Submission

on the

National Classification Scheme Review

to the

Australian Law Reform Commission

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Introduction

On 24 March 2011, Attorney-General Robert McClelland referred the National Classification Scheme to the Australian Law Reform Commission (ALRC) and asked it to conduct widespread public consultation across the community and industry.

The review is to consider issues including existing laws; the current classification categories; the rapid pace of technological change; the need to improve classification information available to the community; the effect of media on children and the desirability of a strong content and distribution industry in Australia.

The ALRC has produced an issues paper and called for public submissions which are due by July 15.

The issues paper sets out 29 questions. This submission addresses each of these questions.

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

The existing framework for classification is reasonably well-known to Australian consumers and parents. There are many elements of it that need improvement but there is no need for an entirely new framework to be proposed at this time.

Recommendation 1:

The ALRC Inquiry should focus on improving key elements of the existing classification framework.

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

Recommendation 2:

The primary objectives of a national classification scheme should be:

- ***providing advice to consumers to help inform their choices about accessing, viewing, hearing, reading or playing material, including warning them of material they might find offensive;***

- ***providing advice to parents to help them determine what material they should allow their children to access, view, hear, read or play, including warning parents of material that may be unsuitable for children;***

- ***protecting all children from harmful or disturbing content by placing legal restrictions on allowing children to access, view, hear, read or play material, or on the sale or distribution of material to children; and***

- ***restricting all Australians from accessing certain types of content that is considered harmful to the community or seriously in violation of community standards.***

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

The technology used for content delivery or the platform on which content is accessed do not fundamentally change the nature of the content as such. Consequently, the same considerations underlying the primary objectives of the national classification scheme apply.

Format can be relevant to classification.

For example, still pictures of a scene with sexual content or violence are generally less impactful than moving pictures or film of the same scene.

Violence in computer games in which action can be easily repeated and in which the player becomes an actor rather than an observer may have a greater impact on the player than an equivalent depiction of violence in a film.

The availability of material via the internet, and through portable communications devices such as mobile phones and hand held computer devices, raises new challenges in how to restrict access to children, and in the case of certain material, restrict access for all Australians.

It is most essential to ensure that content which would be Refused Classification should be legally restricted across technologies and platforms.

Similarly, content that has age-based legal restrictions on access in one technology should have age-based legal restrictions across technologies and platforms.

It is not as essential to provide advisory classifications across all technologies. This is not really feasible for internet content, nor is it necessary for all printed material – parents can fairly readily look through a printed publication to assess its suitability for a child. However, where it is economically and technologically feasible advisory classifications are helpful to consumers and parents.

Recommendation 3:

Insofar as possible, all content which is considered harmful to the community or seriously in violation of community standards to such an extent that it should be refused classification, should be subject to legal restrictions preventing access by Australians regardless of media, technology or platforms.

Insofar as possible, all content which is considered harmful or disturbing to all children (that is all persons aged under 18) or to children aged under 15, should be legally restricted to prevent children, or children under the relevant age, form accessing the content regardless of media, technology or platforms.

Advisory classifications to assist consumers and parents should be provided where it is economically and technologically feasible to do so.

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

Complaint based classifications are problematic because of the lapse of time between the publication of the content, the making of the complaint, the determination of the complaint and the

implementation of any decision. They also shift responsibility for excluding access to harmful material onto community-minded citizens or watchdog groups when this is properly a responsibility of governments to the community as a whole.

4.1 Complaints based system inadequate for outdoor advertising

Billboard and other forms of outdoor advertising are currently self-regulated under the Australian Association of National Advertisers *AANA Code of Ethics*.[1]

Complaints about breaches of the code by advertisers can be made in writing, including via an online complaints form to the Advertising Standards Board.[2]

After the Advertising Standards Board has made a determination the advertiser is free to implement it, ignore it or appeal it to the Independent Reviewer. Complainants may also seek a review of a determination. Review is only available if there is additional material or a flaw in the process.

In 2009 complaints about outdoor advertising represented 23.92% of all complaints up from just 3.67% in 2006.

In 2010 four of the ten most complained about advertisements were billboard advertisements within between 45 and 70 complainants for each advertisement. The Board upheld two of the complaints and dismissed two of them.

- Sexpo Pty Ltd - Case number 60/10 – Featuring woman on knees and man on motorbike – ad for Brisbane Sexpo in March. About 75 complaints. Board decision – Dismissed

- Ashley Madison - Avid Life - Case number 0292/10 – Life is short. Have an affair - Sydney. About 60 complaints. Board decision - Upheld

- Fernwood Fitness Centres Aust Pty Ltd (Billboard) – Case number 15/10 – "Join Now for Fox Sake" – About 50 complaints. Board decision – Dismissed

- Calvin Klein (Billboard) – Case number 0411/10 - Image of one woman and three men. Woman is lying on her back with her head resting on the thighs of one of the men and he is looking down at her. Another man is crouched over her. About 45 complaints. Board decision – Upheld

4.1.1 Sexpo Pty Ltd

The Board describes this advertisement as follows:

> *This outdoor advertisement features a woman wearing a blue bikini-like outfit, she is on her hands and knees and arching her back. A bare-chested male appears in the background. On the right side of the billboard is a man on a motorbike depicted in mid air.*

The Board determined in part:

> *The Board noted the complainants concern that the image of a woman in a sexualised pose with skimpy clothing is inappropriate for the Billboard.*
>
> *The Board considered whether the advertisement 'depicted sex, sexuality and nudity with sensitivity to the relevant audience'.*

The Board noted that the woman is featured with her back arched and was wearing an outfit similar to a bikini. The Board noted that it had previously considered advertisements featuring scantily clad women and that the use of such images has at times been a divisive issue for the community. The Board noted that this advertisement is for a sex related product - a Sex expo - and that a mildly sexually suggestive image of a woman is relevant to that product or service. The Board noted that the relevance of the image to the product or service advertised is a factor in determining whether the advertisement treats sex, sexuality or nudity with sensitivity to the relevant audience.

The Board noted that the advertisement is on a billboard and is therefore available for viewing by a broad audience. The Board considered that some reasonable people would find the portrayal to be unacceptable but considered that the image is relatively discrete (the woman's breasts are mostly covered), the advertisement is only mildly sexually suggestive, and the image is relevant to the products advertised. On this basis the Board determined that the advertisement did depict sexuality with sensitivity to the relevant audience and that it did not breach section 2.3 of the Code.

The Board also considered whether the advertisement discriminated against or vilified women. Some members of the Board considered that the woman was depicted in a sexualised and objectified manner particularly when contrasted with the image of the man, who is depicted in a stronger more powerful position. The majority of the Board considered that this image, although objectifying the woman, was relevant to the product and did not amount to discrimination or vilification of women. On this basis the Board determined that the advertisement did not breach section 2.1 of the Code.[3]

While noting that as a billboard the advertisement was "available for viewing by a broad audience" the Board did not give any specific consideration to the fact that this audience necessarily includes children even though its viewing by children was mentioned in six out of eight of the complaints cited by the Board in the determination.

It is unclear how the Board interprets the phrase "*sensitivity to the relevant audience*". Does this mean the audience likely to see the advertisement, which in this case would include children? If so, it is surprising for the Board to find that this image depicted sexuality with sensitivity to children. An advertisement of this kind would not be cleared to screen during children's viewing times on television.

There is also a degree of circular reasoning in the Board's argument that because the advertisement was for a sexual product – a sex exposition – this justified the sexually suggestive image and the objectification of the woman.

The latter finding seems to mean that as Sexpo as a product objectifies women it is therefore acceptable for an advertisement for Sexpo to objectify women. It is acceptable, the Board seems to be saying, for the sex industry to objectify women and therefore acceptable for advertisements depicting such objectification to be displayed to a general audience – which necessarily includes children.

This decision alone seems to indicate the need for a new approach to outdoor advertising.

4.1.2 Fernwood Fitness Centres

This billboard advertisement featured the words "*Join Now for Fox Sake*."

Unbelievably the Advertising Standards Board accepted the claim by the advertiser – surely not made with a straight face – that although they were aware that if said aloud the slogan could sound like it was using a strong four-letter expletive this was purely unintentional and the slogan, building on other

advertisement for the product around the idea of women being foxy or fox-like, simply was intended to mean "Join Now for the sake of becoming foxy".[4]

This determination seems to treat the public with contempt as idiots. No person who is familiar with the four-letter expletive in question could possibly read this slogan and not have the phrase come to mind.

A play on words where one of the words is a four-letter expletive is simply not suitable for a billboard that can be read by all passers-by including children.

4.1.3 Advanced Medical Institute

There has been a long history of complaints about billboards advertising the services of Advanced Medical Institute (AMI).

Notably in a determination dated 13 August 2008 the Board reversed an earlier decision dismissing complaints against a billboard with the slogan "*Want Longer Lasting Sex?*". The Board opined that, since they had last considered the slogan in 2007 community standards had changed, and that there was now a new level of "*concern about the unsolicited exposure of children to advertisements dealing with sexuality*". Most commentators considered that it was the Board's opinion that had changed to conform to long existing community standards rather than any significant shift in community attitudes.[5]

Parents have never been comfortable having their children confronted with large advertisements with sexual or other inappropriate comment. It is patronising of the Board to suggest that this was some newly emerging sensitivity.

Since August 2008 the Board has upheld complaints about AMI billboards with the slogan "*Be a man and … hold your load*"[6] while dismissing complaints about AMI billboards with the slogans "*Making love? Do it longer*"[7] and "*Impotence busters … call HARD 1800 311 311"*[8]

4.1.4 Problems with the current regime

There are several problems with the current regime for regulating billboards and outdoor advertising:

- Insufficient regard or inconsistent weight is given to the reality that advertisements on billboards cannot be avoided by any member of the community going about their daily business in the vicinity of a billboard. In particular, this applies to families with young children, but also to adult members of the community who find more or less explicit advertisements for sexual services offensive. Unlike all other media there is no option to "turn it off" or "not open it".

- Insufficient regard is given to objections to the overt advertising of sexual services as such, even if the depictions of or references to sexual activity are relatively constrained. Why does the Board not understand that a billboard advertising Sexpo is in itself offensive regardless of how explicit the accompanying images are?

- The complaints based system operates only after an advertisement has been placed on a billboard; indeed, often on many billboards around the country (AMI's *"Want Longer Lasting Sex?"* advertisement was on 120 billboards across Australia[9]). Even after a determination is made, given the physical nature of billboard advertising, it may take some time to remove all such advertisements. In the AMI's *"Want Longer Lasting Sex?"* case it was accepted by the Board that it could take AMI up to 30 days to remove all the relevant advertisements. Naturally thousands of people have seen the offending advertisements before they are removed.

4.1.5 Possible solutions

The AANA Code of Ethics could be amended by incorporating a section dealing specifically with billboards and other forms of outdoor advertising.

This section would need to make it clear that the direct advertising of sexual services and products is not acceptable and that there should be no references – explicit or implied – to sexual activity, to coarse language, to drug use and that there be no sexualised imagery.

The standard should be at least as strict as that used to classify advertisements for exhibition on free to air television as GENERAL "G".

These advertisements are defined as "*Commercials which comply with the G classification criteria in Appendix 4, Section 2 of the Code of Practice and provided the content is very mild in impact and does not contain any matter likely to be unsuitable for children to watch without supervision*."[10]

This category does not permit any advertising of adult products and services or of condoms, except in a public health announcement context. Sexpo, AMI and the Fernwood "for Fox Sake" advertisement almost certainly would not be classified GENERAL for broadcast on free to air television during the G classification time zone.

However, merely changing the Code is unlikely to remedy the problem given the issues identified with the Board's lack of judgement and commonsense and the problem of delay with a complaints based system.

FreeTV offers a service to advertisers on a commercial basis which classifies their advertisements to ensure they are broadcast only in the appropriate classification time zones.

The Association of Australian National Advertisers could develop a similar service for billboard and outdoor advertising.

This could build on an improved AANA Code of Ethics by ensuring that before advertisements are placed on billboards they are tested against the proposed new GENERAL "G" standard for billboards and outdoor advertising.

A complaints system would still be in place as a check on the pre-placement classification system.

This would have the advantage of preventing offensive advertisements from being placed on billboards in the first place.

However, this proposal still relies on self-regulation and on the Advertising Standards Board as the arbiter.

Another approach would be to require advertisements on billboards and other prominent forms of outdoor advertising to be submitted to the Classification Board for a classification before being placed. The Classification Board has the necessary expertise and systems. The service would be on a cost recovery, user-pays basis.

The scheme could either require all advertisements to be submitted or be based, like the scheme for the classification of publications, on a notion of "submittable" advertisements which would need to be defined in legislation as any advertisement which may exceed the requirements for the GENERAL "G" classification.

As noted above, there is currently a systemic failure in the call-in system associated with submittable publications with the Classification Board reporting a pattern of distributors ignoring call-in notices.

Careful thought would need to be given to the enforcement mechanisms if such a scheme were put in place for billboard and other prominent outdoor advertising.

Complementary legislation would need to be introduced by the Commonwealth and the States to ensure full constitutionality and a cooperative approach to standards and enforcement.

