citizens, without providing one iota of evidence, or even assertion, that there is a problem that requires new laws and offences applicable to the conduct of non-commercial online content providers. If the ALRC believes that the ACMA's existing enforcement powers under Sch. 7 of the BSA (which are not applicable to content providers) are not sufficient and adequate in relation to take-down of unrestricted R18+ content and/or any other type of so-called "prohibited content", then the ALRC should publicly explain what the perceived problem is.

16. While the writer has long been a critic of Sch. 7 of the BSA (and its predecessor) for a variety of reasons, such concerns and reasons **pale into absolute insignificance** in comparison with the ALRC's proposals concerning online content providers. The saving grace of Sch. 7 of the BSA is that it does not treat average everyday Australian non-commercial content providers as if they are criminals **merely because there are things that they cannot know and cannot do,** which is the opposite of what the ALRC proposed regime concerning non-commercial content providers would do.

3.2 Intention to criminalise existing lawful sale, and/or individuals' private conduct?

17. The writer is also highly disturbed by ALRC proposals that appear intended to adversely impact adults' existing personal rights and liberties.

18. The ALRC also proposes:

(a) to extend the breadth of the X18+ classification category to include content that is currently lawful to sell in all States/Territories (except Qld), while specifically declining to even propose/recommend that X18+ content be made legal to sell/distribute in all States. In addition that proposal is incapable of implementation without the result that some films that currently are or would be classified R18+, for cinema exhibition and on DVD, becoming "Refused Classification" (See Section 9.1.1.2);

5 http://www.parliament.nsw.gov.au/Prod/parlment/committee.nsf/0/6535938cf30f5fd1ca256cfd002a63c5/$FILE/Committee Report 01 June 2002 - Inquiry into General Matters.pdf

(b) to criminalise private conduct of average everyday Australian adults who make home movies of their own lawful adult activities for their own private use and screening in their own home (e.g. activities involving consenting adult sexual "fetishes" deemed by "classification" law to be offensive to hypothetical reasonable adults):

(i) by making it an offence to "screen" "in Australia" **unclassified** content that "is likely to be X18+" or "may be RC" (the term "screened" used in ALRC proposals is new - it is not used in State/Territory classification enforcement laws, nor in sch. 7 of the BSA);

(ii) by criminalising the simple possession of **unclassified** content, e.g. home-made movies, that "may be RC" by creating an offence for failing to have "all content" that "may be RC" classified (and by the Classification Board at a cost of $550+) regardless of the intended use of the content.

(c) to make it an offence to "distribute...in Australia" "content" (whether or not commercially produced and distributed) that "is likely to be" classified X18+ without first having it classified, thereby making it an offence for an adult person to send, **by email**, an unclassified photo or video of themself (that "is likely to be" X18+) to another adult with whom they have a relationship.

(d) etc.

19. Also, in relation to (b) above, it appears to the writer that that is one of the "gaps" in Commonwealth constitutional powers, i.e. States' power to regulate or not, that the ALRC considers the States should refer (give up) to the Commonwealth (para 13.19 of DP77) in order to implement all ALRC proposals and criminalise conduct referred to in (b) above that is currently lawful in the overwhelming majority of States.

4. Guiding Principles for Reform

20. The ALRC's list of guiding principles seems to have much in common with the Refused Classification criteria and mythical community standards. No doubt the ALRC knows how and which principles it has applied in relation to any proposal and why.

5. Proposed new Classification Scheme & Commonwealth Act (P5-1 to 5-3)

Proposal 5–1 A new National Classification Scheme should be enacted regulating the classification of media content.

21. Opposed. See Section 3.1 above concerning criminal justice issues and compliance impossibility for most **non-commercial** online content providers. Se also under Proposal 9-4, and elsewhere herein.

Proposal 5–2 The National Classification Scheme should be based on a new Classification of Media Content Act. The Act should provide, among other things, for: ...

22. Opposed, for reasons that will be evident elsewhere herein.

Proposal 5–3 The Classification of Media Content Act should provide for the establishment of a single agency ('the Regulator') responsible for the regulation of media content under the new National Classification Scheme.

23. See Section 12 in relation to a Regulator.

Proposal 5–4 The Classification of Media Content Act should contain a definition of 'media content' and 'media content provider'. The definitions should be platform-neutral and apply to online and offline content and to television content.

24. The ALRC states in DP77:

> *5.34 The ALRC proposes that, under the new scheme, some media content must be classified and access to other media content restricted to adults. Those with the* ***primary responsibility to comply with these laws are referred to as 'content providers'. ... definitions should be both broad*** *and platform-neutral ...* [emphasis added]

25. The writer is totally opposed to a broadly defined definition of "content provider". See Section 3.1 above concerning criminal justice issues and compliance impossibility for most **non-commercial** online content providers.

6. Content that must be, or may be, classified

6.1 "must be classified before being sold, hired, screened or distributed in Australia"

26. The above phrase is used in a number of ALRC proposals concerning content that must be classified, and the following comments and criticisms apply to all such proposals.

6.1.1 "screened...in Australia"

27. The ALRC's proposal to make it a criminal offence to "screen...in Australia" various types of films that have not been classified is a breathtakingly broad extension of existing law. These proposals would criminalise private conduct that is currently lawful in all States and Territories. The term "screened" is not used in any State/Territory classification enforcement legislation, nor in sch. 5 or 7 of the BSA. Currently, it is not an offence in any Australian jurisdiction to **privately** "screen" (in the presence of adults) unclassified films that would be classified X18+, nor it is an offence in any Australian jurisdiction (except W.A.) to **privately** "screen" unclassified films (in the presence of adults) that would be Refused Classification (RC). The ALRC's proposals would criminalise the private conduct of average everyday Australian adults who "screen", privately in their own home, home-made movies of their own lawful adult sexual activities, (that "classification criteria" deems offensive to hypothetical reasonable adults), without having their home-made movie classified first.

28. The ALRC needs to explain what legitimate public purpose it considers would be served by its proposed use of the new term "screened" in criminal offences, instead of existing terminology in State/Territory classification enforcement legislation i.e. "exhibit in a public place".

29. Moreover, who does the ALRC intend would be held liable when a person in Australia using a computer in their own home, or in a library, or in an educational institution, etc, accesses (whether accidentally or not) Internet content made available by a resident of another country, that is **un**classified, and is a "feature-length film", or is content that would be classified X18+ or RC, and thereby causes such content to be "screened in Australia" (on a computer screen) before it has been classified?

6.1.2 "distributed ...in Australia" and/or "screened...in Australia

30. The ALRC's terminology appears intended to extend the breadth of existing Commonwealth law by creating criminal offences applicable to average everyday Australian residents who make content available on web sites hosted outside Australia. Sch. 7 of the BSA does not attempt to regulate, let alone criminalise, the conduct of content providers resident in Australia who make content available on overseas hosted sites that is subsequently "screened...in Australia" or "distributed...in Australia" if an Australian resident accesses the content. The ALRC should clarify its intentions and justify any proposal intended to extend the reach of Commonwealth law to the provision of content on overseas hosted sites.

6.1.3 "sold...in Australia"

31. Clarity is also necessary in relation to what is meant by "sold in Australia". As one example, if a content producer/film maker in Australia sells an **un**classified "feature-length film" to a commercial film distributor in another country, and sends the film to the purchaser by means of the Internet, did the sale take place "in Australia" and/or will the "content provider" have committed an offence of selling an unclassified "feature-length film"? If yes, what legitimate public purpose is deemed to have been served by the creation of such an offence provision. Moreover, Schedule 7 of the BSA does not attempt to regulate the activities of Australian residents who may wish to send content to a particular person in another country.

32. There are numerous other questions and issues of a similar nature arising from an attempt to more or less copy and apply laws originally designed to regulate the sale, commercial distribution and public exhibition of offline products to members of the public resident in Australia, to the use of the Internet (which is used for vastly more purposes than commercial sale/distribution), particularly when attempting to draft "platform neutral" legislation.

