NATIONAL ASSOCIATION
FOR THE VISUAL ARTS LTD

PO Box 60 Potts Point
NSW 1335 Australia

T +61 2 9368 1900
F +61 2 9358 6909
E nava@visualarts.net.au

www.visualarts.net.au
www.artistcareer.com.au

ACN 003 229 285
ABN 16 003 229 285

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Submission to the Australian Law Reform Commission's National Classification Review Discussion Paper 77

The National Association for the Visual Arts (NAVA) is the peak body representing and advancing the professional interests of the Australian visual arts, craft, media art and design sector. The sector includes an estimated 25,000 visual arts, craft, media art and design professional practitioners and about 1000 galleries and support organisations. Since its establishment in 1983, NAVA has worked to bring about appropriate policy and legislative change to encourage the growth and development of the visual arts in Australia. It sets best practice standards and works towards increasing professionalism within the industry. It also provides direct services to the sector and its members through offering expert advice, representation, resources and a range of other services.

NAVA's vision is an arts sector that is professional and innovative and whose ideas and work are central to Australian life. NAVA wants to achieve an environment for the visual arts that is supportive and focussed on the continued development.

NAVA's submission is made on behalf of its members and constituents and is informed through its unique position as the national peak industry body, bridging the worlds of art, policy and legislation development and the three tiers of government. NAVA's constituents are creative professionals who are:

- dedicated to their practice, critical ideas and the production and dissemination of visual culture in Australia;
- usually working as sole traders or small to medium enterprises across artforms and media, or providing creative services to other industries;
- engaged with new technologies and exploring their potential;
- entrepreneurial in seeking professional opportunities in Australia and overseas;
- economically vulnerable with limited ability to enforce their rights;
- wanting to abide by existing legislation and protocols while at times challenging orthodoxies.

NAVA's knowledge and experience of the kinds of abuses that artists have been subjected to in Australia, leads us to be very concerned over the need for appropriate legislation, regulation and review mechanisms to recognise the value of artistic practice in all its diversity. NAVA continues to urge the ALRC in its recommendations outlined in the Discussion Paper 77, to uphold the right of freedom of expression not only for artists, but for all members of the community.

This response addresses the specific ALRC Proposals that are of concern to NAVA and its broad and diverse constituency - the visual arts, craft, media art and design sector.

Guiding Principles

NAVA, like other industry bodies including the Arts Law Centre of Australia, acknowledges the need for classification reform in Australia and supports the ALRC's recognition of the nature of the current environment and need for a new system. It is a positive step towards ensuring Australia's Classification System accommodates technological changes and recognises that Australians have a right to participate in the media and read, hear and see the media of their choice.

In relation to the 8 Guiding principles set out in 4.2 of the ALRC's Paper, NAVA in principle supports these proposals provided they continue to be developed with an acknowledgement of the right to freedom of expression, the diversity of the community and the need for Australia to be competitive in the fields of innovation and content production.

NAVA believes it is essential that freedom of expression be observed as a universal human right and one that is highly valued in liberal democratic societies and included in the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR), Article 19(2), which affirms the right to free speech:

> "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."

Members of the Australian Commonwealth Parliament reaffirmed the principles of the Declaration during a sitting on 10 December 1998 to mark the 50th anniversary of the UDHR and pledged to give wholehearted support to the principles enshrined in the Declaration.

Fundamentally, the principle of freedom of expression ensures that the citizenry retains the right to question the wisdom of government and institutions embracing particular ideological positions. Freedom of expression should be able to be used in everything from education and community advocacy through to proceedings in all relevant courts. If freedom of expression binds all government agencies, then it must be used in the development and implementation of government policy. If the right is justiciable, then it can be used in all courts, in both civil and criminal proceedings. Requiring all courts to interpret legislation compatibly with human rights means that freedom of expression will be recognised as a fundamental human right that underpins democracy.

The responsibility of the Classification Board or new governing body should be to understand a range of specialist interests and accommodate them, ensuring a diversity of ideas and interests are best represented as long as this does not cause proven harm to others. In the case of art, there can be misunderstanding or misinterpretation by those for whom the specialist language and intention of art practice is opaque. Because artists' work is often oblique, using metaphorical imagery, quotation or allusion and satire, many meanings can be drawn from it. It is a positive step that the ALRC has recognised the impact that Classification can have on artists and content creators and that policies must provide support not restrictions for Australian content creators, enabling them to contribute and compete in a global environment.