Recommendation 4.1:

A new standard for advertisements on billboards and other outdoor advertising should be defined to exclude any advertising of adult products and services and be at least as strict as the GENERAL "G" classification defined by FreeTV Commercial Advice. This standard could be incorporated as new guidelines for the classification of outdoor advertising as part of the National Classification Scheme.

A scheme for pre-placement classification, of either all or a defined category of advertisements for billboards and other outdoor advertising, should be put in place to ensure that offensive advertisements are not displayed to the public, especially families with children.

This scheme could be provided by the Classification Board with careful attention paid to ensure effective enforcement provisions.

4.2 Complaints based system inadequate for internet content

Complaints based classification is inadequate for dealing with internet content. This approach is unlikely to effectively screen out the bulk of content which should be Refused Classification or subject to age based restrictions (e.g. R18+).

The current law provides for takedown notices for material hosted on internet sites in Australia that is or would be Refused Classification, or which is or would be classified as MA15+, R18+ or X18+ but which lacks an effective age verification system.

Under a complaints-based system, if such material is hosted offshore, the relevant URLs are added to a "black list" maintained by the Australian Communications and Media Authority (ACMA). This black list must be used by filter services that are approved to offer opt-in filtering to block the listed URLs for end users.

The Labor government was elected with a promise to further investigate and, if feasible, introduce a national mandatory filtering scheme. Under this scheme, all ISPs would be required to block a new ACMA-managed black list which would consist of URLs for pages containing Refused Classification material. After investigations have confirmed the feasibility of such a scheme, the government has confirmed its intention to introduce legislation for such a scheme.[11]

Opponents of the scheme commonly put forward several arguments including the claim that the scheme would degrade internet performance. However, the evaluation by Enex Testlabs indicates that the scheme could be implemented effectively with minimal degradation of internet performance.[12]

Opponents of internet filtering also claim that the scheme would violate the right to freedom of access to information.

This is really an argument for no censorship at all in any medium, not even censorship of extreme child abuse material, or films of real rape and murder. There has never been an absolute right to freedom of access to information. This right has always been qualified by the need to protect the community, and there is no logical reason why the internet should be treated differently from newspapers, films, radio or television.

Those who jammed Australian Parliament House and federal government websites with a cyber attack in February 2010, demanding unrestricted access to pornography, merely demonstrated their immature, selfish disregard for the rights of others.[13]

Opponents also claim that the scheme is likely to lead to suppression of political views contrary to those of the government such as happens in China.

China is a one-party state with no democratic elections. An Australian filtering scheme requires legislation which needs to be debated in our multi-party democratically elected parliament. The implementation of the scheme would be subject to scrutiny by members of parliament (through means such as parliamentary questions and estimates committees) and the media.

Finally, opponents point out that the scheme will not succeed in completely blocking access to blacklisted URLs as there are various technological means of circumventing filtering.

This is also true for laws prohibiting the import and distribution of offensive material. Customs officers cannot open every package. However, laws which are efficiently enforced can contribute to a significant reduction in access to offensive material. This is a worthwhile goal, even if complete elimination of access is never achieved.

The mandatory filtering scheme, as currently proposed by the government, could be enhanced in several ways to improve its operation. Some of these improvements could be included in the initial implementation of the scheme. Others could be made once the scheme has been running successfully for a period of time.

Categories to be filtered should include not just Refused Classification but other categories where the law already prohibits hosting of material in Australia. This includes material which promotes, encourages or instructs in methods of suicide; online gaming sites; and sites facilitating financial fraud.

Senator Conroy's media release of 15 December 2009 stated that: "*The Minister for Home Affairs yesterday announced a public consultation process into whether there should be an R18+ classification category for computer games. Until this process is complete, online computer games will be excluded from mandatory filtering of RC content.*"

On 10 December 2010 the Standing Committee of Attorneys-General determined that in relation to computer games they "*do not support the dilution of the refused classification category*".[14]

In the light of this decision there is no reason not to include in the mandatory filtering scheme provisions to exclude access to any computer game that would under the current classification guidelines be classified as Refused Classification.

This would ensure that games like the Japanese computer game RapeLay, which includes rape of children were excluded from access.

The government's scheme would encourage service providers to offer further family-friendly filtering through a grants scheme.

It would be more effective if standard ISP service were required to be filtered to exclude MA15+, R18+ and X18+ level material. MA15+ and R18+ material could be made available only on an opt-in basis with appropriate age verification.

This "opt-in" approach to all pornography is currently being pursued in the United Kingdom.

> *THE UK Government is to combat the early sexualization of children by blocking internet pornography unless parents request it, it was revealed today.*

The move is intended to ensure that children are not exposed to sex as a routine by-product of the internet. It follows warnings about the hidden damage being done to children by sex sites.

The biggest broadband providers, including BT, Virgin Media and TalkTalk, are being called to a meeting next month by Ed Vaizey, the communications minister, and will be asked to change how pornography gets into homes.

Instead of using parental controls to stop access to pornography - so-called "opting out" - the tap will be turned off at source. Adults will then have to "opt in."

The new initiative is in advance of the imminent convergence of the internet and television on one large screen in the living room.

It follows the success of an operation by most British internet service providers (ISPs) to prevent people inadvertently viewing child porn websites. Ministers want companies to use similar technology to shut out adult pornography from children. Pornography sites will be blocked at source unless people specifically ask to view them.[15]

X18+ material should be excluded. It is banned from sale by all six States and, because of its known use in contributing to child abuse, has recently been banned in parts of the Northern Territory.

The blacklist of URLs should not just be compiled by complaints and the supply of lists of child abuse sites from overseas enforcement agencies. A tender should be let for a pro-active web crawler based system that actively seeks out URLs which contain prohibited material.

Real time filtering could be added as this technology becomes more efficient.

It should also be clear that the mandatory filtering scheme for ISPs should also apply to internet services and other content delivery services offered over mobile phone networks in Australia.

Recommendation 4.2:

The legislation to implement the filtering scheme should:

- ***include, in the material to be added to the black list, material which promotes, encourages or instructs in methods of suicide, online gaming and fraud schemes;***
- ***include, in the material to be added to the black list, computer games which have been or would be Refused Classification;***

Consideration should be given to future enhancements to the scheme:

- ***to make the default filtered ISP service family-friendly, by filtering all MA15+, R18+ and X18+ material. MA15+ and R18+ material should be available only on an opt-in basis with appropriate age verification. X18+ material should be prohibited, as it is prohibited under the laws of all six states as well as under the NTER provisions in parts of the Northern Territory;***
- ***to improve the method of compiling the black list by the use of proactive approaches such as web crawlers used when feasible; and***
- ***real time filtering should be considered as it becomes more efficient.***

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

It is not technologically and economically feasible to classify all internet content as G, PG, M etc.

Nor is it necessary to classify printed material, including books in this way.

However, advisory classifications for films, computer games and programs broadcast on television have proved helpful to Australian consumers and parents.

It would be helpful to extend this to sound recordings, at least music sound recordings.

Advisory classifications should reflect the real concerns of parents.

5.1 Changes to the G classification in 2003 undermined parents

Changes to the G classification for films and computer games made in 2003 have been of particular concern to parents. This classification is for a general audience. While not all G classified movies will be of interest to all children (many documentaries would attract a G classification) parents should be able to have confidence that nothing in a G classified movie will be unsuitable for children's viewing.

The National Classification Code sets out the film classifications in a descending hierarchy. The PG classification, the classification immediately above the G classification, states that this should apply to "films (except RC films, X films, MA films and M films) that cannot be recommended for viewing by persons who are under 15 without the guidance of their parents or guardians". The Code indicates that "all other films" should be given a G classification. This necessarily implies that G films are films that *can* be recommended for viewing by persons [of any age] under 15 *without the guidance of their parents or guardians.*

In other words G films should not have any classifiable elements that may give rise to a need for parental guidance. For this reason there is no requirement under the *Classification (Publications, Films and Computer Games) Act 1995* for consumer advice to alert parents to such classifiable elements (although we note that the Board has provided consumer advice for some G films).

However, the 2003 revision of the Guidelines did, for the first time, provide for both drug use and nudity in the G classification. **This means that there is now no classification that will indicate to a parent that the film is completely free of drug use and nudity.**

Previously the G classification made no reference to **drug use**. The 1996 Guidelines provided that "discreet verbal references and mild, incidental visuals of drug use" would attract a PG classification. The new Guidelines allow films in which drug use is "implied only very discreetly and justified by context" to be classified G.

In a parallel development, **nudity** is now referred to the first time in relation to the G classification. For G the new Guidelines state with no further qualification that "Nudity should be justified by context".

The 1996 Guidelines provided that **violence** could be "very discreetly implied, but should have a light tone, or have a very low sense of threat or menace, and be infrequent, and not be gratuitous". This is reduced in the 2003 Guidelines to read that **violence** "should have only a low sense of threat or menace, and be justified by context."

The 1996 Guidelines provided that **sexual activity** "should only be suggested in very discreet visual or verbal references, and be infrequent and not be gratuitous". This is replaced in the 2003 Guidelines by the rule that **sexual activity** "should be very mild and very discreetly implied, and be justified context."

5.1.1 Examples of films classified G under the 2003 Guidelines

5.1.1.1 The Cat in the Hat (File No. T03/2081)

In its Reasons for the Decision the Classification Board "notes a small number of double-entendres – for example when the Cat is holding a mud covered hoe, he calls it a "Dirty Hoe'." The Board goes on to claim that "these references are mitigated by the lack of detail and the fact that the references have a literal meaning – the Cat is indeed holding a dirt covered hoe".

This is an extraordinary claim. The Board recognises these as "double-entendres". The purpose of "double-entendres" is precisely to make a point of the second, usually sexual or crude "entendre" rather than from the natural referent. The existence of a natural referent hardly neutralises the intended sexual or crude meaning of the words. For example, introducing a character with the surname Phuc into a film and frequently using his name could not escape a charge of coarse language by claiming that it had a separate "literal meaning".

"Dirty ho" is gangster rap for "dirty whore". It is strong offensive language.

An explicit verbal reference to a whore would not have qualified under the previous 1996 Guidelines that required that "sexual activity should only be suggested in very discreet … verbal references."

Parents taking their children to this movie in good faith believing that a G classification excluded any unsuitable elements have been upset by this unexpected use of strong offensive language and explicit verbal reference to sexual activity.

5.1.1.2 Love's Brother (File No. T03/3145)

The Board notes that one brother asks the other "Haven't you ever done it before at the bordello in town?" The Board characterises this as a "very discreet sexual reference".

In our submission this could not have been accommodated in G under the 1996 Guidelines that required that "sexual activity should only be suggested in very discreet visual or verbal references". The question has the potential of raising two natural questions in a child's mind – "What is 'it'?" and "What is a bordello?" Both of these questions clearly raise matters for parental guidance.

5.1.1.3 Finding Nemo (File No. T03/5)

The minority view of the Board that this film requires a PG classification, due to the scenes containing violence, would have prevailed under the 1996 Guidelines in which violence could only "be very discreetly implied". The new Guidelines have dropped this significant phrase.

5.1.1.4 Prisoner of Paradise (File No. T03/2309)

The minority view of the Board that this film requires a PG classification due to its treatment of the theme of Nazi treatment of Jews would have prevailed under the previous Guidelines which made no provision for "adult themes" (including racism) in the G classification.

5.1.1.5 Ned (File No. T03/1191)

The Board records a verbal reference to sexual activity, namely "touching in places … you know that you have to keep covered at decent beaches". In our view this verbal reference would not have qualified under the previous Guidelines as a "very discreet verbal reference". Under the previous Guidelines this would have, as a discreet verbal reference, required a PG classification.

Recommendation 5:

The G classification for films and computer games should be amended to exclude any classifiable elements that could give rise to a need for parental supervision. Specifically, the following amendments should be made:

NOTE: The G classification is for a general audience. Parents should feel confident that children can watch material in this classification without supervision.

DRUG USE

Drug use is not permitted.

NUDITY

Nudity is not permitted.

SEX

References to sexual activity are not permitted.

VIOLENCE

Very discreetly implied, but should have a light tone, or have a very low sense of threat or menace, and be infrequent, and not be gratuitous.

THEMES

References to adult themes are not permitted.

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

The market reach of material cannot easily be determined at the point of its first publication. This is not an appropriate criterion for determining whether or not material should be classified.

Nor should the size of the producer be relevant.

Recommendation 6:

Size or market position of content producers or distributors or the potential mass market reach of the material are not suitable criteria for determining whether content should be classified.

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

7.1 Artworks as submittable publications

Artworks should be treated as a form of publication and be considered submittable for classification before being exhibited if they meet the criteria in section 5 of the *Classification (Publications, Films and Computer Games) Act 1995.*

In particular, artworks that depict a child in a way that could be likely to cause offence to a reasonable adult should be submitted for classification before being exhibited.

> ***Recommendation 7.1:***
>
> ***Artworks should be treated as publications and submitted for classification on the same basis. Artworks depicting a child in a way that could be likely to cause offence to a reasonable adult should be submitted for classification before being exhibited.***

7.2 Artistic merit and offensive depictions of a child

Section 11 (b) of the *Classification (Publications, Films and Computer Games) Act 1995* specifies as one of the matters to be taken into account in making a decision on the classification of a publication, a film or a computer game include:

> *the literary, artistic or educational merit (if any) of the publication.*

This provision of the Act clearly does not require that if any such merit is present any particular decision regarding the classification should be made. It does not exclude a publication, a film or a computer game with some literary, artistic or educational merit from still being Refused Classification under the Code and guidelines.