6.2 Other definitions and terminology

6.2.1 "feature-length film"

33. The writer cannot see how that could be defined other than by some number of minutes of running time, which would seem likely to encourage cutting of some films to reduce running time and avoid classification requirements. That would not be a desirable outcome of "classification policy" for Australian film viewers.

6.2.2 "produced on a commercial basis"

34. It is far from clear what is intended by "produced on a commercial basis". If, for example, student film makers produce a "feature-length film" and make it available for viewing free of charge on their own web site, and that web site is supported by advertisers who pay to have their advertisements appear on the web site, or, the web site invites visitors to **donate** money, then:

(a) was the film "produced on a commercial basis"? or

(b) is a film made available in those circumstances intended to be covered by the ALRC's statement that: "*A more precise definition in the proposed Act should, however, clarify that other content does not need to be classified. In particular, this definition is not intended to capture other film-like internet content such as user-generated videos" (para 6.59).*

6.2.3 "user-generated" content

35. The writer considers that the term "user-generated" should not be used in legislation, nor in law reform proposals, without defining what it means, because the question arises: user of what? It seems, most frequently, to be used by people who are intending to mean users of services such as YouTube and Facebook. Is that what the ALRC means?

6.2.4 "television programs ... produced on a commercial basis"

36. Are all television programs broadcast by the public broadcasters ABC and SBS "produced on a commercial basis"?

> *6.60 …The ALRC uses the phrase 'television program' in the absence of a popularly understood, media-neutral alternative phrase.*

37. Obviously the above statement leaves readers wondering precisely what the ALRC intends, particularly those aware of the controversy and appeals occurring in the UK about regulatory definition of "TV-like" for the purposes of requiring "TV-like" online Video on the Demand service providers to pay licence fees because television broadcasters are required to do so.

38. The writer doubts it is possible to legislatively define content 'like a television program' for the purpose of requiring classification of online content, without capturing content that the ALRC probably does not intend be captured, unless the definition is limited to content that was first made publicly available in Australia on broadcast television.

6.3 Feature-length films, television programs, and computer games (P6-1 to 6-2)

Proposal 6–1 The Classification of Media Content Act should provide that feature-length films and television programs produced on a commercial basis must be classified before they are sold, hired, screened or distributed in Australia. The Act should provide examples of this content. Some content will be exempt: see Proposal 6–3.

39. Not supported. Insufficient clarity to determine intent of proposal. See Sections 6.1 and 6.2 above.

Proposal 6–2 The Classification of Media Content Act should provide that computer games produced on a commercial basis, that are likely to be classified MA 15+ or higher, must be classified before they are sold, hired, screened or distributed in Australia. Some content will be exempt: see Proposal 6–3.

40. Not supported. Insufficient clarity to determine intent of proposal. See Sections 6.1 and 6.2 above.

6.4 "Exempt Content" (P6-3)

Proposal 6–3 The Classification of Media Content Act should provide a definition of 'exempt content' that captures all media content that is exempt from the laws relating to what must be classified (Proposals 6–1 and 6–2). The definition of exempt content should capture the traditional exemptions, such as for news and current affairs programs. The definition should also provide that films and computer games shown at film festivals, art galleries and other cultural institutions are exempt. This content should not be exempt from the proposed law that provides that all content likely to be R 18+ must be restricted to adults: see Proposal 8–1.

6.4.1 Art galleries and other cultural institutions

41. The writer strongly objects to the proposal that art galleries and other cultural institutions be made subject to a new legislated obligation to guess whether artworks are "likely to be R18+ and if they guess so, restrict access to adults. What, if any, serious problem currently exists, and what, if any, legitimate public purpose is achieved by, among other things, preventing parents from taking, e.g. their teenage sons and daughters, to see an art exhibition that includes so-called "content" that may be likely to be classified R18+. (Note: under the classification enforcement laws of a number of States and Territories it is specifically not an offence for parents to privately exhibit a film that has been classified R18+ in the presence of their children).

42. Has the ALRC considered the implications and potential consequences of its restrict access to likely to be R18+ proposal for the National Library of Australia, the "content provider" of "*PANDORA, Australia's Web Archive, is a growing collection of Australian online publications, established initially by the National Library of Australia in 1996, and now built in collaboration with nine other Australian libraries and cultural collecting organisations.*"[6] (Note: The PANDORA archive of web sites includes content produced and made available online by many types of Australian content providers including non-professional, non-commercial content providers).

6.4.2 News and Current Affairs

43. The ALRC states:

> *6.65* **...** *The Act should contain a definition of 'exempt content' drawn from the existing exemptions in the Classification (Publications, Films and Computer Games) Act 1995 (Cth) (Classification Act), the Broadcasting Services Act 1992 (Cth), and television codes. This exempt content would include, for example:*
> • *news and current affairs programs;*

44. The writer assumes that the above states "programs" because the ALRC proposals do not require classification of content, that would contain news and current affairs, unless the content is an (undefined) "television program" or "feature-length film".

45. However, ALRC proposals do require all content providers of news and current affairs "content", including but not limited to:

- publishers of newspapers printed on paper;
- providers of online newspaper Web sites;
- TV broadcasters

46. to assess whether news and current affairs content (whether in the form of written words, audio or video) would be "likely to be" classified R18+ and if so restrict access to adults.

47. The writer considers restricted access requirements applicable to news and current affairs information, that is or may be R18+, are totally inappropriate and impractical.

48. As the writer remarked in response to IP40, a significant "achievement" of the ACMA's existing powers to require implementation of restricted access and/or order take-down of "likely to be" R18+ content occurred in 2009 when various Australian news sites deleted links to overseas-hosted videos showing the death of Neda Agha-Soltan during the Iranian election protests (which shocked the world) after it became publicly known that the ACMA had applied to the Classification Board for classification of the videos and

6 http://pandora.nla.gov.au/about.html

the Board classified them R18+[7]. It is unknown whether link deletion orders were issued to Australian news sites, or whether they self-censored to avoid receiving ACMA take down orders, due to the impracticality and costs of implementing, administering and maintaining an onerous and reader-privacy invasive ACMA-approved restricted access system for use in the relatively few instances where content may be likely to be R18+.

49. Requiring restricted access to such information cannot effectively achieve any legitimate public purpose. Australian adults, and minors, hear about such events from numerous sources and those interested will easily find such information, deemed R18+ in Australia, on overseas hosted sites. Most Australian adults are unlikely to provide privacy invasive information to Australian online newspaper sites merely for the purpose of occasionally accessing news reports that have been required to be hidden by Australian Internet censorship legislation. They will use overseas hosted web sites instead. This outcome is obviously not consistent with the ALRC's Guiding Principle "(6) the classification regulatory framework should not...disadvantage Australian media content and service providers in international markets".

50. News and current affairs reporting, analysis, commentary and opinion "content", both offline and online, should be entirely exempt from classification requirements and from associated restricted access requirements.

6.5 Content likely to be X18+ (P6-4)

Proposal 6–4 If the Australian Government determines that X 18+ content should be legal in all states and territories, the Classification of Media Content Act should provide that media content that is likely to be classified X 18+ (and that, if classified, would be legal to sell and distribute) must be classified before being sold, hired, screened or distributed in Australia.

51. Firstly, the above proposal suffers from the same definition and terminology flaws raised in Sections 6.1 and 6.2 above.

52. Secondly, Proposal 6-4 is strongly opposed because in other sections of DP77 the ALRC proposes that content that would be classified X18+ (which is currently illegal in all States to sell) be significantly expanded to include content that is currently classifiable and legal to sell to adults from shops in all States and Territories, except Queensland. (That ALRC proposal would also result in some films currently classified R18+ for cinema exhibition, and on DVD, being Refused Classification). See Section 9.1.1.2 for detailed information.