NAVA welcomes the opportunity to contribute to ensuring Australia is able to create a flexible and functional classification system that can adapt to the technological

changes and challenges whilst ensuring that people's basic human rights are not contravened.

The National Association For the Visual Arts Response to Discussion Paper 77

Part One

The Discussion Paper 77 outlines the current climate and conditions for Classification, recognising the impact of media convergence and a transformed media environment and the issues with the current Classification Scheme. The paper positively has identified the need for an entirely new classification scheme that includes responsiveness to the digital environment.

NAVA supports the ALRC's **Proposal 5-1** A new National Classification Scheme should be enacted regulating the classification of media content.
As suggested by NAVA in its July 2011 submission, it recommends that the ALRC proposes a re-examination of the various state laws with a view to standardization, but with the objective of ensuring the principle of all adults having the right to make informed choices within the law about what they want to experience, express and communicate. As suggested in **P5-2 and P5-3** this standardization can be brought into affect through a single piece of legislation.

In regards to **P5–4** NAVA supports the inclusion of the definitions of 'media content' and 'media content provider' on the provision that as identified by the ARLC in **P6-3** artistic content and providers (including artists using any medium, galleries, cultural and visual arts events) are exempt and that this is included in the definitions of both content and content providers.

Part Two

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

NAVA supports this proposal in bringing together content that is required to have classification and that media and content created not for commercial purposes is not expected to be classified. Further comment on exempt material is included under P6-3.

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

The definition of exempt content will be a crucial inclusion for the visual arts, craft, media arts and design sector and NAVA recommends that industry consultation be undertaken to ensure the definition encompasses the diversity of artistic practice and presentation mechanisms for artistic and cultural content.

NAVA would recommend that this exemption also includes visual arts, craft, media arts and design practitioners. Within a converged environment and with shifting presentation trends, artistic work is no longer only made available to the public within gallery spaces but is exhibited in a wider range of contexts and locations. The Classification of Media Content Act should be able to recognise and encompass this diversity rather than implementing regulation for static frameworks that do not acknowledge the full spectrum of artistic works and exhibition platforms.

Therefore, NAVA recommends that the work of all professional artists should be exempt, regardless of the context in which it is brought to the public. In the case of contention this may mean ascertaining whether the person is a professional practising artist. The criteria for making this assessment should be those recommended by the art industry. Current definition and criteria can be found on NAVA's website at http://www.visualarts.net.au/advicecentre/professional-artist-definitions or in the ATO's Taxation Ruling TR 2005/1Income tax: carrying on business as a professional artist at http://law.ato.gov.au/atolaw/view.htm?docid=TXR/TR20051/NAT/ATO/00001

NAVA strongly supports the important step the ALRC has taken in recognising that "films and computer games shown at film festivals, art galleries and other cultural institutions are exempt." This is a positive move towards supporting Australia's innovative and creative practitioners and their rights to freedom of expression. NAVA hopes this is also a measure of the ALRC's understanding that the visual arts, craft, media art and design sectors are self regulatory in informing visitors and patrons of content that may not be suitable for children and restricting access to such content.

Proposal 6–5 The Classification of Media Content Act should provide that all media content that may be RC must be classified. This content must be classified by the Classification Board: see Proposal 7–1.
NAVA supports the Arts Law Centre of Australia's response that the RC category "should only apply to content that is illegal and not capture any content that is simply offensive." What is regarded as offensive is subjective with community standards constantly shifting. Restricting anything other than what is clearly illegal creates unnecessary complexity and is of particular concern in relation to artists whose work is often opaque and open to multiple interpretations and/or can be intended to create intelligent discussion and debate around received wisdom.

There needs to be a clear understanding of RC content, one that does not depend on subjective interpretation to ensure the classification systems is clear, coherent and does not infringe on the rights of reasonable adults across all communities.

Proposal 6–6 The Classification of Media Content Act should provide that the Regulator or other law enforcement body must apply for the classification of media content that is likely to be RC before:

(a) charging a person with an offence under the new Act that relates to dealing with content that is likely to be RC;

(b) issuing a person a notice under the new Act requiring the person to stop distributing the content, for example by taking it down from the internet;

or

(c) adding the content to the RC Content List (a list of content that the Australian Government proposes must be filtered by internet service providers

NAVA agrees in principle with this proposal if RC content is restricted only to illegal content. This is particularly relevant to point 6-6(c) in relation to the list that is filtered by internet service providers which, as identified by NAVA and Arts Law in their July 2011 submission discussions about the ACMA filtering, can lead to mistakes in restriction of artistic content that is not RC.