However, it could be helpful to clarify the application of this provision in relation specifically to child pornography.

Commonwealth child pornography offences do not have an artistic or literary merit defence.

A recent report from the Child Pornography Working Party (CPWP) appointed by the New South Wales Attorney-General recommended that the artistic merit defence for child pornography be removed:

> *The CPWP is of the view that the inclusion of the defence of artistic merit amongst the child pornography offences may, somewhat unhelpfully, lead to the impression that material that would otherwise constitute child pornography is acceptable if the material was produced, used, or intended to be used whilst acting for a genuine artistic purpose. The CPWP is not of the view that this should be the case. Material that is otherwise offensive because of the way in which it depicts children should not be protected because its creator claims an overriding artistic purpose for it. If having considered the artistic merit of an image it is considered offensive then it should only be legitimate if there is an overriding, definable and clear public purpose.*[16]

The defence has since been removed from New South Wales law.

It would be helpful to amend the guidelines for the classification of publications and of films and computer games to make it clear that material that should be Refused Classification because it promotes or provides instruction in paedophile activity or contains descriptions or depictions of child sexual abuse or any other exploitative or offensive descriptions or depictions involving a person who is, or appears to be, a child under 18 cannot be classified otherwise because of any alleged artistic or literary merit.

It may considered necessary to also amend Section 11 of the *Classification (Publications, Films and Computer Games) Act 1995* so that it specifies that there is no requirement to consider artistic or literary merit in relation to material that would otherwise be Refused Classification for offensive depictions or descriptions involving children.

Alleged artistic merit is no excuse for child pornography. The Senate Legal and Constitutional Affairs Committee recently recommended that:

> *the Australian Government, through the Standing Committee of Attorneys-General, pursue with relevant states the removal of the artistic merit defence for the offences of production, dissemination and possession of child pornography.*[17]
>
> ***Recommendation 7.2:***
>
> ***The Classification (Publications, Films and Computer Games) Act 1995, the National Classification Code, the Guidelines for the Classification of Publications and the Guidelines for the Classification of Films and Computer Games should each be amended to make it clear that material that otherwise would be Refused Classification due to offensive depictions or descriptions of children should not be given a lower classification due to any alleged artistic or literary merit.***

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

The Australian Record Industry Association (ARIA) and the Australian Music Retailers Association (AMRA) currently jointly administer a code of practice for the labelling of recorded music product containing potentially offensive lyrics and/or themes.[18]

The scheme provides for three levels of warning labels as follows:

- Moderate impact coarse language and themes
- Strong impact coarse language and themes
- Restricted: High impact themes: Not to be sold to persons under 18.

Additionally the scheme provides that:

> *Product containing lyrics which promote, incite, instruct or exploitatively ("exploitative" means appearing to purposefully debase or abuse for the enjoyment of listeners, and lacking moral, artistic or other values) or gratuitously ("gratuitous" means material which is unwarranted or uncalled for, and included without the justification of artistic merit) depict drug abuse; cruelty; suicide; criminal or sexual violence; child abuse; incest; bestiality; or any other revolting or abhorrent activity in a way that causes outrage or extreme disgust to most adults.*

These recordings are not permitted to be released and/or distributed by ARIA members or sold by AMRA members.

The scheme includes a Complaints Handling Service and an ombudsman. Failure to comply with the scheme can result in expulsion from ARIA or AMRI.

The Report of the APA Taskforce on the Sexualization of Girls provides a summary[19] of research evidence on the sexual content of popular music.

> *It is evident that the lyrics of some recent popular songs sexualize women or refer to them in highly degrading ways, or both.*
>
> *Some examples include the following:*
>
> - *"So blow me bitch I don't rock for cancer / I rock for the cash and the topless dancers"* (Kid Rock, "f*ck off", 1998);
> - "*Don'tcha wish your girlfriend was hot like me?"* (Pussycat Dolls, 2005);
> - "*That's the way you like to f*** … rough sex make it hurt, in the garden all in the dirt*" (Ludacris, 2000);
> - "*I tell the hos all the time, Bitch get in my car*" (50 Cent, 2005);
> - "*Ho shake your ass*" (Ying Yang Twins, 2003);
>
> *As part of a recent study of the effects of listening to popular music on sexual behavior (Martino et al., 2006), researchers coded the content of 164 songs from 16 artists popular with teens. Overall, 15% of songs contained sexually degrading lyrics. Most of these lyrics were concentrated within the work of rap and R&B artists; as many as 70% of individual artists' songs included degrading sexual content.*

Recent research has found that "Listening to music with degrading sexual lyrics is related to advances in a range of sexual activities among adolescents, whereas this does not seem to be true of other sexual lyrics. This result is consistent with sexual-script theory and suggests that cultural messages about expected sexual behavior among males and females may underlie the effect. Reducing the amount of degrading sexual content in popular music or reducing young people's exposure to music with this type of content could help delay the onset of sexual behaviour."[20]

Two examples of lyrics from albums approved for sale[21] by ARIA/AMRA with Level 3 Warnings suffice to illustrate the inadequacy of this scheme:

Stripped, raped and strangled[22]

(from 15 Year Killing Spree [Album] by Cannibal Corpse

They think they know who I am
All they know is I love to kill
Face down, dead on the ground
Find me before another is found

I come alive in the darkness
Left murdered and nameless
Dead unburied and rotten
Half eaten by insects

She was so beautiful
I had to kill her

Tied her up
And taped her mouth shut
Couldn't scream
Raped violently
Rope tight, around her throat
Her body twitches
As she chokes

Strangulation caused her death
Just like all the others
Raped before and after death
Stripped, naked, tortured

They're all dead, they're all dead
They're all dead by strangulation

I come alive in the darkness
Left murdered and nameless
Dead unburied and rotten
Half eaten by insects

It felt so good to kill

I took their lives away
Seven dead, lying rotten
Unburied victims
Their naked bodies putrefy

Strangulation caused her death
Just like all the others
Raped before and after death
Stripped, naked, tortured

They're all dead, they're all dead
They're all dead by strangulation

I come alive in the darkness
Left murdered and nameless
Dead unburied and rotten
Half eaten by insects

They think they know who I am
All they know is I love to kill
Face down, dead on the ground
Find me before another is found

The Corpse Garden[23]

(from Left in Grisly Fashion [Album] by Prostitute Disfigurement)

Cruising the streets for young women
Luring them into my van
Gagged, her eyes begged for mercy
Never to be seen again

Blindfolded, gagged with masks of tape
Stripped naked, shackled to the bed
Female body infested, bruised and lacerated
There's no escape from your fate

Enter the house of horror
No turning back from your fate

Slowly slicing her body
Using my tools of the trade
With a depraved relish
The horror is now uncaged

Young women were stripped
Bound with tape
Raped, tortured then killed [2x]
Dismembered and buried
In the corpse garden

Deceased through mutilation
Bones are turned to mush
Sliced female flesh leaves me
In a rudimentary rush

Slashing young women and children
Left mummified in my masonry
Stuffed and buried in my backyard
To hide my killing spree

The corpse garden [2x]

It is hard to see what might qualify as sufficiently exploitative and gratuitous to be actually classified as "*not to be sold*" under a system that finds these lyrics acceptable.

The Senate Legal and Constitutional Affairs Committee recently recommend that:

> *the ARIA/AMRA Labelling Code should be required to incorporate the classification principles, categories, content, labelling, markings and warnings of the National Classification Scheme. The adoption of these measures by industry should be legally enforceable and subject to sanctions.*[24]

Recommendation 8:

The ARIA/AMRA Labelling Code of Practice for Recorded Music Product Containing Potentially Offensive Lyrics and/or Themes needs to be revised and strengthened to limit more effectively the distribution of material which demeans women by treating them as sexual objects, including as objects for sexual violence.

If the music industry is not willing to do this then consideration should be given to legislation to bring audio music recordings under the National Classification Scheme.

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

The potential size and composition of the audience cannot easily be determined at the point of the first release of material. With modern technological developments content developed initially for a small audience may easily "go viral" and enjoy a widespread distribution so audience size is not an appropriate criterion for determining whether or not material should be classified.

Recommendation 9:

Potential size or composition of the audience is not a suitable criterion for determining whether content should be classified.

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

It is not possible at the point of initial publication or release to determine whether content will be accessed in public or at home. Most technological platforms can function in both home and public settings. For example, subscription television, which may be primarily thought of as directed at home consumption, can become public simply by placing a television screen in a public place.

AUSTAR, the provider of subscription television narrowcasting services to the Northern Territory, was specifically identified in the report, *Little Children are Sacred*[25], as the source of pornographic television. Several witnesses indicated that pornographic television was contributing to the problems of sexualisation of Aboriginal youth and the sexual abuse of women and children in their communities.

> *Wherever the Inquiry travelled throughout the Territory, people would tell us the same story – lack of housing, inadequate housing, 10-20 people living in many homes, no privacy, families relegated to a single room in a house shared with several other families, toilets and showers not working due to excessive use, security issues, very young children being exposed to adult sexual behaviour, children exposed to pornographic magazines, videos and television, and vulnerable children living in close proximity to adults who are often intoxicated or violent or both.*[26]

> *Pornography is an issue as are music film clips and various television programs.* - Central Australian community.

> *Porn is available in the community – SBS and Austar are probably the main sources.* - Service Providers at a Central Australian community.

> *We are worried about the influence of television and magazines. In particular, pornographic videos and music video clips.* - East Arnhem community.[27]

A similar issue has been reported in suburban Australia by Mr Paul Hotchkin of Media Standards Australia in relation to music videos broadcast on a television screen in a McDonald's store:

> *We were wondering if McDonald's family restaurants have a new slogan: 'Do you want porn with your happy meal?' McDonald's in Busselton, a very popular rural holiday town in Western Australia, is showing pornographic music videos through Foxtel's MAX channel. One particular music video clip shown in early January this year was Girls on Film by Duran Duran. It was the uncut and unedited version, which shows naked women and women in see-through negligees in various supposedly erotic scenes such as nude mud wrestling and a close-up of an ice cube being rubbed on a nipple—the sort of thing you would not find on Sesame Street or Play School. I immediately sent a letter of complaint by registered express mail direct to McDonald's head office, with no reply. When we complained to the store directly, we were told it was company policy to screen the MAX music video channel.*
>
> *I then emailed the ACMA, who suggested I contact ASTRA or the Classification Branch of the Attorney-General's Department. ASTRA said I should complain to Foxtel, which I did, but I have still had no reply.*
>
> *Someone from the Classification Branch actually phoned me and said they had no record of any Duran Duran Girls on Film video that had a rating of higher than PG, which to me meant they only had a record of the censored version.*
>
> *Further, we also understand that this cases is not isolated. In the past, people who go to fitness gyms have also complained about music videos on Foxtel's MAX channel. Foxtel rate about 95 per cent of material on their MAX channel as MA. I do not think that Foxtel have any control over what its members do with their subscriptions, so I am surprised that ASTRA suggested I contact them. Pay TV needs to advise its members that it is against the law to show films that have a classification of MA+. Due to the serious nature of the complaint it would have been great if someone from the ACMA, or even ASTRA, had taken the initiative and responded and acted quickly. To my knowledge, nothing has been done.*[28]
>
> ***Recommendation 10:***
>
> ***Whether content is accessed in public or at home should not affect whether it should be classified.***

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

As discussed above at 4.1 outdoor advertising should be classified because of its potential impact on children given its pervasive presence in public space.

> ***Recommendation 11:***
>
> ***As detailed in recommendation 4.1 outdoor advertising should be classified.***

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

Recommendation 12:

Access to online content should be controlled as recommended in detail in Recommendation 4.2.

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

If the mandatory filtering scheme required ISPs to offer as the standard default feed a service that, as far as technologically feasible, excluded material that would be classifiable MA15+ of higher, with access to MA15+ and R18+ material offered by ISPs as an opt-in service with strict age verification controls, then it would greatly assist parents to protect children form exposure to unsuitable material.

Recommendation 13:

Children's access to online content should be controlled as recommended in detail in Recommendation 4.2.

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

Decisions on the classification of publications are made by the Classification Board which must apply criteria which are set out in the National Classification Code. The terms of the Code are determined in accordance with the *Classification (Publications, Films and Computer Games) Act 1995 (the Classification Act).*[29]

The Code states that classification decisions are to give effect, as far as possible, to the following principles:

(a) adults should be able to read, hear and see what they want;

(b) minors should be protected from material likely to harm or disturb them;

(c) everyone should be protected from exposure to unsolicited material that they find offensive;

(d) the need to take account of community concerns about:

(i) depictions that condone or incite violence, particularly sexual violence; and

(ii) the portrayal of persons in a demeaning manner.

Evidence of harm to children from adult pornography is provided in a recent survey by Robert Peters, President of Morality in Media. [30] Evidence of harm is detailed for the following:

- Child sexual abusers use adult pornography to groom their victims.
- Child sexual abusers use adult pornography to sexually arouse themselves preliminary to committing offences against children.