53. With regard to content that ***currently*** is or would be classified X18+, it should not be subjected to classification requirements different from other adults-only classification categories. Consistency in ALRC proposals would result, for example, in a requirement that "feature-length" films "produced on a commercial basis" (whatever that is intended to mean) that are likely to be X18+ must be classified, not all likely to be X18+ content. The ALRC's stated justification for requiring mandatory classification of all "likely to be X18+" is contrary to the statement in DP77 that:

> *"1.20 Law reform recommendations cannot be based upon assertion or assumption and need to be anchored in an appropriate evidence base."*

54. Nevertheless, in relation to proposed mandatory classification of all X18+ content, the ALRC asserts :

> *"6.72 ... the sheer quantity of sexually explicit adult content on the internet ...*
> *6.73 ... Even if it is highly unlikely that most adult content will be classified, by insisting that it should be, the law makes clear Australia's standard on what may be acceptable to display in sexually explicit content."*

55. If the ALRC intends to maintain its mandatory classification proposal concerning X18+ content, the ALRC should find a different justification (from 6.73), and one that is not based on assertion or assumption. At the very least, the ALRC should change the phrase "makes clear Australia's standard" to "makes clear Censorship Ministers' and the Federal Parliament's standard (as at 2000)", given there is no evidence that the

7 ACMA Blacklists Iran Protest Video & Boing Boing, 28 August 2009
http://www.orzeszek.org/blog/2009/08/28/acma-blacklists-iran-protest-video-boing-boing/
(Note: As at July 2011, some Australian news sites contain, or link to, much shorter edited versions of the videos that were classified R18+, while others which previously provided link/s to the unedited versions have deleted the link.)

existing criteria for X18+, nor the prohibition on sale in all States, is reflective of the general Australian community's standard; evidence is to the contrary[8]. Furthermore the ALRC's 6.73 justification invites the claim that therefore all content likely to be R18+ must be classified to allegedly 'make clear Australia's standard on the limits on adult discourse about social and political issues (in so-called "media content") and descriptions and depictions of violence, etc' (although there is no evidence that such an assertion about "Australia's standards" would be factual either).

6.6 Content that "may be" be RC (P6-5 to P6-6)

Proposal 6–5 The Classification of Media Content Act should provide that all media content that may be RC must be classified. This content must be classified by the Classification Board: see Proposal 7–1.

56. This proposal is strongly opposed because it creates an offence of failing to have material classified (merely because it's possible it actually would be Refused Classification); Classification Board fees are unaffordable for non-commercial content providers; it is impossible for anyone to know what would in fact be "RC" under current broad and vague criteria; and the result is likely to be unnecessary self-censorship due to fear of being prosecuted for failure to have material classified. This proposal been made without providing one iota of evidence, nor even suggesting, that the ACMA's existing enforcement powers under Sch. 7 of the BSA (which are not applicable to content providers) are not sufficient and adequate in relation to removing content that is or would be RC.

57. If new Commonwealth criminal offences and penalties are to apply to non-commercial online content providers in relation to unknowingly and/or knowingly providing any type of content that is not already illegal to make available/distribute under the Commonwealth Criminal Code, then **such offences and penalties must not be based on mere failure to pay to have material classified**. Such offences and penalties should be in the Criminal Code, not a "Classification Act" and should clearly specify, in detail, the type/s of content that are illegal to distribute in a manner that members of the public can understand and comply with.

58. Furthermore, Proposal 6-5 requires content that "may be RC" to be classified regardless of the purpose or use of the "content". It would therefore subject average everyday Australians to the risk of criminal prosecution for simple possession of *unclassified* content that may be or would be Refused Classification. This includes home-made movies made by average everyday Australian adults to record their own lawful adult activities (which so-called "classification" law deems offensive to hypothetical reasonable adults). As the ALRC itself states out in DP77, "it is not illegal to possess a considerable amount of RC material in all parts of Australia except in Western Australia and in prescribed areas of the Northern Territory" (para 10.6). Therefore Proposal 6-5 requires people to pay classification fees in order to "safely" possess home made movies etc for private use that are legal to possess (in most parts of Australia) regardless of the classification decision that would result from paying a classification fee.

Proposal 6–6 The Classification of Media Content Act should provide that the Regulator or other law enforcement body must apply for the classification of media content that is likely to be RC before:
(a) charging a person with an offence under the new Act that relates to dealing with content that is likely to be RC;
(b) issuing a person a notice under the new Act requiring the person to stop distributing the content, for example by taking it down from the internet; or
(c) adding the content to the RC Content List (a list of content that the Australian Government proposes must be filtered by internet service providers).

59. The above proposal merely requires the Regulator or other law enforcement body to **apply** for a classification decision. It should require them to apply for **and obtain** a classification decision **from the Classification Board** before doing any of (a), (b) or (c).

60. Furthermore, Proposal 6-6 is specifically limited to "content that is likely to be RC" and there is no similar proposal in DP77 concerning other types of content. **An additional proposal/recommendation, concerning other categories of content should be made, the same as Proposal 6-6 (a) and (b).**

8 More detailed information was previously provided in the writer's response to IP40: Submission No. CI 1244 Section 5.2.6

61. In relation to Proposal 6-6(c), the writer is strongly opposed to the Federal Government's proposal, but if such proposal is implemented, certainly the Regulator must be required to apply for **and obtain** an "RC" classification decision from the Classification Board before adding content to a mandatory filtering/blocking list.

6.7 Modified content (P6-7)

Proposal 6–7 The Classification of Media Content Act should provide that, if classified content is modified, the modified version shall be taken to be unclassified. The Act should define 'modify' to mean 'modifying content such that the modified content is likely to have a different classification from the original content'.

62. Is the ALRC stuck in an analogue world, or does the ALRC seriously intend that online "content providers" should have to constantly check their web pages? The content of many Web pages changes multiple times per day without action by the "content provider". The writer has not has time to fully contemplate and document the potential multitude of liability risks and problems that could arise for content providers.

63. While it would not resolve *all* of the above types of problems, at the very least, Proposal 6-7 should be changed so that content is taken to be unclassified only if the modified version is likely to have a **higher** classification than the original content, and also if R18+ content is modified such that it is likely to be classified X18+ (X18+ is not a 'higher' classification than R18+; these two categories are mutually exclusive as discussed in Section 5.2.1 of my previous submission[9]). For example, if content is modified such that the classification is lowered from e.g. MA15+ to proposed "T13+" then re-classification should not be required; it should be optional.

7. Who Should Classify Content? (P7-1 to P7-7)

7.1 Classifiable Content

Proposal 7–1 The Classification of Media Content Act should provide that the following content must be classified by the Classification Board:
(a) feature-length films produced on a commercial basis and for cinema release;
(b) computer games produced on a commercial basis and likely to be classified MA 15+ or higher;
(c) content that may be RC;
(d) content that needs to be classified for the purpose of enforcing classification laws; and
(e) content submitted for classification by the Minister, the Regulator or another government agency.

64. In relation to (c) above, see remarks under Proposal 6-6 above.

65. In relation to (d) above, there is no numbered proposal in DP77 that **requires** the Regulator, nor other law enforcement agencies, to have content classified for the purpose of enforcing classification laws (except Proposal 6-6 which is specifically limited to "content that is likely to be RC"). Does the ALRC intend that such agencies will in fact "need" to submit other types of content to the Classification Board for classification before taking enforcement action? They should be so required.

66. In relation to (e) above, for what reason/s or purpose/s does the ALRC envisage that the Regulator or another government agency would submit content for classification **other than** (d) above, i.e. enforcing classification laws?

Proposal 7–2 The Classification of Media Content Act should provide that for all media content that must be classified—other than the content that must be classified by the Classification Board—content may be classified by the Classification Board or an authorised industry classifier.

67. This proposal appears to have potential to create an unlevel playing field between large and small businesses, which would be undesirable. It appears to the writer, from the information in DP77, that it may not be practical and affordable for small business to employ trained classifiers, and therefore they may have to pay the very high classification fees charged by the Classification Board. While industry associations may

9 Submission No. CI 1244 in response to ALRC Issues Paper 40.

engage trained classifiers, it seems possible that use of such classifiers could be limited to businesses who had paid expensive membership fees to join the industry association, etc.