- Clients of child prostitutes use adult pornography to model what they do with child prostitutes.
- Pimps use adult pornography to instruct child prostitutes.
- Many child sexual abusers begin by viewing adult pornography and progress to viewing child pornography and then to actual abuse of children.
- Children act out what they view in adult pornography with other children.

These uses of adult pornography make it imperative that, if society insists on allowing adult pornography to be available to adults, the strictest possible conditions are enforced. The present classification enforcement system is failing and changes are needed to provide better protection for children.

14.1 Serial classifications

A number of issues of publications that had been given serial classification were submitted to the Classification Board by Ms Julie Gale of Kids Free To Be Kids. This has resulted in nine such serial classifications being revoked. The titles affected are *Best of Cheri*, *Finally Legal*, *Live Young Girls (2)*, *Swank*, *The Very Best of High Society*, *Purely 18*, *Hawk* and *Gallery*.

The case of *Live Young Girls* is particularly revealing of the flawed nature of serial classification.

On 11 July 2006 this title was given a serial classification, valid for 24 months, of Category 1 Restricted based on Vol. 26, no. 5, May 2005. On 27 June 2008, this same title was given a subsequent 24 month serial classification of Category 1 Restricted, based on Vol. 29, no. 5, May 2008.

Ms Gale submitted three issues of *Live Young Girls* (dated Dec 2006, August 2007 and April 2008) to the Classification Board. On 13 January 2009 the Director informed Ms Gale that these issues each contained RC (Refused Classification) content and that the serial classification granted on 11 July 2006 had now been revoked.

It appears that at that point that no action was taken to revoke, or even to audit, the 24 month serial classification granted to *Live Young Girls* on 27 June 2008.

It was only when Ms Gale - who is not on the public payroll - submitted three further issues (dated June 2008, September 2008 and December 2008) that were covered by this second serial classification that the Board audited them and revoked this serial classification.

These facts are sufficient to demonstrate the comprehensive failure of the serial classification scheme to ensure that publications are appropriately classified.

As of February 2010 the serial classification declarations of 55 publications had been revoked since the scheme began in December 2005. Forty-eight of these were originally classified Category 1 restricted.[31]

While it may be the case that some titles may comply with the requirements for serial classifications, there is no obvious way of distinguishing these in advance.

The public is entitled to certainty that the classification on a publication accurately reflects the nature of that publication – not a mere pious wish that it may do so based on an earlier issue of the same title.

Recommendation 14.1:

The serial classification scheme should be abandoned and all relevant titles be made subject to mandatory submission for classification on an issue by issue basis.

14.2 Display of restricted publications

The current classification guidelines for Category 1 and Category 2 Restricted publications are given in the *Guidelines for the Classification of Publications 2005*.[32]

All jurisdictions prohibit the sale of Category 1 and Category 2 Restricted publications to persons under 18. Category 2 Restricted publications have the additional constraint, in most jurisdictions, that they may only be displayed in premises restricted to adults.

While Category 2 publications allow depiction of "actual sexual activity", Category 1 allows "realistic depictions of nudity" which "may contain genital detail and emphasis; realistic depictions of obvious sexual excitement and realistic depictions" that "include touching of genitals."

A brief summary of the differences between the guidelines for Category 1 and Category 2 Restricted publications is given in the following table.

	Category 1 - Restricted	**Category 2 - Restricted**
Display	Covers must be suitable for public display - or sealed in plain opaque wrapping.	May not be publicly displayed and may only be displayed in premises that are restricted to adults.
Violence	Publications which promote, incite or instruct in violence are not permitted.	As for 'Category 1 - Restricted'.
Sex	Detailed descriptions of sexual activity involving consenting adults may be permitted - but not actual sexual activity shown in realistic depictions.	Actual sexual activity involving consenting adults may be realistically depicted.
Nudity	Realistic depictions of nudity may contain genital detail, obvious sexual excitement and may include touching of genitals.	Realistic depictions of nudity may include actual sexual activity.
Coarse Language	Virtually no restrictions.	As for 'Category 1 - Restricted'.
Adult Themes	Descriptions and depictions of *revolting and abhorrent* phenomena are not permitted.	Depictions of *revolting and abhorrent* phenomena may be permitted.
Drug Use	Descriptions and depictions of drug use may be permitted.	As for 'Category 1 - Restricted'.

Clearly, Category 1 material is designed for the sole purpose of sexual arousal. Sale of such material in general retail outlets such as newsagents and petrol service stations is inappropriate. Its sale should be rigorously restricted to adults by limiting display and sales to premises restricted to adults, as is the case with Category 2 material in most jurisdictions.

Several jurisdictions restrict the sale and display of Category 2 restricted publications to a "*restricted publications area*" that must be constructed and monitored in such a way as to exclude the entry of a minor.

For example South Australian legislation provides as follows:

> **81—Restricted publications area—construction and management**
>
> *(1) A restricted publications area must be so constructed that no part of the interior of the area is visible to any person outside the area.*

(2) Each entrance to a restricted publications area—

(a) must be fitted with a gate or door capable of excluding persons from the area; and

(b) must be closed by means of that gate or door when the area is not open to the public.

(3) A restricted publications area must be managed by an adult who must be in attendance in or near the area at all times when the area is open to the public.

(4) The manager of a restricted publications area must cause a notice containing the following words, in legible letters or numerals not less than 15 millimetres in height and of a colour that contrasts with the background colour of the notice, to be displayed in a prominent place on or near each entrance to the area, so that it is clearly visible from outside the area:

RESTRICTED PUBLICATIONS AREA—PERSONS UNDER 18 MAY NOT ENTER. THE PUBLIC ARE WARNED THAT SOME PUBLICATIONS DISPLAYED HEREIN MAY CAUSE OFFENCE. [33]

Those jurisdictions that do not have this provision (such as Western Australia) should adopt it.

In all jurisdictions, these requirements should also be applied to the sale and display of Category 1 Restricted publications.

The Senate Legal and Constitutional Affairs Committee recently recommend that:

Category 1 and 2 Restricted publications, and R18+ films, where displayed and sold in general retail outlets, should only be available in a separate, secure area which cannot be accessed by children.[34]

Recommendation 14.2:

All restricted publications should only be sold or displayed in a restricted publications area accessible to adults only.

14.3 Display of R18+ films

Requirements for the display of R18+ films vary from one jurisdiction to the next.

Amendments to South Australian legislation passed in 2010 set a new standard that should be adopted nationally.

40A—Keeping R 18+ films with other films

(1) An occupier of premises (other than adult-only premises) at which films with a classification lower than R 18+ are sold must not display material for a film classified R 18+ at the premises—

(a) unless—

(i) the material is displayed in a different area (including, for example, in a different aisle or on a different shelving case, stand or table) from that in which material for other films is displayed; and

(ii) the area is marked as an area displaying material for films classified R 18+ by a notice complying with subsection (2) displayed in a prominent place near the area; and

(iii) the surface area of the material that is on display (for example, the front cover of a DVD container where that is on display) is not more than 300 cm²; or

(b) unless, at all times while on display, the material bears no images or markings other than—

(i) the name of the film in letters of 10 millimetres or less in height; and

(ii) the determined markings relevant to its classification.

Maximum penalty: $5 000.

Expiation fee: $315.

(2) A notice required to be displayed under subsection (1)(a) must contain the following statement (printed in legible type of at least 15 millimetres in height and of a colour that contrasts with the background colour of the notice):

R 18+ FILMS AREA—THE PUBLIC ARE WARNED THAT MATERIAL DISPLAYED IN THIS AREA MAY CAUSE OFFENCE.[35]

Recommendation 14.3:

R18+ films should, in all jurisdictions, be subject to requirements for display similar to those currently required under South Australian legislation.

14.4 The enforcement system

There is a serious failure of the call-in notice system for adult material.

Since 1 January 2008, 858 items mainly concerned with sex or sexualised nudity ('adult material') have been called in. Not a single distributor of adult material has submitted a film or publication for classification as a result of the call-ins.[36]

Once a distributor fails to respond to a call-in notice the director of the Classification Board refers the matter to the Attorney-General's department which then notifies the relevant state or territory law enforcement agency. There is no system for follow-up or feedback so there is only limited information about the results of such referrals.[37]

While it is appropriate that law enforcement of the classification system remains a matter for the states it would be very useful for the Commonwealth to play a role in co-ordinating information on the results of law enforcement efforts. Publications and films that are found to be in breach of the classification system are likely to be offered for sale in more than one state, not just in the state in which a copy of the offending publication or film has been found.

It is odd that there is no penalty on distributors for failing to respond to a call-in notice. Indeed it seems that distributors who are repeat offenders in such failure to comply nonetheless continue to be offered the services of the Classification Board in classifying new publications or films submitted for publication.

It would be helpful to try to improve the abysmal response rate to call-in notices by introducing penalties for failure to comply with a notice, including suspension from using any services of the Classification Board for a fixed period, say twelve months, and until all call-in notices are complied with.

Recommendation 14.4:

The enforcement system should be improved by:

- ***establishing a centralised information database recording the progress and outcomes of all enforcement matters referred to state and territory law enforcement agencies by the Commonwealth;***
- ***introducing financial penalties for distributors that fail to comply with call-in notices; and***
- ***suspending services by the Classification Board to any distributor that fails to comply with a call-in notice for a minimum of 12 months with no services to be resumed until all outstanding call-in notices have been complied with by the distributor.***

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

Classification markings, warnings and consumer advice have proven to be a useful tool in meeting one of the objectives of the national classification scheme - providing advice to consumers and parents to help inform their choices about accessing, viewing, hearing, reading or playing material, including warning them of material they might find offensive or unsuitable for their children.

Recommendation 15:

The present system of classification markings, warnings and consumer advice is generally working well and should be maintained.

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

Classification of programs for broadcast is carried out by the industry itself subject to a complaints process which allows ultimate decision making and penalties for breaches to be applied by the Australian Communications and Media Authority.

An examination of the Australian Communications and Media Authority's findings of breaches[38] of the broadcasting codes indicates that most breaches do not result in any penalty for the licensee.

Licensees are enjoying a privilege in being given access to the airwaves. This privilege carries it with the legal and social responsibility to comply with the codes of practice which are developed by the respective industry sectors. There ought to be a financial penalty for *any* breach of the code.

More importantly ACMA should be empowered to impose temporary restraints on broadcasting a particular series in response to prima facie serious breaches of a broadcasting code. For example, if an

episode in a series if found to have been wrongly classified, then all future episodes should be presumptively classified according to the higher classification.

ACMA found on 4 October 2007 that there had been three breaches of the G classification by *Home and Away*[39] in episodes broadcast on 21 February, 23 March and 26 March 2007. However, by the time this finding was made the licensee had upgraded the default classification for the series to PG.

Recommendation 16:

Penalties for breaches of the broadcasting codes of practice should be increased, in particular:

- ***licensees should incur a financial penalty for any breach of a code; and***
- ***ACMA should be empowered, based on a preliminary investigation, to order a licensee not to broadcast any further episodes of a program that has breached the code or to impose conditions on any further broadcast of the program.***

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

The co-regulatory model should not be extended to publications, films and computer games. It is more suitable for these to continue to be classified by a government appointed Classification Board than by industry itself.

If industry classified its own material there would be a natural tendency to favour lower classifications which generally lead to increased market share. This is why applicants, from time to time, appeal against the classification of a film for public exhibition at a higher classification than they would prefer for marketing reasons.

The endemic problems with the sale of pornographic magazines, and the failure of pornography distributors to respond to call-in notices discussed in the response to Question 14 make it clear that the pornography industry could not be trusted to classify restricted publications and X18+ films appropriately.

Recommendation 17:

Classification of publications, films and computer games should continue to be done by a government appointed Classification Board and not devolved to industry under a co-regulation scheme.

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

Recommendation 18:

No further extensions to classification by industry assessors should be considered at this time.

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

Recommendation 19:

Fee waiver rules should allow the discretionary waiver of classification fees for non-commercial organisations except for material that would attract a classification with age-related legal restrictions on access. Fee waivers should also be available for community groups who appeal any classification decisions.

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

20.1 MA/AV distinction is unnecessary

In the *Commercial Television Code of Practice* both MA and AV are described as being suitable for viewing only by persons aged 15 years or over. It is therefore illogical to assign them different classification zones. The classification zones should take into account the needs of families, where parents who wish to preclude their children under 15 from viewing material judged to be unsuitable for viewing by persons under 15.

It is unreasonable to expect parents to enforce a 9:00 pm curfew on television viewing by 14 year olds. 9:30 pm would be more reasonable. In the United States, the time slot when TV programs unsuitable for children can be shown doesn't commence until 10 pm.

While many parents are rightly concerned about the adverse impact of violence on their children, many are equally concerned about the adverse impact of sexual depictions, coarse language, adult themes and drug use. Such parents see no reason to differentiate these elements by separate classifications. The provision of consumer advice meets the needs of those parents who wish to permit their older children to view some but not all material from the adult classification range.

Recommendation 20.1:

The MA and AV classifications should be combined into a single MA classification with a classification zone from 9:30 pm to 5:00 am.

20.2 X18+ v R18+ : Actual sex

Most people expect that actual sex is only allowed in the X18+ classification.