68. In relation to the ALRC's statement that:

> *7.100 Similar to current arrangements concerning complaints about television program content, complaints would, in the first instance, be made directly to the organisation that made the classification decision. A complainant may lodge a complaint with the Regulator where that complainant considers the complaint has not been satisfactorily resolved.*

69. In relation to content that is **not** a television program being broadcasted, how will intending complainants be able to know or find out, in the first instance, who made the classification decision, if the same classification labels/markings are applied to content classified by the Board and by industry classifiers?

70. Will the Regulator be required to make publicly accessible, and searchable, a classification database of industry classification decisions, containing the same information as the existing online database about the Classification and Review Boards' classification decisions plus the name of the organisation/industry classifier that made a classification decision?

Question 7–1 Should the Classification of Media Content Act provide that all media content likely to be X 18+ may be classified by either the Classification Board or an authorised industry classifier? In Chapter 6, the ALRC proposes that all content likely to be X 18+ must be classified.

71. Content that, under **current** legislation, is likely to be X18+ should be able to be classified by an authorised industry classifier, or the Classification Board, at the choice of the content provider/distributor.

72. The writer does not agree with the ALRC's proposals elsewhere in DP77 about what would **become** likely to be X18+ if the ALRC's proposed changes are implemented, and therefore also does not agree that **all** content "likely to be X18+" if the ALRC's proposals are implemented "must be classified". See Section 9.1.1.2.

Proposal 7–3 The Classification of Media Content Act should provide that content providers may use an authorised classification instrument to classify media content, other than media content that must be classified.

73. The writer is extremely dubious about this proposal in relation to consistency in classifications decision making, and how consumers would/will be able to know who, *or what*, made the classification decision signified by classification category markings. If artificial intelligence automated generators, as envisaged by the ALRC, could make the same classification decisions as real people trained to do so would, in any particular instance, why bother to have Classification Boards and trained industry classifiers?

7.2 Proposed disbandment of the Classification Review Board (P7-6)

Proposal 7–6 The Classification of Media Content Act should provide that the functions and powers of the Classification Board include:
(a) reviewing industry and Board classification decisions; and
(b) auditing industry classification decisions.
This means the Classification Review Board would cease to operate.

74. The writer strongly objects to the proposed disbandment of the Classification Review Board for the purpose of enabling the Classification Board to review its own classification decisions. While the writer raised a number of issues in relation to the Classification Review Board in response to IP40, the ALRC's proposal involves some similar, and introduces new, issues and problems (a number of which the ALRC admits in Section 7). The end result would be more problematic and unsatisfactory than the existing situation.

75. In the undesirable event that the ALRC remains of the view that the Review Board should be disbanded, the writer makes additional comments as follows. The ALRC proposes:

> *7.93 The new Classification of Media Content Act should provide statutory requirements for the composition of review panels, including making explicit **whether** primary decision makers are to be allowed to sit on reviews. ...* [emphasis added]

76. Under no circumstances should any primary classification decision maker be permitted to sit on a review panel. The proposal that the Classification Board review its own decisions would eliminate **independent** merits review and the ALRC's implication that it would be acceptable to permit classifiers who made the first decision to vote on a review decision suggests that the ALRC is insufficiently aware of classification processes and why there has long been an **independent** Review Board. Furthermore, if the Classification Board is to be allowed to review its own classification decisions, then **merits** review (in addition to administrative review) should be made available in the Federal Court in relation to any Refused Classification decision and any review decision that results in content being classified R18+, X18+ or RC where the original classification decision was a less restricted classification category than the review decision.

> *7.93 ... In addition, in order to allow for review panels to be constituted as larger or completely different panels there should be legislative provisions prescribing the maximum size of panels for original classification decisions.*

77. The above is one of the reasons why the Review Board should **not** be disbanded. Prescribing the maximum size of panels inappropriately restricts the Director of the Classification Board's discretion to convene a panel of all members of the Classification Board in cases of classifying contentious material, and/or convening a second larger panel (which may or may not include the first panel members) to consider contentious material where the first panel's opinions were near evenly split and/or the first panel considered it would be appropriate and/or helpful to involve a larger number of Board members in discussions and decision making. Legislatively restricting the size of panels undermines the existing legislative intention/objective that the Classification Board, as a whole, be broadly representative of the "Australian community".

78. Furthermore, if the Review Board is disbanded, an associated issue is whether or not there that will result in less transparency about classification decisions. Currently, the Review Board publishes reports containing detailed reasons for all of its classification decisions on the classification web site (and previously, since at least 1995, published those reports in the printed annual reports). However the Classification Board does not publish any classification decision reports (and has not since at least 1995). There is no legislative obligation on the Review Board to publish classification decision reports, hence it appears that since at least 1995 the Review Board Convenors have voluntarily chosen to make such reports publicly available, presumably for reasons of transparency, among other things.

79. If review of classification decisions is to become a function of the Classification Board, there **must be a legislated obligation** on the Classification Board to make reports, containing detailed reasons for all classification review decisions, readily publicly available (e.g. on its web site) and to do so within a legislatively specified time frame that is no longer than 14 days after the decision was made.

80. The ALRC remarks:

> *7.87 A common criticism of the current review arrangements is that the cost of reviews is too high.47 Operations of the Review Board are expensive, as Review Board members travel to Sydney from across Australia to attend Review Board hearings and high-level secretariat support is provided by the Department for all Review Board activities. As Review Board members are part-time and not located in Sydney, organising reviews can also be logistically and administratively time-consuming.*

81. The above is not a reason to dispense with independent review of classification decisions by disbanding the Review Board. There are other means of reducing classification review fees, if there was the governmental will to do so.

7.3 Applications for Review

82. The ALRC says:

> *7.95 ... the ALRC considers that the Regulator should be provided with powers to submit an application for review in response to serious complaints, or as a result of audit activity undertaken by the Board.*

83. The Regulator must **not** be given such power, absolutely not. Far too many of the ALRC's proposals appear intended to undermine the independence of the Classification Boards by giving "the Regulator" powers to interfere in the Classifications Boards' activities and/or take over functions of the Boards.

84. Furthermore, no Minister should be permitted to apply for review of a classification, and the definition of "aggrieved person" in a Classification Act should be the definition that existed in the C'th Classification Act **before** 2000.

8. Restricting Access (P8-1 to P8-4)

Proposal 8–1 The Classification of Media Content Act should provide that access to all media content that is likely to be R 18+ must be restricted to adults.
and
Proposal 8–2 The Classification of Media Content Act should provide that access to all media content that has been classified R 18+ or X 18+ must be restricted to adults.

85. Firstly, the above proposals. if implemented, would create a new criminal offence applicable to parents who allow e.g. their teenage children to watch an R18+ film with them in their own home. Such an offence would be contrary to the exemption for that purpose for parents and guardians that is in most, probably all, States'/Territories' classification enforcement legislation. Is that one of the reasons why the ALRC considers States should refer their powers - those necessary to achieve the ALRC's proposed new Commonwealth Act - to the Commonwealth?

86. Secondly, the writer notes that since issue of DP77, the ALRC has asked on its online web discussion forum "*Restricted access systems are intended to stop minors from accessing certain content on the internet by verifying a person's age. Should restricted access systems continue to have a role in a national classification scheme. Do you have any suggestions of alternatives or improvements to the current restricted access systems*?[10] Responses to that question, pointed out numerous issues, difficulties and problems concerning mandatory requirements to implement such systems, particularly for non-commercial content providers.

87. In DP77, the ALRC asserts:

> *8.17 ... [R]estricting access at the R 18+ level, rather than the MA 15+ level, is more consistent with international norms concerning the regulation of online content, as the focus is on restricting access to adults.*

88. Can the ALRC support that assertion with examples, even one, of liberal democracies where legislation mandates that online content the same as the Australian R18+ category be hidden behind a restricted access system? The writer expects not.

89. The writer considers that online content providers should not be required to use restricted access systems.

90. However, if there "must be" a continuing pretence in Australian legislation that mandating online restricted access systems protects unsupervised children by preventing them from accessing unsuitable material on the the **world-wide** Internet, then, at most, the pretence should be limited to the pretence that currently applies in relation to MA15+ material, *but* instead of being applicable to MA15+, be applicable to content that is or is likely to be R18+. This would result in **only** following subset of R18+ content being required to be subject to a restricted access system.

Content that:
- does **not** consist of text and/or one or more still visual images; **and**
- is provided on payment of a fee (whether periodical or otherwise); **and**
  - is provided for profit or as part of a profit-making enterprise (other than a news service or a current affairs service); **or**
  - is provided by means of a mobile premium service.

91. The above would avoid the problems for non-commercial online content providers of being unable to implement an RAS, and eliminate the potential for written informational, research and discussion content to be captured by RAS requirements. Written material *may be* R18+ when e.g. it contains **detailed** information

10 http://www.alrc.gov.au/public-forum/classification-forum/3-restricted-access-systems

about a topic that may be disturbing to minors. Such topics include, but are not limited to, "suicide, crime, corruption, marital problems, emotional trauma, drug and alcohol dependency, death and serious illness, racism, religious issues".

Methods of Restricting Access

92. In relation to online content, it is astounding that the ALRC proposes that all online content providers be required to hide online content that is likely to be, or is, classified R18+ behind a restricted access system which limits access to adults, given DP77 fails to provide even one example of a type of restricted access system that is effective for that purpose, nor one that is even mostly effective that is **also** possible and practical for **non-commercial** online content providers to implement, notwithstanding having asked about this issue in IP40, and receiving over 2,400 submissions.

93. The basis for this proposal appears to be a claim made in Telstra's submission, which is quoted in DP77. Telstra's submission (CI 1184] states:

> *"Customers must provide their credit card details as part of their registration process [to access BigPond website content] ... **As credit cards are only issued to individuals aged 18 and over**, the validation of a customer's credit card constitutes verification that they are at least 18 years of age and allows them to access age-restricted content." [emphasis added]*

94. Firstly, Telstra cannot know whether the person entering credit card details online is the person to whom the card was issued, and as reported by a person posting in the ALRC's discussion forum, a credit card number can be used to register to access Bigpond Movies without the card ever being charged[11]. Therefore the holder/owner of the card would not know if, for example, their child had 'borrowed' their card number to sign up.

95. Secondly, Telstra is apparently mistaken in relation to credit card issue. Numerous Australian financial institutions (including major banks) issue credit cards to persons aged 16 and 17 years where the credit card is an additional card on a credit card account opened by an adult (depending on the institution, the adult may be a parent, sibling, or friend)[12].

96. Thirdly, the writer strongly suggests that the ALRC ask Telstra whether or not a credit card (as distinct from a debit card), is essential to register to access, for example, Bigpond Movies content, given a page on Telstra's web site states that to sign up/register to access Bigpond Movies a "credit/debit card is required"[13]. In addition, various people have remarked in online discussion fora that they use a debit card to access Bigpond Movies[14].

97. Pre-paid Visa Debit Cards[15] are reportedly purchasable by unaccompanied 10 year olds from Australia Post shops (and probably various other retailers), according to an "experiment" reportedly conducted by a participant in the Whirlpool discussion forum thread about mandatory ISP filtering. After the 10 year old purchased the Visa debit card "no questions asked", the child's father and father's friend used it to sign up to and access numerous porn sites. Unless information on Telstra's web site (mentioned above) is not factual, it appears a pre-paid debit card purchased by a 10 year old could be used to register to access Bigpond Movies.

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11 Submitted by cw on 25 October 2011 http://www.alrc.gov.au/public-forum/classification-forum/3-restricted-access-systems#comments

12 http://www.westpac.com.au/personal-banking/credit-cards/lower-annual-fee/55-day-interest-free-credit-card/
http://www.nab.com.au/wps/wcm/connect/nab/nab/home/personal_finance/4/2
http://www.boq.com.au/online_online_applications_faq_cards.htm
http://www.stgeorge.com.au/personal/credit-cards/compare-credit-cards

13 Telstra News: "*Telstra T-Box. BigPond finds another use*" states "Credit/Debit card details (for BigPond Movies sign up)"
http://exchange.telstra.com.au/?p=6285 (Accessed 27 Oct 2011)

14 http://forums.whirlpool.net.au/forum-replies.cfm?t=1562778#r6 (Posting dated Oct 2010)
http://forums.whirlpool.net.au/archive/1322892#r25184973 (Posting dated Aug 2010)
http://forums.whirlpool.net.au/archive/1322892#r25187311 (Posting dated Aug 2010)

15 http://auspost.com.au/personal/reloadable-prepaid-visa-cards.html Page states: "Reloadable Prepaid Visa cards are ideal for: ... online shoppers who want to keep their credit card or bank account details private; parents who want to provide their children with a controlled spending option that's easy to use and widely accepted"

98. In addition, various Australian financial institutions (including major banks) issue Visa Debit Cards or Mastercard Debit Cards to applicants under 18 years, including as young as 12 years[16], although more typically it appears eligibility is "over 16 years of age". While in some instances, there is a requirement that the debit card be linked to a transaction account held by an adult[17], in other instances it appears there is no such requirement[18].

99. While credit cards are apparently less easily obtainable by minors than debit cards, it would be highly inappropriate to mandate only credit cards. That would discriminate against adults unable to obtain credit, and interfere with adults' freedom to choose to avoid credit card fees and over-spending by use of credit.

100. It should also be noted that the use of credit cards/debit cards is not available to non-commercial content providers who have no means of checking the validity of a card, and in any case, growing awareness of privacy and security risks online, makes it decreasingly likely that potential visitors to a site will be willing to provide credit card information merely to gain access to freely provided content - much easier and safer to use overseas hosted sites not subject to burdensome and privacy invasive legislated obligations.

Proposal 8–3 The Classification of Media Content Act should not provide for mandatory access restrictions on media content classified MA 15+ or likely to be classified MA 15+.

101. This proposal, pursuing the mantra of "platform neutrality" is not fully supported. Access restrictions relating to age 15 should not apply to the provision of content online, because online content providers have no means of ascertaining whether or not a person is under or over age 15, and requiring online content providers to attempt to restrict access for that purpose achieves nothing given the ease with which unsupervised children of any age can access material that would be MA15+ on overseas hosted sites. The unworkability and ineffectiveness of online access restrictions is not a justification for completely removing existing requirements concerning MA15+ content applicable to the operators of cinemas and shops in the streets who can *see* their customers and estimate the age of unaccompanied children (which at least prevents younger children from accessing MA15+ material).

Proposal 8–4 The Classification of Media Content Act should provide that methods of restricting access to adult media content—both online and offline content—may be set out in industry codes, approved and enforced by the Regulator. ...

102. In relation to online content, given (unsurprisingly) it is evidently considered too difficult, or impossible, to specify in legislation the details of restricted access obligations to be placed on online content providers, with the result that commercial content providers are to be legislatively favoured by permission to develop their own "flexible" rules in industry codes concerning methods of restricting access, etc.; the restricted access requirements should apply ***only*** to commercial content providers who are participants in an industry which has an association that actually does produce a relevant industry code. Better, proposals requiring restricted access pertaining to online content should be abandoned.

Question 8–1 Should Australian content providers—particularly broadcast television—continue to be subject to time-zone restrictions that prohibit screening certain media content at particular times of the day? For example, should free-to-air television continue to be prohibited from broadcasting MA 15+ content before 9pm?

103. No. Effective from a date in the relatively near future, television broadcasting time-zone restrictions should cease and, in addition, television broadcasters - all types including free-to-air TV - should also be allowed to broadcast R18+ content. The reasons for that view, and what "relatively near future" means follows.