However, in January 2000 a decision of the Classification Review Board to classify the film Romance as R18+ opened a significant breach in what was until then a clear dividing line between the R18+ (no actual sex) and the X18+ (depictions of actual sex but no sexual violence) classifications in regard to explicit depictions of sex. The film contained several brief depictions of an erect penis, of fellatio and of a woman masturbating a man. As the Classification Board observed in its initial decision to classify the film as RC 'the explicit depictions of sexual activity [had] not previously been permitted (other than in an educational context) in the 'R' classification'.[40] The Board noted that it was obliged to

classify the film in accordance with the Classification Guidelines for Films and Videotapes which, at that time specified that for a film to be classified R, *'Sexual activity may be realistically simulated; the general rule is "simulation, yes - the real thing, no"'* and '*Nudity in a sexual context should not include obvious genital contact*.' The Board found that the sexually explicit depictions could have been accommodated in the X18+ classification but that other scenes of sexual violence prevented this.

In classifying Romance as R18+ on appeal, the Classification Review Board opined that '*In the R18+ Restricted classification, "sexual activity may be realistically simulated; the general rule is "simulation, yes - the real thing no"*. "*The real thing*" possibly may have occurred in the fellatio scene, and certainly in the masturbation scenes. The "rule" referred to above is expressed to be a general rule, implying the possibility of exceptions in a limited number of instances. After careful consideration the majority of the Board decided that the limited discretion implicit in the application of the rule should be exercised in this film's favour.'[41]

Curiously the Classification Review Board's decision did not address the provision in the guidelines which specified, without exception, that "*Nudity in a sexual context should not include obvious genital contact.*" This provision was subsequently dropped from the revised *Guidelines for the Classification of Films and Computer Games* adopted in 2003 by the Standing Committee of Attorneys-General (Censorship).

Since this decision a number of films with explicit depictions of sexual acts have been classified as R18+. These include *Irreversible*, a film with a seven minute long scene showing a woman being anally raped as well as several scenes of actual sex and *Anatomy of Hell* a film with several detailed scenes of actual sex acts as well as a scene in which '*A young girl – approximately 8 to 10 years of age – is shown removing her underpants and then lying down under a bush. A medium shot of what appears to be the naked girl is shown. A group of boys watch her and laugh. One boy removes the glasses of another and implicitly inserts the arm of the glasses into the girl's vagina. The boy then looks at a mucous-like fluid on the arm of the glasses.*'[42]

The majority of the Classification Review Board found that '*this scene is of high impact but interpreted the actions of the children as exploratory play and the intention of the filmmaker as not attempting to titillate viewers, but to provide a context for future scenes. The impact was also moderated by the fleeting nature of the explicit scene and the somewhat positive interactions between the children.*'[43] There you have it: vaginal penetration of an eight to ten year old girl with an instrument while a group of boys look on can be a '*positive interaction*' and '*exploratory play*'.

In January 2005 the Classification Review Board classified the film *Nine Songs* as R18+. The film consisted largely of sex scenes interspersed with scenes from rock concerts. Actual sex shown with explicit detail and close-ups included vaginal intercourse and masturbation of a man by a woman to ejaculation. A minority of the Classification Review Board '*noted previous decisions of the Review Board permitting fleeting, non-detailed scenes of actual sex and case law regarding the application of a "general rule". In the film, the actual sex scenes were prolonged and detailed, took more than five minutes of the 69 minute film and were shown with full lighting. The amount of actual sex scenes and cumulative impact of those scenes was gratuitous.*'[44]

On 6 September 2006 the Classification Board classified the film *Shortbus* as R18+. Director John Cameron Mitchell has explained how he '*launched a website for people to send in a videotape of them talking about sex. The site was swamped with hits, and 500 videos arrived in the mail. Some had people talking about sex, some people sang about sex and some people, well, just did it. He chose 100 of those people and got them together for a huge game of "spin the bottle" where people made out with other people who were not necessarily their sexual preference. Then he got everyone to watch all the videos, and rate everyone in terms of sexual attraction. A bit of playing with a spreadsheet, and he soon knew which couples, or triples, were going to partner up on screen. What he still didn't know was what the story was. That came out as the actors workshopped. Often, the crew would strip naked to help the actors relax. And in one group sex, the director went that extra yard and joined in.*

Mitchell says you can see the back of his head as he performed oral sex on an actress, something the gay man admits was a personal milestone.'[45]

In the light of these decisions it was understandable that Adultshop.Com Ltd. initiated an attempt that, if it had been successful, would have resulted in all (or nearly all) films of the type being classified as X18+, that is films depicting actual sex with no pretence to any purpose other than the sexual stimulation and arousal of the audience, being classified as R18+. According to the Classification Review Board the film *Viva Erotica* is '*of 98 minutes duration and depicts men and women having explicit sex. There is no plot and the persons depicted are not given names. There are six separate, unrelated "vignettes" containing explicit sex scenes, five involving a man and a woman and one involving two women.'*[46] The Classification Review Board dismissed an appeal from Adultshop.Com Ltd to have the film classified as R18+ concluding that a departure from 'the general rule' was not warranted for this film. Adultshop.Com Ltd. pursued this matter before a single judge of the Federal Court[47] and then before the Full Court of the Federal Court. A unanimous decision by the Full Court dismissed the appeal advanced by Adultshop.Com Ltd which asserted that the Guidelines for the Classification of Films and Computer Games were invalid, and that the Classification Review Board was bound in the light of expert evidence about Australians attitudes to sexually explicit films to find that Viva Erotica was not offensive.[48]

In July 2008 the Minister for Home Affairs, Bob Debus, initiated applications to the Classification Review Board to review the classifications of four anime films, *Classes in Seduction, T & A Teacher, Holy Virgins* and *Bondage Mansion*, each of which had been classified as R18+ by the Classification Board. The Classification Review Board classified Holy Virgins as RC '*because of the sexual depictions of characters who appear to be under 18*'.[49] The three other films were each classified as R18+. The Classification Board had noted in its Board report on the film *T & A Teacher* that '*Although this film is animated, the depictions of the various sex acts are graphic and in close-up and the male and female genitalia are anatomically correct. The film is predominantly about sex and there are several prolonged scenes which depict masturbation of a vagina and penis, cunnilingus, fellatio, anal and vaginal penetration by digit and penis, ejaculation and intercourse*.'[50] Although this film and *Classes in Seduction* each feature sexual acts between a teacher and his or her students the Classification Review Board appears to have seen this as acceptable for a film to be classified R18+ as none of the students appear to be less than eighteen years of age.[51] It appears that they were able to distinguish these films from films such as *Viva Erotica* only because they are animated. As the technology continues to blur the boundaries between animation and acting – consider *Beowulf* – the classifiers will now have to decide how much animation or computer editing is sufficient to allow a film which depicts actual sex with no pretence to any purpose other than the sexual stimulation and arousal of the audience from being classified R18+.

The January 2000 decision of the Classification Review Board to allow, as exceptions to a general rule, a breach of the dividing line between the X18+ and R18+ classifications in relation to depictions of actual sex has resulted in a steady erosion of this dividing line. Although Adultshop.Com Ltd failed in its attempt to have the dividing line dissolved altogether it seems that it is only a matter of time before successive classification decisions widen the breach in the line to the point where there is no remaining difference between the classifications.

The only effective way to halt this progressive erosion would be to amend the classification guidelines. The R18+ classification would need to state clearly and unambiguously that explicit depictions, including animated depictions, of actual sexual intercourse, other sexual activity or genital contact in a sexual context are not permitted.

Recommendation 20.2:

The Guidelines for the Classification of Films and Computer Games should be amended to state that, in regard to sex in the R18+ classification for films, there can be no explicit depictions, including animated depictions, of actual sexual intercourse, of other sexual activity or of genital contact in a sexual context.

20.3 Child abuse in an R18+ film

The film *Salo o le 120 Giornate di Sodoma (Salo)* currently remains classified as Refused Classification for public exhibition but was reclassified as R18+ for a DVD version with extra material.

The Classification Review Board reasons for decision have been published. The majority determined to classify the DVD version of the film *Salo o le 120 Giornate di Sodoma (Salo)* as R18+ with consumer advice "*Scenes of torture and degradation, sexual violence and nudity*".

A minority of the Classification Review Board found that the film describes and depicts persons under 18 in a way that "*that is likely to cause offence to a reasonable adult*" and so should be Refused Classification.

This view was well supported by the evidence before the Review Board.

In the 1997 decision by the Classification Board and in the 1998 decision by the Classification Review Board different views were expressed by the respective majorities and minorities as to whether any of the "*young teenagers*" depicted in the film were or appeared to be aged under 16 years.

This reflected the then provisions of the National Classification Code. However, the Code has since been modified so that it now provides in Clause 3, Item 1 (b), that:

Films that … describe or depict in a way that is likely to cause offence to a reasonable adult, a person who is, or appears to be, a child under 18 (whether the person is engaged in sexual activity or not) [are to be classified] RC.

In the 1997, 1998 and 2008 decisions reference is made to "*young teenagers*". This description certainly suggests that all decision makers considered the group – or at least most of them – to be under 18.

The 2010 Classification Board decision refers to "*young males and females*" and has no direct discussion in the majority reasons about the depiction of minors. This is curious given that the minority of the Board specifically find that the film contains "*numerous depictions of realistically simulated sexual activity, sexual violence and torture involving minors throughout, including depictions of coprophagia and urolagnia*."

It seems then that no decision maker to date has argued either that there are no minors depicted in the film or that, conceding that minors are depicted, these depictions are not "*likely to cause offence to a reasonable adult*".

At least one of the actors who plays a young male victim – Sergio Fascetti – was born in 1958 and so was aged under 18 when the film, which was released in 1975 was made.[52]

In addition to the numerous scenes depicting the young teenagers in offensive ways there is also a scene depicting a "*young girl*" being sexually molested by an adult male who puts her over his knees and lifts her skirt to rub her buttocks. This depiction takes place while an adult female Senora Maggi is describing in explicit detail being sexually abused by an adult male when she was a young child.

FamilyVoice Australia has lodged an appeal against the Review Board's decision and a hearing is scheduled before the Federal Court of Australia on 4 March 2011.

The majority decision, when carefully read, fails to make a finding on whether the film describes or depicts any persons under 18.

The majority decision improperly modified the requirement that "*Descriptions or depictions of child sexual abuse or any other exploitative or offensive descriptions or depictions involving a person who is, or appears to be, a child under 18*" by taking into account irrelevant considerations such as "*context, purpose and cinematic techniques*".

By "*context*" the majority includes, and places primary emphasis on, additional material included with this DVD format.

"*It is the opinion of the Review Board that the inclusion of additional documentary features in this modified DVD format version of Salo facilitates wider consideration of the historical, political and cultural context of the film, and this would mitigate the level of potential community offence and the impact of classifiable elements to the extent that the film can be accommodated within the R 18+ classification.*"

The majority failed to give consideration to evidence before it that many or even most viewers are unlikely to view this additional material.

In our view, these failures give sufficient grounds for a reasonable prospect of success in the appeal to the Federal Court.

Furthermore, such an appeal is urgent because if this decision is allowed to stand uncorrected then it will be open to the Classification Board and the Classification Review Board to make further classification decisions based on the undesirable and unwarranted assumptions that:

- Detailed descriptions and simulated depictions of child abuse are permitted in R18+ films;
- Merely providing 'additional material' in the form of interviews with directors etc. can be sufficient to qualify a film that would otherwise be Refused Classification to be classified as R18+.

This would significantly corrupt the classification process in Australia.

Regardless of the determination of the *Salo* appeal it would be helpful to amend the classification guidelines to minimise the danger of these undesirable outcomes.

Recommendation 20.3:

The Guidelines for the Classification of Films and Computer Games should be amended to state that:

- ***The mere presence of additional material in a DVD version of a film does not in itself justify lowering the classification of the film; and***
- ***Matters such as context, purpose and cinematic techniques do not justify detailed descriptions or simulated depictions of child abuse in R18+ films.***

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

There is no need for any new classification categories.

21.1 No R18+ for computer games

An R18+ classification for computer games has been discussed several times by censorship ministers including at the Standing Committee of Attorneys-General (Censorship) meetings in December 2010 and March 2011.

At the December 2010 meeting it was decided that Ministers would "*consider draft guidelines to be developed for classification of games at their next meeting, including a possible R18+ classification, taking into account concerns raised by Ministers relating to the difference in nature of film and games; and the interactivity of games; and that there will continue to be a refused classification category*."

It was also decided that Ministers "*do not support the dilution of the refused classification category*."[53]

Taken together these decisions leave open the possibility of a new R18+ classification for computer games but only on the condition that introducing the new classification would not involve "*the dilution of the refused classification category*". In other words, no computer games that would be refused classification under the current guidelines where the highest classification is MA15+ should be able to be classified R18+ under the possible new classification.

This outcome could only be achieved by carefully splitting the current MA15+ classification for computer games to ensure that those games with more violence or more intense violence are classified R18+.