104. An ACMA parental lock standard/requirement for digital TV equipment sold in Australia came into effect in February 2011 (some such such equipment already had parental locks, and all must since February). Given typical political legislative time frames (especially when numerous changes to policy and legislation are under consideration and/or being drafted), the writer doubts any ALRC recommendations would be enacted before analogue TV service ceases throughout Australia, by which time a substantial proportion of the population are likely to have parental-lock capable TV equipment. While there probably would be legitimate concern that some parents may have bought non-lock capable digital TV equipment before

16 http://www.hsbc.com.au/1/2/personal/savings/visa-debit/faq
17 http://www.nab.com.au/wps/wcm/connect/nab/nab/home/personal_finance/15/17/1
18 http://www.commbank.com.au/personal/accounts/transaction-accounts/debit-mastercard/what-you-need.aspx

February 2011 (unknown, to the writer, how many products before then were not lock-capable), rather than continuing laws and rules designed for analogue TV merely for that reason, the government should subsidise the purchase of parental-lock-capable TV equipment for e.g. low income families with children under 15 years who prove they had bought non-capable equipment before February 2011, or something substantially similar. Any such subsidisation should not commence until the date of final switch-off of analogue TV and/or much nearer to commencement of new legislation that removed rules about what free-to-air TV may broadcast and when, whichever happened first.

9. Classification Categories and Criteria (P9-1 to P9-5)

9.1 One set of Classification Categories

Proposal 9–1 The Classification of Media Content Act should provide that one set of classification categories applies to all classified media content as follows: C, G, PG 8+, T 13+, MA 15+, R 18+, X 18+ and RC. Each item of media content classified under the proposed National Classification Scheme must be assigned one of these statutory classification categories.

105. The above proposal is strongly opposed. Among other things, the ALRC's proposal to apply film classification categories to content that is not a film, as stated in DP77, would result in publications and some films that are currently lawful to publicly exhibit in cinemas, sell and distribute, becoming Refused Classification and others classified X18+. See section 9.1.1.2 below.

9.1.1 What this means for publications

9.1.1.1 Existing "Unrestricted" classification

> *9.30 ... publishers may also choose to classify some of their other content. Classified publications could then be given any one of the proposed classifications: C, G, PG 8+, T 13+, MA 15+, R 18+, X 18+ or RC, accompanied by consumer advice where required or appropriate.36*

106. The writer is absolutely opposed to proposals to apply classifications to publications (whether voluntary or not) to any greater extent than currently. The writer is unaware of any evidence that there is widespread community demand for more classification categories for books, magazines, artworks, etc.

107. Legislative specification of new and more classification labels for publications will encourage vocal minority fundamentalist religious groups and serial complainers to complain about material in libraries, bookstores, art galleries, etc,, alleging it should be in a restricted part of the premises and/or classified.

9.1.1.2 Existing "Category 1 Restricted" and "Category 2 Restricted" classifications

108. The ALRC asserts:

> *9.32 Most publications that are currently required to be classified are sexually explicit magazines. Under the scheme proposed by the ALRC, these publications would be classified X 18+, rather than Category 1 restricted or Category 2 restricted. In the ALRC's view, this is the appropriate classification for this content, because the X 18+ classification is specifically for depictions of consensual sexually explicit activity.*

109. The ALRC's assertion, that "most publications" that are or would be classified Category 1 or 2 Restricted are "sexually explicit", is contrary to factual information published by the Classification Board, and criteria in legislative provisions. During the last two financial years, the overwhelming majority of publications classified Restricted were classified Category 1 Restricted, the criteria for which does **not** permit explicit depictions of sexual activity. As stated in the National Classification Code:

> Category 1 Restricted: *"(a) explicitly depict nudity, or describe or **impliedly depict sexual** or sexually related activity between consenting adults, (b) ...."* (emphasis added)
>
> Category 2 Restricted: *"(a) **explicitly depict sexual** or sexually related activity between consenting adults, (b) ...."* (emphasis added)

110. During 2010-2011 the Classification Board made:

- 178 Category 1 Restricted classification decisions (129 single issue publications and 49 serial publications), and

- 15 Category 2 Restricted classification decisions (14 single issue and 1 serial).[19]

111. During the previous year (2009-2010), the proportions were similar: 164 Category 1 Restricted (116 and 48) and 33 Category 2 Restricted (29 and 4).[20]

112. The ALRC's proposal concerning classification of adult publications cannot be implemented without serious negative and undesirable consequences. The ramifications cannot be ascertained by reading the current classification guidelines for R18+ and X18+ films, because those guidelines were massively abbreviated in 2003 to the extent that, in the writer's opinion, they are near useless. However, the Explanatory Statement to the March 2003 Guidelines, issued by the Commonwealth Censorship Minister, stated that the new guidelines "*do not contain changes in classification standards*". Subsequently, in December 2004, the "*Report on Review of the Operation of 2003 Guidelines for Classification for Films and Computer Games*" (commissioned by the OFLC), which analysed and compared classification decisions made under the former and new guidelines, reported that "*no change in standards has been observed*"[21].

113. The following analysis was written after comparing the detailed criteria in the current Publications Guidelines with the detailed criteria in the Film Guidelines that were in effect immediately before[22] the March 2003 abbreviated version. Since March 2003, no changes have been made to the film guidelines that are relevant to the analysis below.

(a) If existing Category ***1*** R criteria is merged into X18+ film criteria then:

(i) publications currently classified Category 1 R would still be able to be classified R18+, **unless** existing R18+ criteria is significantly narrowed to prohibit depictions of explicit nudity and implied sexual activity currently permitted in R18+, with the result that numerous films that currently are or would be classified R18+ for cinema exhibition and on DVD will not be able to be classified R18+. They would be classified X18+ or Refused Classification, depending on what is done in relation to to (ii) below; and

(ii) the merging of Cat 1 R and X18+ criteria would result in a broad range of descriptions and depictions that are **not** currently permitted in X18+ (including depictions of consenting adult fetishes and implied and actual violence, whether or not sexual violence) becoming permitted in X18+, **unless** only part of the Cat. 1 R criteria is merged with X18+.

(b) If **solely** the part of Cat 1 R criteria that concerns explicit nudity and implied sexual activity is merged into X18+, then Cat 1 R publications containing such material would still be able to be classified R18+, **unless** the R18+ criteria is changed to prohibit such depictions and descriptions, with the result that some films that currently are or would be classified R18+ for cinema exhibition and on DVD would be Refused Classification, and an unknown quantity of publications that currently are or would be classified Category 1 Restricted would be Refused Classification.

(c) In addition, in relation to Category ***2*** Restricted publications:

(i) if existing Cat. ***2*** R criteria is merged with X18+ criteria then a broad range of descriptions and depictions that are **not** currently permitted in X18+ will become permitted in X18+, **unless** only part of the Cat. 2 R criteria is merged with X18+.

(ii) If only part of the Cat. 2 R criteria is merged with X18+ criteria (to avoid the result in (c)(i) above), an unknown quantity of publications that currently are or would be classified Category 2 Restricted would be Refused Classification. In addition, *possibly* some films that currently are or would be classified R18+ for cinema exhibition or on DVD would be Refused Classification, as a result of changes to the R18+ classification implemented that perhaps might be necessary to

19 Classification Board Annual Report 2010-2011
20 Classification Board Annual Report 2009-2010
21 Report on Review of the Operation of 2003 Guidelines for Classification for Films and Computer Games, December 2004
http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(CFD7369FCAE9B8F32F341DBE097801FF)~80000CPB+~+on+Review+of+the+Operation+of+2003+Guidelines+for+Classification+of+Films+and+Computer+Games256785.pdf/
The above report includes a copy of the Explanatory Statement to the March 2003 Guidelines
22 A copy of the pre-2003 Film Guidelines is available at:
http://libertus.net/censor/history/docarchive/pdf/200009AmendFlmVid.pdf

prevent a possibly dual classification category situation similar to that mentioned in (a)(i) above.

114. In summary, the ALRC's proposal concerning adult magazines cannot be implemented, in a manner that does **not** result in films and publications that are currently lawful to publicly exhibit, sell and distribute, becoming Refused Classification and X18+, unless the ALRC abandons "platform neutrality", or involves itself in classification category criteria issues and also in what is or is not lawful to sell in States, and makes associated recommendations.

Proposal 9–3 The Classification of Media Content Act should provide that all content that must be classified, other than content classified C, G or RC, must also be accompanied by consumer advice.

115. The above proposal, which refers to content that "**must** be classified", is inconsistent with the following:

> *9.42 ... The ALRC therefore proposes that consumer advice **must** be provided for **all classified media content**, except content classified C and G.* (emphasis added)

116. The above apparently includes voluntarily classified material, which would make it more time consuming for those who voluntarily classify and may therefore discourage them from even providing a classification marking. The ALRC should clarify its intentions and preferably limit requirements for consumer advice to content that **must** be classified.

117. In relation to the type of consumer advice that is or should be provided, the writer notes the ALRC's remarks that:

> *9.41 Consumer advice is an efficient way to highlight content that may be of particular concern as well as demonstrate to the community that the Board has considered a specific matter in its deliberations. For example, a 1994 version of the children's film Lassie was classified PG with the consumer advice 'some smoking by minors', reflecting concerns of the Australian community about smoking but particularly in relation to depictions of children smoking.47*

118. It seems unlikely that referring to Classification Boards' consumer advice practices when they classified the particular 'Lassie' film in September 1994 provides an accurate impression of the Board's current practice. Unless the Classification Boards' practice has changed since 2004 (and the writer is under the impression it has not), then practice remains as follows:

> *"Current Classification Board practice for consumer advice is to indicate only those elements that put a film or computer game into a particular classification category. Television consumer advice can flag any number of elements that appear in the program, regardless of how that particular element may be classified."* [23]

119. In other words, in the case of Classification Board classifications, if a film contains e.g. violence that can be accommodated in e.g. the PG or M category, but contains other elements that result in an MA15+ classification, then the consumer advice for the MA15+ film will not even mention that the film contains violence.

120. According to the UK BBFC's web site, it provides both types of consumer advice for some films and games: standard "Consumer Advice" about the elements which determined the classification, and also "Extended Classification Information" which "also notes any additional content which did not determine the classification but may be of interest to the likely audience."[24]

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23 "Community Attitudes Towards Media Classification and Consumer Advice", Research conducted by: Michelle Spratt for the Office of Film and Literature Classification, March 2004 http://www.ag.gov.au/www/cob/rwpattach.nsf/VAP/(8AB0BDE05570AAD0EF9C283AA8F533E3)~80000CPB+-+Community+Attitudes+Towards+Media+Classification+and+Consumer+Advice+-+Market+Research256558.pdf/$file/80000CPB+-+Community+Attitudes+Towards+Media+Classification+and+Consumer+Advice+-+Market+Research256558.pdf

24 http://www.bbfc.co.uk/classification/guidelines/consumer-advice/

Proposal 9–4 The Classification of Media Content Act should provide for one set of statutory classification criteria and that classification decisions must be made applying these criteria.

121. The above proposal is strongly opposed because the Act would merely mention that there is one set of statutory classification criteria, but not all of that criteria would be in the Act. That situation, in combination with ALRC Proposal 13-1 would result in a single Commonwealth Minister, i.e. the Minister responsible for classification and censorship from time to time, being empowered to unilaterally determine and change the classification criteria in the National Classification Code and detailed Classification Guidelines. That is apparent from the ALRC's remarks that:

> *9.64 ...legislation should set out the classification categories and the matters that must be taken into account when making a classification decision, but it need not contain the detailed classification guidelines. This would better facilitate periodic review of the classification guidelines ....*
>
> *9.65 ... the 'statutory classification criteria'—the classification categories and matters set out in the Act plus* ***the Code and the detailed classification guidelines—should be contained in a separate legislative instrument*** *that consolidates all decision-making information.* [emphasis added]

122. Therefore, the National Classification Code and the detailed classification guidelines would exist only in a legislative instrument that the Commonwealth Minister responsible for classification would have unilateral power to change (unless the Commonwealth Government *voluntarily* chose to make different arrangements from normal practice in relation to legislative instruments, or the Commonwealth Parliament declined to pass legislation granting a government Minister such power (which would not even be possible if the Government held the balance of power in both Houses at the time of enacting the proposed Act)).

123. Furthermore, in the context of the ALRC's proposed Commonwealth sole control of classification and censorship policy, the writer does not agree with the ALRC's assertion in 9.64 that having the Code and guidelines in a legislative instrument, separate from the Act, would "better facilitate periodic review of the classification guidelines". The only thing that it would "better facilitate" is empowering a single Minister to ignore views expressed in public submissions and change criteria in the Classification Code and classification guidelines to suit his or her personal opinions and/or pacify vocal fundamentalist religious lobby groups (subject only *perhaps* to censure by the government party in power if the party did not agree). In relation to the existing National *co-operative* Classification Scheme, it would not have been appropriate or practical to have established that scheme with the Code and Guidelines in the C'th Act, because that would/could have resulted in a situation where after C'th, State and Territory Censorship Ministers had agreed on amended classification criteria, the Commonwealth Parliament could refuse to enact the changes - a completely unworkable situation.

124. The writer is strongly opposed to a single Minister having the power to change the Code and guidelines. If all State/Territory Governments/Ministers cease to have voting rights in relation to changes to the Code and guidelines (as the ALRC proposes), then the Code and Guidelines **must** be part of the Commonwealth Act, e.g. a Schedule to the Act, thereby necessitating an amendment Act of the Commonwealth Parliament to make changes to classification criteria (increasing or decreasing restrictions and censorship). Proposal 9-4 should be changed to e.g.:

> The Classification of Media Content Act should provide for one set of statutory classification criteria, **set out in a Schedule to the Act**, and require that classification decisions must be made applying these criteria.

125. In summary, if the Commonwealth is to become the sole determiner of classification and censorship policy throughout Australia, then **all Commonwealth politicians must be made accountable to their constituents** in relation to changes to classification and censorship criteria, by requiring them all to vote on any such changes.

126. The writer is also opposed to the ALRC's suggestion that the Department (and therefore Minister) responsible for the new National Classification Scheme "might be" the Department of Broadband, Communications and the Digital Economy. Responsibility for classification policy should be within the Attorney-General's portfolio (see under Proposal 12-1 for reasons).

127. Furthermore, the writer questions the ALRC's implications that there was "consensus" and/or general agreement in submissions in response to IP40 that the Code and guidelines not be in the Act. According to the ALRC:

> *9.63 Some submissions expressed the view that some matters, such as guiding principles for decision making and matters relevant to the classification framework are appropriately set out in the Act, so that changes can only be made by Parliament following debate by both Houses.64 ...*

128. The writer notes that the sole example, provided in DP77 (footnote 64), of such a submission is that submitted by a former Director of the Classification Board/OFLC.

> *9.63 ... There was also consensus that the detailed classification criteria (for example, in the Code and the current classification guidelines) should be separately established so that they can be more readily amended to flexibly respond to changing community attitudes and technological developments.65.*

129. The writer notes that the only asserted examples, provided in DP77 (footnote 65), of such "consensus" submissions are those submitted by a former Deputy Director of the Classification Board/OFLC; an association representing subscription TV broadcasters; and an association representing companies in the computer and video game industry. Furthermore, none of those three submissions appear to have contemplated, let alone commented on, the prospect of a single Commonwealth Minister being the final determiner of classification criteria in the National Classification Code and Classification Guidelines contained in a legislative instrument separate from the Act.

Proposal 9–5 A comprehensive review of community standards in Australia towards media content should be commissioned, combining both quantitative and qualitative methodologies, with a broad reach across the Australian community. This review should be undertaken at least every five years.

130. The myth that Australia's multi-cultural, multi-religious society has identifiable "community standards" in relation to classification and censorship should be abandoned, and references to such mythical standards removed from classification and censorship criteria.

10. Refused Classification Category (P10-1)

Proposal 10–1 The Classification of Media Content Act should provide that, if content is classified RC, the classification decision should state whether the content comprises real depictions of actual child sexual abuse or actual sexual violence. This content could be added to any blacklist of content that must be filtered at the internet service provider level.