At the March 2011 meeting Ministers "*considered draft new Guidelines for the Classification of Computer Games; considered the proposed amendments to the National Classification Code to support the introduction of an R 18+ classification for computer games and agreed to make a decision regarding the introduction of an R 18+ classification at the July 2011 SCAG meeting.*"[54]

On 25 May 2011 the proposed draft new *Guidelines for the Classification of Computer Games* were released by the Minister for Justice, the Hon Brendan O'Connnor. He claimed that "*The draft guidelines make it clear that sexually explicit games or games with very frequent, strong and realistic violence will not be allowed in the MA15+ category*" and that the draft guidelines "*provide safeguards to restrict the availability of material that is unsuitable for children; address the difference between films and computer games, especially in terms of interactivity*" and "*ensure that the Refused Classification category is retained*."[55]

As will be made clear below in discussing the proposed draft new *Guidelines for the Classification of Computer Games*, **they fail to give effect to the 10 December 2010 decision of the Ministers not to "*support the dilution of the refused classification category*" for computer games**. The draft guidelines would, if implemented, allow many computer games that must, under the current guidelines, be Refused Classification to be classified R18+ and therefore made available for sale and distribution.

The draft guidelines are available online and public comment – limited to 1000 characters – is invited via the website.[56]

The proposed draft new *Guidelines for the Classification of Computer Games* contain only minor variations from the current provisions for the MA15+ classification for computer games.

The impact test remains the same: "*The impact of material classified MA 15+ should be no higher than strong*."[57]

There is no change to the provision for the classifiable element "themes".

In relation to the classifiable element "violence" the new guidelines propose adding "*Strong and realistic violence should not be very frequent*."[58] It is not clear that this provision would change the outcome of any classification decision. The rules for assessing impact already mention that impact may be higher where a scene "*is repeated frequently*" or "*is realistic, rather than stylised*". Following this direction it seems that a classifier ought, under the current guidelines, to consider a very frequent repetition of strong and realistic violence to have a "high" impact and therefore to exceed the MA15+ impact test of "*no higher than strong*".

Under the classifiable element of "sex" is the provision that "*Sexual activity must not be related to incentives or rewards*."[59] However, this is not a new provision as the current guidelines already state "*As a general rule except in material restricted to adults,… sexual activity must not be related to incentives or rewards*."[60] As the MA15+ classification is not restricted to adults this provision applies already to MA15+ computer games. There is a difference in that the new guidelines do not refer to "*a general rule*" – a term which has been applied by the Classification Board and the Classification Review Board in another context to allow exceptions - so the absence of this phrase could be seen as making the rule exceptionless for the MA15+ classification.

Under the classifiable element of "language" there is a slight variation. The current guidelines provide that "*Aggressive or very strong coarse language should be infrequent.*"[61] The new guidelines would provide that "*Aggressive or strong coarse language should be infrequent.*"[62] The prohibition on frequent "*strong coarse language*" rather than only on "***very** strong coarse language*" may make a difference to classification decisions. This would be easier to assess if the guidelines gave examples. It is anybody's guess as to what language would count as "*very strong coarse language*" rather than merely "*strong coarse language*".

Under the classifiable element of "drug use" the following provisions would be added under the new guidelines: "*Drug use must not be related to incentives or rewards*" and "*Interactive drug use that is detailed and realistic is not permitted*".[63]

The current guidelines already provide that "*material that contains drug use … related to incentives or rewards is Refused Classification*" although this is expressed as a "*general rule*" so the absence of this phrase could be seen as making the rule exceptionless for the MA15+ classification.[64]

The proposed new provision "*Interactive drug use that is detailed and realistic is not permitted*"[65] may clarify that such material should not be allowed in the MA15+ classification although material that involves "*Detailed instruction in the use of proscribed drugs*" is to be Refused Classification under both the new and the current guidelines.[66] It is difficult to see how any detailed, realistic and interactive drug use in a computer game would not amount to "detailed instruction". If a depiction is both detailed and realistic it could be copied in real life and therefore could be understood as "instruction".

Under the classifiable element of nudity the new guidelines would add the provision that "*Nudity must not be related to incentives or rewards*."[67] The current guidelines already provide that ""*As a general rule except in material restricted to adults, nudity … must not be related to incentives or rewards.*"[68] The comments above on "sex" and the "*general rule*" apply also to this provision.

The proposed new guidelines for MA15+ could be read as containing slightly stricter provisions on very frequent strong and realistic violence and frequent strong coarse language, as well as clarifying that for the MA15+ classification no material containing nudity, sexual activity or drug use may be related to incentives of rewards, and that interactive drug use that is detailed and realistic is not permitted.

It is possible, but by no means certain, that these minor changes could result in a few games that may have been classified as MA15+ under the current scheme being found to exceed the MA15+ classification under the proposed new guidelines.

The proposed new R18+ classification for computer games is virtually word for word identical with the current R18+ classification for films.

The only difference is the inclusion under the classifiable element of "violence" after the provision that "*Violence is permitted*" of the phrase "*except where it offends against the standards of morality, decency and propriety generally accepted by reasonable adults to the extent that it should not be classified*."[69]

This phrase is lifted from the National Classification Code provision for RC computer games. It is not clear what purpose its repetition in the guidelines is intended to serve. The Code already requires that computer games that depict violence in such a way that they "*offend against the standards of morality, decency and propriety generally accepted by reasonable adults to the extent that they should not be classified*" to be Refused Classification.[70]

Computer games classified R18+ under the proposed new guidelines could include:

- **high impact themes – including for example detailed instructions in methods of suicide;**
- **high impact violence – rather than the current maximum level of strong impact violence;**
- **high impact sexual violence – as long as it is "justified by context" and not related to "incentives or rewards";**
- **high impact sexual activity – including sexual activity related to incentives and rewards; realistically simulated sexual activity; and, as exceptions to the "general rule" actual depictions of real sexual acts as allowed in films since the decision by the Classification Review Board on *Romance* in January 2000[71];**
- **high impact coarse language – including frequent aggressive language; and**
- **high impact drug use – including, as exceptions to the "general rule", drug use that is related to incentives or rewards and interactive drug use that is detailed and realistic.**

It is clear that the proposed new R18+ classification could allow a significant number of computer games that would currently be Refused Classification to be classified R18+ and therefore made available for sale and distribution in Australia for the first time.

At their meeting on 10 December 2010 the Ministers determined not to "*support the dilution of the refused classification category*" for computer games.[72]

The current National Classification Code provides that computer games must be Refused Classification if, among other criteria, they "*are unsuitable for a minor to see or play*".[73] While the draft proposed new National Classification Code provided to Ministers at the meeting on 4 & 5 March 2011 has not been released to the public, it is evident from the provisions in the proposed draft new

Guidelines for the Classification of Computer Games that this criterion would have to be deleted from the National Classification Code.

This in itself would necessarily represent a "*dilution of the refused classification category*" by no longer requiring that all computer games that are "*unsuitable for a minor to see or play*" be Refused Classification.

The current guidelines specify that "*Computer games that exceed the MA 15+ classification category will be Refused Classification*".[74] This provision would be replaced in the new guidelines with the provision that "*Computer games that exceed the R 18+ classification category will be Refused Classification..*"[75] This clearly would mean a "*dilution of the refused classification category*".

Additionally as set out above computer games with high impact themes, violence, sexual violence, sex, language, nudity and drug use that would, under the current guidelines, be Refused Classification would under the new guidelines be classified R18+ and therefore no longer Refused Classification.

The new guidelines would result in a very substantial dilution of the Refused Classification category for computer games.

The rationale for the original decision by Ministers to exclude an R18+ classification for computer games while allowing such a classification for films was that computer games involve a level of interactivity significantly greater than that involved in viewing a film.

There are three reasons why the effect of violence from playing a computer game is likely to be greater than that from viewing a film:

- in playing a computer game the player often identifies with the aggressor;
- in playing a computer game the player often actively rehearses the whole sequence of aggression; and
- in violent computer games the proportion of the game devoted to violence is higher than for most violent films.

Swing and Anderson explain how each of these factors would work:

> *A common question about violent videogame effects is whether they are stronger than the effects that have been found for violent television and films. There are several reasons, based on social psychological theory, to believe this to be the case. First, theory suggests that identification with an aggressor makes an individual more likely to behave aggressively in the future. Videogames force a player to identify with the aggressor because the player is controlling them… This increased identification with the aggressor is likely to make the rewards for the portrayed violence more direct and salient as well.*
>
> *Violent videogames may also have a stronger effect on aggressive behavior than films or television because these games often allow the player to rehearse the entire aggression sequence. A player may be required to look for threats, identify them, make a decision, and take aggressive action in a game, whereas television or film observer may not rehearse all of these steps in watching a film or television show. By developing more complete aggressive scripts, future aggressive behavior becomes more likely.*
>
> *The overall rate of violence tends to be higher in violent videogames than violent films and television shows. Even films and television shows with generally violent themes often spend a decent amount of time in non-violent plot development. Many videogames, on the other hand,*

contain non-stop violence. This difference in the quantity of violence is likely to make the effect of videogame violence stronger than that of television and film.[76]

The current guidelines already observe that "*Impact may be higher where a scene … encourages interactivity*."[77] They also provide that:

Interactivity includes the use of incentives and rewards, technical features and competitive intensity. As a general rule: except in material restricted to adults, nudity and sexual activity must not be related to incentives or rewards; [and] material that contains drug use and sexual violence related to incentives or rewards is Refused Classification.[78]

The proposed draft new *Guidelines for the Classification of Computer Games* do expand the references to interactivity from the current guidelines.

A definition of "*interactivity*" would be added to the "*List of terms*" as follows:

***Interactivity**: The quality of being interactive. Providing or capable of providing for user participation that enables some measure of control in relation to user action, data input and commands. The user's participation may influence outcomes that in turn, may affect what options are available to them for subsequent interaction.*[79]

The following provision would be added to the section in the guidelines on "*essential principles*":

Interactivity and computer games

Interactivity is an additional and important consideration that the Board must take into account when classifying computer games. This is because there are differences in what some sections of the community condone in relation to passive viewing (as may occur in a film) compared to actively controlling outcomes by making choices to take or not take action.

Interactivity may increase the impact of some content: for example, impact may be higher where interactivity enables action such as inflicting post-mortem damage, attacking civilians or engaging in sexual activity. Greater degrees of interactivity (such as first-person gameplay compared to third-person gameplay) may also increase the impact of some content.[80]

It seems strange to attribute the need to take interactivity into account to "*what some sections of the community condone*" rather than to the likelihood, based on the available evidence, that interactivity does increase the impact of violence and other classifiable elements. Research commissioned by the Interactive Entertainment Industry Association confirmed that the large majority of Australians – both gamers (79%) and non-gamers (87%) – shared the view that "*interactivity made media experiences more violent*".[81]

The additional comments on interactivity in the proposed draft new Guidelines for the Classification of Computer Games would not in themselves significantly change the guidelines for the classification of computer games.

However, the introduction of an R18+ classification for computer games would mean that where interactivity was considered to increase the impact of violence or other classifiable elements that might otherwise be accommodated in the MA15+ classification the computer game would no longer be Refused Classification but would be classified R18+.

The original rationale for having MA15+ as the highest classification for computer games based on the higher impact of violence and other classifiable elements due to the interactive nature of computer games compared to films is sound. No R18+ classification for computer games should be introduced.

There is now a substantial body of scientific research into the effects of violent computer games on players. This research demonstrates that violent computer games are significantly associated with:

- increased aggressive behaviour, thoughts, and affect;
- increased physiological arousal;
- decreased pro-social (helping) behaviour.[82]

Researchers Swing and Anderson say: *"A clear picture has emerged of the effects of violent video games on aggressive affect, behavior, and cognition….short term exposure to violent video games produces immediate increases in aggressive behavior, aggressive cognition, and aggressive affect; repeated exposure leads to the development of stable individual differences in aggressiveness*."[83]

Recently longitudinal studies have also found a relative increase in aggression over time by those who consume high levels of violent video games.