131. No it could not be added to a such a blacklist. What does "actual" mean? That term does not appear in classification criteria. What does the ALRC think "violence" means, or intend it to mean? In the classification guidelines, the definition of "violence" is vastly broader from that in dictionaries. In addition would the ALRC's version of "sexual violence" capture depictions/descriptions of consenting adult sexual activities, e.g. bondage, spanking.

132. No content should be added to a secret government blacklist to be filtered by ISPs.

11. Industry Codes and Co-regulation (P11-1 to 11-4)

133. The writer has significant doubts about a number of aspects of the ALRC's proposals about industry codes but has not had time to document more than the below. Failure to mention any other aspects does not signify agreement with the ALRC's proposals.

134. The writer is particularly disturbed by the ALRC's remarks that:

> *11.44 ... For example, statutory classification criteria would provide that there be an R 18+ category for content with high impact violence, across all media. However, a code of practice relating to the classification of films might explain how interactivity should be taken into account in assessing film content specifically; and a code of practice relating to internet content might explain how to assess film sequences embedded in an 'e-book'.*

135. The writer strongly objects to industry associations being permitted to determine their own rules, in industry codes, about how the statutory classification criteria and guidelines are to be applied by their

industry members. An objective of classification should be consistency in classification decision making, and the writer fails to see how that can occur if industry groups are allowed to make special rules for their members.

> *11.45 More generally, there are a range of matters that are too detailed or media-specific to be included in statutory classification criteria. For example, the ALRC proposes that statutory obligations be placed on online content providers to restrict some online content to adults, including by using restricted access technologies. Codes of practice may be used to provide flexible guidance and industry rules on such technologies...*

136. If it is too difficult to specify the obligations of online content providers in legislation, with the result that commercial content providers are to be legislatively favoured by permission to develop their own "flexible" rules in industry codes about restricting access, etc, then restricted access requirements should apply only to the commercial content providers who are members of an industry association that develops such a code

137. Industry associations, who have the best interests of their own business members at heart, are extremely unlikely to develop codes that have taken into account the difficulties and problems faced by non-commercial content providers (nor probably sole traders and small businesses).

12. A single agency ('the Regulator') (P12-1)

Proposal 12–1 A single agency ('the Regulator') should be responsible for the regulation of media content under the new National Classification Scheme. The Regulator's functions should include:

...

In addition, the Regulator's functions may include:

(f) providing administrative support to the Classification Board;

(g) assisting with the development of classification policy and legislation;

(h) conducting or commissioning research relevant to classification; and

(i) educating the public about the new National Classification Scheme and promoting media literacy.

138. It is unclear to the writer whether or not the Classification Board/s would remain independent statutory bodies, nor to what extent "the Regulator" may be able to interfere in the Classification Board/s operations. The writer is strongly of the view that the Classification Board/s should remain independent statutory bodies, separate from the Regulator (separate in the sense that the Regulator is not empowered to instruct/direct the Director of the Board or Board members to do anything), and should continue to undertake the same classification related functions as now, including the Director of the Board approving classification training etc.

139. In relation to the Regulator, the writer notes the ALRC's remarks that:

> *12.2 The Regulator would be responsible for most regulatory activities related to the classification of media content—both offline and online. ...*
> *12.3 The Regulator need not be a stand-alone agency, but might form one part of the ACMA...*
> *...*
> *12.45 The new Regulator might have a number of other functions, although these might also be performed by the Department of Broadband, Communications and the Digital Economy or other department responsible for the new National Classification Scheme or other department responsible for the new National Classification Scheme.*

140. The writer is strongly opposed to a Regulator, of a National Classification and Censorship Scheme, being part of the ACMA and to the ALRC's suggestion that functions (f) to (i) of Proposal 12-1 might be performed by the Department of Broadband, Communications and the Digital Economy.

141. The Regulator **must** be an independent statutory authority within the portfolio of the Attorney General (or at least Minister for Justice, as currently, and associated with the A-G's department); it must **not** be a statutory authority or department within the portfolio of Broadband, Communications and the Digital Economy, nor any other portfolio. The writer has strongly held that view (since before the ALRC published any submissions in response to DP77) as a result of having closely watched classification policy, etc, developments and issues since 1995. The writer's reasons for that view are the same as expressed by Mr

John Dickie (former Director of the Classification Board and OFLC, previously Chief Censor) in his submission in response to DP77, specifically the following:

> *"The Regulator should be an independent statutory authority with sufficient status and standing in the Government to resist attempts to influence his or her decisions. ...*
>
> *To bolster this independence, I suggest that the ALRC recommend that the Regulator should remain under the ministerial responsibilities of the Attorney-General. The censorship/classification system was removed from the Customs Department in 1972 to the Attorney-General on the basis that civil liberties were involved in such decision making.*
>
> *In my view there is a much better chance of the Regulator retaining independence if the issues involved in the new regime are recognised primarily in the area of human rights and civil liberties which have always been the responsibility of the Attorney-General."*[25]

142. Furthermore, in relation to public and parliamentary accountability and transparency, etc, the Regulator's operations and activities must be within the oversight capabilities of the Senate Legal and Constitutional Legislation Committee, (as would be the situation if the Regulator is within the A-G's portfolio, or Minister for Justice's). That Committee is the only appropriate one in relation to Ministerial responsibilities and a Regulator with the powers and functions proposed by the ALRC (including taking over some current powers and functions of C'th, State and Territory police agencies) which involve human rights and civil liberties issues.

13. Enacting the New National Classification Scheme (P13-1 to P13-2)

Proposal 13–1 The new Classification of Media Content Act should be enacted pursuant to the legislative powers of the Parliament of Australia.

143. Opposed, for the same reasons as stated in the writer's submission in response to IP40, and also under Proposal 9-4.

Proposal 13–2 State referrals of power under s 51(xxxvii) of the Australian Constitution should be used to supplement fully the Parliament of Australia's other powers, by referring matters to the extent to which they are not otherwise included in Commonwealth legislative powers.

144. Opposed.

14. Enforcing Classification Laws (P14-1 to P14-2)

Proposal 14–4 Offences under the new Classification of Media Content Act should be subject to criminal, civil and administrative penalties similar to those currently in place in relation to online and mobile content under sch 7 of the Broadcasting Services Act 1992 (Cth).

145. The writer has massive concerns about what the ALRC may be proposing and/or intends to recommend in a final report. The types of offences in sch 7 of BSA are, in the writer's opinion, totally unsuitable for application to many types of online content providers, and some offline providers under ALRC proposals, as are offences in States' Classification Enforcement Acts.

146. Many of such existing offences appear to the writer to be either strict liability offences, or so close to that, that the slight difference is irrelevant.

147. A fundamental difference between e.g. existing State offences, and ALRC proposals, is that currently offline commercial distributors/sellers etc are under a legislated obligation to have almost all types of content classified before distribution, regardless of the "likely to be" classification. Therefore it is not unreasonable to have strict liability offences applying to the sale etc of that type of offline *unclassified* material (penalties vary depending on what the classification actually is after classification).

148. However, under the ALRC proposals, many content providers both offline and online will not be under an obligation to have some types of content classified, unless it is "likely to be" some particular classification. Strict liability offences are not appropriate for such offences, and then the question becomes what physical and fault elements will apply to conduct, circumstance and/or results, and/or what defences will apply. In the writer's opinion the typical fault element of "recklessness" as to circumstance is extremely

25 John Dickie, Submission CI 2457

problematic when the circumstance is that some time after the accused published/distributed something, some number of the members of the Classification Board (by not necessarily unanimous vote) gave the content a particular classification.

149. The ALRC's constant references throughout DP77 to "likely to be" and "may be" gives this writer a very strong impression that the ALRC either has not thought about fault elements and criminal justice, or is of the view that recklessness would, as typical, apply to circumstances or result.

Proposal 14–5 The Australian Government should consider whether the Classification of Media Content Act should provide for an infringement notice scheme in relation to more minor breaches of classification laws.

150. Same as under Proposal 14-1. What type of offences is the ALRC contemplating could/would be strict liability offences to which an infringement notice scheme could apply?