Anderson and colleagues conducted longitudinal research in the United States and Japan which demonstrated that habitually playing violent video games leads to increased physical aggression some months later in children and adolescents and that this effect occurs in the two very different cultural contexts of the United Sates and Japan. The research contradicted the popular hypothesis that only aggressive children become more aggressive from playing violent video games.[84]

A longititudinal study of German adolescents by Moller and Krahe found that exposure to violent games influenced physical aggression 30 months later via an increase of aggressive norms and hostile attribution bias.[85]

Wallenius and Punamaki have reported the results of a longitudinal study of Finnish adolescents. It found that "*digital game violence was linked to direct aggression both longitudinally and synchronously, and the link was moderated by parent–child communication in interaction with sex and age. Results suggest that the moderating role of parent–child communication changes with increasing age. Poor parent–child communication may be one of the factors in an adolescent's development that may strengthen the negative effects of digital game violence, but even good parent–child communication does not necessarily protect the adolescent in the long run. Digital game violence seems to be one of the risk factors of increased aggressive behavior*."[86]

Some other particular findings from recent studies include the following:

- violent video games are especially likely to increase aggression when players identify with violent game characters;[87]
- increased play of a violent first person shooter video game can significantly increase aggression;[88]
- participants who previously played a violent video game had lower heart rate and galvanic skin response while viewing filmed real violence, demonstrating a physiological desensitisation to violence;[89]
- video game violence exposure was associated with stronger pro-violence attitudes in 4th and 5th graders;[90]
- violence desensitisation should be reflected in the amplitude of the P300 component of the event-related brain potential (ERP), which has been associated with activation of the aversive motivational system. Violent images elicited reduced P300 amplitudes among violent, as compared to non-violent video game players. Additionally, this reduced brain response

predicted increased aggressive behaviour in a later task. Moreover, these effects held after controlling for individual differences in trait aggressiveness;[91]

- adolescents who expose themselves to greater amounts of video game violence were more hostile, reported getting into arguments with teachers more frequently, were more likely to be involved in physical fights, and performed more poorly in school. Mediational pathways were found such that hostility mediated the relationship between violent video game exposure and outcomes.[92]

Anderson reports that "*the long term effect of video game violence on later aggression and violence is larger than most known risk factors for adolescent violence, such as abusive parents, poverty, and antisocial parents*".[93]

In a 2010 meta-analysis of studies on computer game violence Anderson and colleagues concluded that "*the evidence strongly suggests that exposure to violent video games is a causal risk factor for increased aggressive behavior, aggressive cognition, and aggressive affect and for decreased empathy and prosocial behavior*."[94]

Reviewing this meta-analysis L Rowell Huesmann comments:

> *About 38 years ago, Jesse Steinfeld, then Surgeon General of the United States, reviewed the research that had been conducted to date on the effects of TV violence on youth behavior. He stated in testimony before Congress, "It is clear to me that the causal relationship between [exposure to] televised violence and antisocial behavior is sufficient to warrant appropriate and immediate remedial action. … There comes a time when the data are sufficient to justify action. That time has come" (Steinfeld, 1972, pp. 25–27). With the evidence provided by Anderson et al. (2010), it would now be fair to make the same statement about violent video games.*
>
> *It is time for the public health establishment to accept the fact that playing violent video games increases the "risk" that the player will behave more aggressively.*[95]
>
> ***Recommendation 21.1:***
>
> ***In the light of the evidence linking the playing of violent computer games with increased aggressive behaviour, no R18+ classification category for computer games should be introduced to the Australian National Classification Scheme. Computer games which exceed the provisions of the MA15+ classification should continue to be classified as Refused Classification.***

21.2 Category 1 and Category 2 Restricted

> ***Recommendation 21.2:***
>
> ***These two categories could be combined into a single R18+ classification provided this is defined to ensure that all publications which have been or would be classified Category 1 Restricted are included in the new single classification. In all jurisdictions, the rules, offences and penalties currently applying to Category 2 Restricted publications should apply to all publications receiving the new single classification. This would ensure that combining the categories does not result in an easing of rules or lowering of penalties.***

21.3 X18+ films

All decent Australians were deeply disturbed by the accounts of child sexual abuse, including the sexualisation of young children through exposure to X-rated pornography, recounted in *Little Children are Sacred.*

One example will suffice to illustrate the nature of the problem:

> *The Inquiry was also told a story of a 17-year-old boy who would regularly show pornographic DVDs at a certain house then get young children to act out the scenes from the films.*[96]

This echoes the findings of the *1999 Report of the Aboriginal and Torres Strait Islander Women's Task Force on Violence (Queensland)*[97] which also pointed to the link between X-rated films and sexual violence against women and children:

> *The incidence of sexual violence is rising and is [in] a direct relationship to negative and deformed male socialisation associated with alcohol and other drug misuse, and the prevalence of pornographic videos in some Communities.*

The Aboriginal Coordinating Council referred to $4,000 to $5,000 of orders of pornographic videos sent every week from Canberra to the Cape Communities.

Measures introduced as part of the response to the Northern Territory emergency prohibited the sale, transport and possession of an X18+ film through prescribed areas of the Northern Territory.

Those who live in the prescribed areas are not, nor should they be, prohibited from travelling outside these areas. The Northern Territory, unlike the six States, currently permits the sale of X18+ films to any person over the age of 18. If this is allowed to continue then it will seriously undermine the prohibitions being put in place in the prescribed areas.

Furthermore, the Northern Territory's *Classification of Publications, Films and Computer Games Act (NT)* Section 50 (2) provides that "*A person shall not sell or deliver to a minor a film classified X 18+ or R 18+, unless the person is a parent or guardian of the minor.*" This extraordinary provision means that it is not unlawful for a parent or guardian to give any child under their care an X18+ film.

Videos and DVDs are very portable items. Unless their sale is prohibited not just within the boundaries of the prescribed areas but throughout the Northern Territory then X18+ films will most likely continue to play a role in the premature sexualisation and sexual abuse of indigenous children.

At the Joint Press Conference announcing the legislative package to respond to the Northern Territory emergency on 22 June 2007 the then Prime Minister, Hon John Howard, stated:

> *If this set of circumstances had been disclosed as taking place in the suburb of Dickson, can you imagine what the local response from police, from medical authorities and from the state government would have been? It would have been horror and immediate action and a demand by the community that something be done*.

Sadly, there is evidence that similar events involving the sexualisation of young children through exposure to X-rated pornography are taking place in the suburbs of Canberra. The problem may be less widespread than in indigenous communities but it is nonetheless alarming.

A paper presented at the Ninth Australasian Conference on Child Abuse and Neglect in November 2003 by staff from the Child at Risk Assessment Unit, Canberra Hospital has reported that exposure to X-rated pornography is one significant factor in children younger than 10 years old sexually abusing other children. [98]

In the first six months of 2003 the Unit had identified as many as 48 children under 10 years of age that had engaged in sexualised, sexually abusive behaviour. The paper does not claim that pornography is the only factor in children becoming sexually abusive. Other factors include substances abuse, mental health and domestic violence issues in the family. Nonetheless the authors make a strong case for access to pornography as decisively shaping this disturbing trend in the incidence of sexually abusive children.

The authors present a case study of a nine year old boy, Steven, who sees his mother's current de facto (her fourth since Steven was born) watching pornography and concludes that this is an acceptable activity. He then gets involved in viewing pornography regularly. Soon he is making his four year old half-brother Deacon act out homosexual acts with him. He also makes younger girls at school participate in sexual acts with him and threatens to hurt them if they tell anybody. While Steven certainly had significant social and developmental problems the specific expression of these problems in sexually aggressive behaviour with younger children was shaped by his exposure to graphic sexual images.

In 2003 the Australia Institute found that, of boys aged 16 or 17, one in twenty watch X-rated videos on a weekly basis while more than a fifth watch an X-rated video at least once a month. [99]

In the light of this evidence of the damaging effect of X-rated videos on non-indigenous children and young people, in places other than the Northern Territory, as well as the evidence cited above on the impact of X18+ films on indigenous communities in Queensland, there is a strong case for extending complementing the specific provisions introduced to exclude X18+ films from indigenous communities in the Northern Territory proposed in this bill by additional measures that would reduce the exposure of children everywhere to X18+ films.

Every day thousands of X18+ films are sent by carrier services from Canberra to pornography consumers all around Australia, including those in indigenous communities, not just in the Northern Territory but in Queensland and other States.

The Commonwealth has a clear constitutional head of power (*Commonwealth of Australia Constitution Act 1900*, Section 51(v)) to make laws dealing with postal and other like services.

It should be made an offence to carry or cause to be carried or to receive from a carrier service a film classified X18+.

This would make it unlawful for pornography merchants in Canberra to send X18+ films not just to the prescribed areas in the Northern Territory but to any person in Australia. Rather than profiting from the sexualisation of young Australians, including indigenous children, the Canberra pornography industry would be effectively limited to over the counter sales.

Obviously the most decisive measure to stop the pernicious effect of X18+ films on children and young people, indigenous and non-indigenous, in Australia would be to prohibit the production and supply of X18+ films in the Australian Capital Territory.

The ACT government inherited permissive legislation on X18+ films when it attained self-government. Sadly it has not followed the lead set by all six States in prohibiting the production and sale of X18+ films. This has meant that despite State bans on the sale of X18+ films anyone in Australia can purchase X18+ films by mail order from the ACT.

The Commonwealth, which retains ultimate responsibility under the territories power, ought to act to remedy this problem. This would be the most effective measure as it would close down the principal sources from which X18+ films find their way into the hands of children and their abusers in both indigenous and non-indigenous communities around Australia.

The pornography industry has recently advanced claims that State laws prohibiting the sale of X18+ films may be unconstitutional because they violate Section 92 of the *Constitution* which provides that:

> *On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.*[100]

This argument is yet to be tested in court but would be made moot if the Commonwealth moved to prohibit the sale of X18+ films in the territories as all States uniformly already ban the sale of X18+films.

The Senate Legal and Constitutional Affairs Committee recently recommend that:

> *the exhibition, sale, possession and supply of X18+ films should be prohibited in all Australian jurisdictions.*[101]

Recommendation 21.3:

The Commonwealth should enact legislation to:

- ***prohibit the sale of X18+ films throughout the Northern Territory;***
- ***prohibit the use of a carrier service to carry or cause to be carried or to receive a film that is or that would be classified X18+; and***
- ***to prohibit the sale of X18+ films in the Australian Capital Territory.***

The Customs (Prohibited Imports) Regulations 1956, Regulation 4A, Importation of Objectionable Goods should be amended so that films that would be classified X18+ are included in the definition of objectionable goods.

Alternatively, the same outcome could be achieved by abolishing the X18+ classification and redefining the Refused Classification category to include all films that have been or that would have been classified X18+.

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

Recommendation 22:

The classifications and markings used in the broadcasting codes of practice, and for sound recordings, should be aligned to those used for films and computer games.

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

The Act, the Code and the Guidelines all need to be taken into account in classifying an item. Each operates at a different level with changes to the Guidelines able to be made after agreement by all the ministers who are party to the National Classification Scheme whereas changes to the Act naturally require the debate and passage of a bill through both houses of Parliament. It is not clear how the classification criteria could be combined in a single document without either depriving the Parliament of the responsibility for amending the overarching classification scheme through the Act or depriving ministers of the flexibility to amend the guidelines from time to time without recourse to Parliament.

Recommendation 23:

The Act, Code and Guidelines should remain as separate but related instruments.

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

As discussed in detail at 4.2, access to content that is or would be classified Refused Classification or X18+ should be entirely prohibited online.

Recommendation 24:

Access to content that is or would be classified Refused Classification or X18+ should be entirely prohibited online.

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

In general the current categories for Refused Classification should be maintained.

25.1 Suicide

The internet, alongside its many benefits, has introduced a new danger to impressionable people who may be at risk of suicide. It is possible through the internet for complete strangers to encourage such vulnerable people to commit suicide and to provide detailed instruction in effective methods of committing suicide.

Australian law already prohibits the use of any carriage service (including the internet) to "directly or indirectly counsel or incite committing or attempting to commit suicide" or to "promotes a particular method of committing suicide ; or to provide instruction on a particular method of committing suicide".[102]

However, in the absence of a mandatory filtering scheme these provisions have proved ineffective in preventing suicides following instruction and encouragement received by vulnerable people over the internet.

In April 2007, two 16 year old girls, Jodie Gater and Stephanie Gestier committed suicide. They hanged themselves from the branch of a tree a few kilometres from their homes in Melbourne's Dandenong Ranges. [103]

It was later discovered that the children had followed step-by-step instructions from a suicide website hosted in the Netherlands.[104]

The site offered practical and illustrated advice on a variety of methods including strangulation, asphyxiation and poisoning.

Liam Bartlett of Channel Nine's Sixty Minutes program reported Rob Gater's horror when he discovered that his daughter and her friend had used the internet to find a virtual suicide manual – telling them the kind of rope and knots to use, plus other deadly details.[105]

Similar incidents have occurred in Britain.

In 2008 it was reported that up to 29 "internet suicides" had been identified as having occurred in Britain since 2001, including a cluster of suicides of young people in the Welsh town of Bridgend. Various suicide promoting websites had been implicated including one sponsored by California-based Nagasiva Yronwode, who identifies as a Satanist and runs the so-called Church of Euthanasia, which advocates suicide as a means of saving the world from overpopulation.

Another website sponsored by Dutch woman Karin Spaink gives detailed instruction in 41 methods of suicide. A Swedish man, Calle Dybedahl who also hosts a suicide instruction site, claims that death is not a n inherently bad thing.[106]

Dr Phillip Nitschke, Australia's best known promoter of euthanasia, believes that the means and knowledge of how to commit suicide should be available to every person.

> *I do not believe that telling people they have a right to life while denying them the means, manner, or information necessary for them to give this life away has any ethical consistency.*
>
> *So all people qualify, not just those with the training, knowledge, or resources to find out how to 'give away' their life. And someone needs to provide this knowledge, training, or recourse necessary to anyone who wants it, including the depressed, the elderly bereaved, [and] the troubled teen. If we are to remain consistent and we believe that the individual has the right to dispose of their life, we should not erect artificial barriers in the way of sub-groups who don't meet our criteria.* [107]

Dr Nitschke's webite, located offshore, offers his Peaceful Pill Handbook for sale.[108] This book is prohibited from sale or distribution in Australia after it was Refused Classification for instructing in crime, including the manufacture and importing of illicit drugs (barbiturates) as well as in how to avoid a coronial inquiry following an assisted suicide.[109]

It would be appropriate to amend the classification guidelines for publications and for films and computer games to include in the Refused Classification category material that directly or indirectly counsels or incites committing or attempting to commit suicide or that promotes a particular method of committing suicide; or that provides instruction on a particular method of committing suicide.

Recommendation 25.1:

The classification guidelines for publications and for films and computer games should each be amended to include in the Refused Classification category material that directly or indirectly counsels or incites committing or attempting to commit suicide or that promotes a particular method of committing suicide; or that provides instruction on a particular method of committing suicide.

25.2 Actual sex

If as recommended at 21.3, the import of X18+ films and their sale in the territories are prohibited, or the X18+ classification is abolished, then the material that currently attracts an X18+ classification would be incorporated into the Refused Classification category.

If as recommended at 20.2 all explicit actual sex is excluded from the R18+ classification then all depictions in films of actual sex would require the film be classified as Refused Classification.

Recommendation 25.2:

All films that include a depiction of actual sex should be Refused Classification.

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

Consistency with minimal standards is important but states should maintain the right to impose stricter standards than the agreed national minimal standards if they believe this reflects community opinion in their state.

For example Queensland currently prohibits the sale of all Category 1 and Category 2 Restricted publications.

South Australia has even in recent years exercised its prerogative of classifying a film at a higher classification than the Classification Board.

Subject to preserving this freedom, consistency should be sought through the current Standing Committee of Attorneys General (Censorship) process.

Recommendation 26:

Subject to maintaining the right of states to impose stricter conditions reflecting community standards in a state, consistency in classification laws is desirable and should be sought through the cooperative federalism process reflected in the National Classification Scheme and the Standing Committee of Attorneys-General (Censorship).

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

Recommendation 27:

The current cooperative scheme should not be replaced by any alternative legislative scheme.

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

If the states were to refer powers to the Commonwealth then classification law and guidelines could be changed at the whim of a single government, especially if it had control in its own right, or in collaboration with a minor party or independents, of both houses of the Commonwealth Parliament.

This could lead to classification guidelines that were less reflective of widespread community standards across Australia.

Recommendation 28:

The states should not refer powers to the to the Commonwealth to enable the introduction of legislation establishing a new framework for the classification of media content in Australia.

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

29.1 Sexualisation and the objectification of women

The Senate and Legal and Constitutional Affairs Committee recently recommended that:

> *The fourth key principle in the National Classification Code should be expanded to take into account community concerns about the sexualisation of society, and the objectification of women.*

This is a worthwhile proposal that should be supported.

Recommendation 29.1

The fourth key principle in the National Classification Code should be expanded to take into account community concerns about the sexualisation of society, and the objectification of women.

29.2 Sexualisation in music videos

Since 1 January 2000, the Classification Board has received 14 complaints about music videos. Of these, eight complained of the sexual content or explicit lyrics and six complained of violence or other issues.[110]

A 2008 inquiry into the *Sexualisation of children in the contemporary media* by the Senate Standing Committee on Environment, Communications and the Arts recommended "*that broadcasters review their classification of music videos specifically with regard to sexualising imagery*".[111]

Classification guidelines for films perhaps in dealing with the element of sex perhaps fail to take into account fully the issue of "sexualised imagery" and action. Dancers in a music video do not normally engage in or even explicitly simulate sexual acts. However, the overall nature of the video can be highly sexualised. Because music is such a powerful influence on children parents are rightly concerned about the overall impact of repeated viewing of such material by younger children.

The guidelines need to reflect this valid concern and ensure that the raunchier music videos are appropriately classified.

Recommendation 29.2:

The Guidelines for the Classification of Films and Computer Games should be amended to make specific provision for the classification of music videos in a way that takes into account the impact of sexualised imagery in association with music on younger children.

29.3 Sexualisation of children and advertising

The Report of the American Psychological Association (APA)'s Taskforce on the Sexualization of Girls[112] found evidence that "*although advertisers are typically careful not to sexualise young girls directly, several advertising techniques do so indirectly*." The report cited studies illustrating three techniques:

(1) *Children, girls especially, depicted as sexual objects or as counterparts to adult versions for example, advertisements in which girls appear with sexualised adult women and are posed in matching clothing or seductive poses.*

(2) *Advertising imagery with both a "trickle up" and a "trickle down" framework on girls and women so that the distinction between women and girls may become blurred. In this framework, young girls are "adultified" and adult women are "youthified."*

(3) *Advertising which employs youthful or "barely legal" celebrity adolescents, particularly those popular with children, in highly sexual ways. The message from advertisers and the mass media to girls (as eventual women) is they should always be sexually available, always have sex on their minds, be willing to be dominated and even sexually aggressed against, and they will be gazed on as sexual objects.*

The report also discusses "the impact of products that sexualise girls or women" including "dolls, clothing, and cosmetics" which "present examples of products marketed to girls that present images of sexy, sexualised persons."[113]

According to the report "sexualisation occurs when a person's value comes only from his or her sexual appeal or behaviour, to the exclusion of other characteristics; a person is held to a standard that equates physical attractiveness (narrowly defined) with being sexy; a person is sexually objectified—that is, made into a thing for others' sexual use, rather than seen as a person with the capacity for

independent action and decision making; and/or sexuality is inappropriately imposed upon a person."[114]

Sexualisation of girls is problematic because it may be linked to "a variety of harmful consequences. These consequences include harm to the sexualised individuals themselves, to their interpersonal relationships, and to society. For example, there is evidence that sexualisation contributes to impaired cognitive performance in college-aged women, and related research suggests that viewing material that is sexually objectifying can contribute to body dissatisfaction, eating disorders, low self-esteem, depressive affect, and even physical health problems in high-school-aged girls and in young women.

"The sexualisation of girls may not only reflect sexist attitudes, a societal tolerance of sexual violence, and the exploitation of girls and women but may also contribute to these phenomena."[115]

In response to community concerns, in 2008 the Australian Association of National Advertisers amended its AANA Code of Advertising & Marketing Communications to Children to include a specific provision on sexualisation:

> ***2.4 Sexualisation***
>
> *Advertising or Marketing Communications to Children:*
>
> *(a) must not include sexual imagery in contravention of Prevailing Community Standards;*
>
> *(b) must not state or imply that Children are sexual beings and that ownership or enjoyment of a Product will enhance their sexuality.*[116]

It would helpful to also specifically prohibit the advertising of products that sexualise children, such as pole dancing kits for young girls and articles of children's clothing with sexualised messages.

> ***Recommendation 29.3:***
>
> ***The Australian Association of National Advertisers should amend the AANA Code of Advertising & Marketing Communications to Children to include a provision that:***
>
> ***Advertisements to Children must not advertise products that sexualise children.***

29.4 Sexualisation on television

The Report of the APA Taskforce on the Sexualization of Girls provides a summary of research evidence[117] indicating that:

- sexual comments and remarks are pervasive on television, and they disproportionately sexually objectify women;
- in prime-time comedies, sexual behaviours by men included were leering, ogling, staring, and catcalling at female characters and sexual remarks by men were about female body parts or nudity;
- one study of 81 episodes of prime-time programming found that 84% contained at least one incident of sexual harassment, with an average of 3.4 incidents per program;
- another study of 56 episodes of prime-time programming found that 74% contained at least one incident of gender harassment in the form of jokes, most of which were accompanied by laugh tracks, with the majority of jokes referring to women's sexuality or women's bodies and comments that characterized women as sexual objects.

- in music videos sexually objectifying images of women constitute a large portion of the content, with women more frequently than men presented in provocative and revealing clothing, objectified and typically serving as decorative objects that dance and pose and do not play any instruments, often displayed in ways that emphasize their bodies, body parts, facial features, and sexual readiness.

Noting research that the average child or teen watches 3 hours of television per day, the report comments that "massive exposure to media among youth creates the potential for massive exposure to portrayals that sexualize women and girls and teach girls that women are sexual objects."[118]

29.4.1 Commercial Television Industry Code of Practice

The Commercial Television Industry Code of Practice[119] has no provisions which directly address the problem of sexualisation of women and girls in television programming.

Section 1.8.6 of the Code prohibits material which is likely to "provoke or perpetuate intense dislike, serious contempt or severe ridicule against a person or group of persons on the grounds of age, colour, gender, national or ethnic origin, disability, race, religion or sexual preference." This provision has not been interpreted to exclude the kind of material which presents women as sexual objects as outlined in the research summarised in the Report of the APA Taskforce on the Sexualization of Girls.

Provisions in the Code dealing with the depiction of sexual behaviour are linked to partial exceptions based on being "*relevant to the story line*". For example the Code provides in relation to "sex and nudity" in the MA Classification that[120]:

> *Visual depiction of intimate sexual activity may contain detail but must only be implied. The impact shall not be high (ie no higher than strong). The depiction must be relevant to the story line or program context.*
>
> *Visual depiction of nudity must be relevant to the story line or program context.*
>
> *The impact shall not be high (ie no higher than strong). Verbal references to sexual activity may be detailed but the impact shall not be high (ie no higher than strong). The verbal references must be relevant to the story line or program context. A program or program segment will not be acceptable where the subject matter serves largely or wholly as a vehicle for gratuitous, exploitative or demeaning portrayal of sexual activity or nudity. Exploitative or non-consenting sexual relations must not be depicted as desirable.*

This formulation is from the 2010 code. The previous code included the qualifier "discreetly" before the verb "implied".

The Australian Communication and Media Authority's investigators had given quite clear content to the qualifier "discreetly" in this context.

In ACMA's finding that Episode 10 of Series 1 of *Californication* had been wrongly classified MA, the investigator drew a clear contrast between intimate sexual behaviour being "overtly implied" rather than "discreetly implied". The factors that determined the finding that a particular depiction of intimate sexual behaviour was not "discreetly implied" included: the length of the depiction; the overt, obvious movements of the participants and their facial expressions; the explicitness of the verbal references in connection with the intimate sexual behaviour being depicted; the use of close-ups on nude breasts; and the amount of detail contained in the depictions.[121]

However, even under the pre-2010 provision ACMA had allowed the following depictions of sex and nudity in the series *Californication* largely on the grounds of being "*relevant to the story line*" because the series is "*a narrative set in contemporary Californian society*"[122]:

- oral sex between a Catholic nun in her habit and the main male character;
- the main male character's 12 year old daughter alerting him to the presence of a naked woman in his bedroom;
- the main male character having sex with a 16 year old girl;
- a scene in which a woman asks the main male character whether she should have cosmetic surgery on her breasts and her vagina, he answers that she shouldn't while pushing her back through a doorway he is leaving by;
- a woman strips naked in front of the main male character asking him what he thinks of her body, her pubic area is obscured in the camera shot just by the man's arm; the couple then have sexual intercourse after which they both vomit as a result to imbibing alcohol and smoking cannabis;
- while having sex with another woman the main male character fantasises about having sex with a 16 year old girl;
- a man masturbates while looking at photographs on a website of his female employee in sexualised poses dressed in her underwear with one nipple exposed;
- a couple have rear-entry intercourse;
- a man smacks the bare bottom and thighs of his young female employee.

This list of incidents of depictions of sexual behaviour is from just three one hour episodes of this series. If this series can pass muster by ACMA as suitable for free to air television then it is clear that either the Commercial Television Industry Code of Practice is defective or its interpretation by ACMA is unacceptable. It does seem that ACMA gave too much weight to the question of relevance to the story line. The notion that because the story is *about* decadent and meaningless sex in California it is justifiable to serve up endless depictions of such sex is wrongheaded. ACMA also seemed to rely on a distorted notion of the word *discreetly*, arguing that various camera angles, shadows, and so forth made *discreet* the scenes in which it was quite clear that the sexual activity detailed above was taking place.

Recommendation 29.4:

The Commercial Television Industry Code of Practice should be revised to more clearly exclude programs that portray women as sexual objects. It should be made clearer that contextual factors such as story line do not permit the inclusion of material which otherwise exceeds a program's classification:

Officers of the Australian Communications and Media Authority should be given appropriate training on the issue of sexualisation of women and girls so that they are less likely to treat as trivial the kinds of depictions of sexual behaviour prevalent in programs like Californication.

29.5 Sexualisation in the National Classification Scheme

Although there is some variation in detail, in general the classification system for the various television codes of practice reflects the schema of the *Guidelines for the Classification of Films and Computer Games*.

These guidelines should be amended to exclude, at least from those classifications which permit children under 18 to view material, any depictions of women as sexual objects.

Recommendation 29.5:

The Guidelines for the Classification of Films and Computer Games should be revised to clearly exclude from classifications up to and including MA15+ any material that portrays or depicts women as sexual objects. It should be made clearer that contextual factors such as story line do not permit the inclusion of material which would otherwise breach this provision.

29.6 Other matters: No exceptions for minors

Several jurisdictions allow exceptions for the offences of supplying a restricted publication to a minor for parents or for employers.

It does not make any difference who gives a publication featuring explicit sexual or violent material to a child. Parents and employers can also corrupt young people through the use of such material.

The ACT provision (*Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* - Sect 35(3)(a)) exempting the supply of a RC (Refused Classification) publication by a parent to a minor is particularly abhorrent.

No child should be allowed, let alone required, to handle publications which are suitable for adults only, in the course of employment.

Recommendation 29.6:

All exceptions to the offences of supplying a restricted publication to a minor should be abolished.

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