Proposal 6–8 Industry bodies should develop codes of practice that encourage providers of certain content that is not required to be classified, to classify and mark content using the categories, criteria, and markings of the National Classification Scheme. This content may include computer games likely to be classified below MA 15+ and music with explicit lyrics.

As identified in NAVA's July 2011 submission to the ALRC, NAVA holds the view that artwork should not mandatorily be subject to the classification regime and strongly supports the ALRC exemption. However, as identified above in P6-8, NAVA would support the principle that there are two circumstances when artwork should continue to be dealt with in the classification system, when:
- artists , galleries or publishers anticipate a possible adverse reaction to the work and want to demonstrate that it has **not** been refused classification and/or has been deemed suitable for access at a defined level of maturity
- an independent arbiter is needed in the case of a complaint.

If there is a need for classification of artwork, then this should be done either without charge if artists or their exhibiting institutions or publishers bring the works to the

Classification Board (or new governing body) themselves, or with the cost being borne by the complainant if the works are called in as the result of a complaint.

NAVA believes that the relatively small number of controversial works makes it viable for the Government to subsidise the cost. This would allow Classifiers to continue to play the role of trusted mediators in the case of differences of opinion and make its services accessible to artists and the art sector which currently find the cost a major barrier.

It is currently the art industry's standard to use signage and explanatory panels to alert the public to potentially challenging content, and the Government should support the industry itself to develop mechanisms and codes for alerting the public to challenging content. NAVA supports the ALRC proposal to have the industry develop a code of practice.

NAVA as the peak industry body for the visual arts would be willing to work with or funded by the Commonwealth Government on a suitable code. Having commissioned the research and publication of the Art Censorship Guide, NAVA has already prepared some guidelines for the visual arts industry on its responsibilities in relation to making art available to the public, especially work which is likely to be regarded as contentious.

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

NAVA supports this proposal but, as stated above in 6-5 that RC is only applied to illegal content and, as stated in 6-6, there should be limited circumstances when an artwork may be classified and industry standards and codes should inform this classification decision.

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

NAVA supports this proposal, however, in addition NAVA recommends that frameworks be put in place to support those who become 'authorised industry classifiers' and that a certain amount of expert knowledge is required from applicants about the particular industry for which they will be making judgements. It is important, particularly for the visual arts, to ensure that work and content is understood and assessed based on artistic merit.

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

As previously mentioned (P6-8) the industry itself should be able to apply self-regulatory codes and actions including the acknowledgement of artistic merit (see elaboration below).

Proposal 7–4 The Classification of Media Content Act should provide that an authorised industry classifier is a person who has been authorised to classify media content by the Regulator, having completed training approved by the Regulator.

NAVA would make the same recommendations here as it has previously proposed to the police and the DPP in NSW, that the Act have a provision for
i) establishing objective standards for 'artistic merit'
ii) establishing a standing committee of art experts who would apply these standards.

In relation to the term 'artistic merit', the issue of whether the work has merit as good or bad art is irrelevant in this context. NAVA maintains that image quality is not what is being assessed. Instead NAVA would recommend that 'artistic merit' be elaborated to include the following criteria against which evaluation could be made: intention; context; and meaning.

The reason for establishing an expert panel system is that art is a specialised language and this changes over time and in different contexts.

There is a need to ensure equity of access to regulatory systems. Many artists and art galleries are non-commercial enterprises and the cost of requiring classification can become detrimental to income. Having one subsidised industry body which is able to make these decisions would shift the cost from those in vulnerable economic circumstances.

Proposal 7–5 The Classification of Media Content Act should provide that the Regulator will develop or authorise classification instruments that may be used to make certain classification decisions.

NAVA recommends this should be undertaken in consultation with the industry in relation to what already exists in terms of 'classification instruments'.

Question 7–2 Should classification training be provided only by the Regulator, or should it become a part of the Australian Qualifications Framework? If the latter, what may be the best roles for the Board, higher education institutions, and private providers, and who may be best placed to accredit and audit such courses.

NAVA supports an understanding of and reliance on industry self regulation as this is particularly pertinent to the visual arts, craft, media arts and design sectors. However we have serious concerns over the economic burdens this may place on industry professionals. Artists are some of the lowest income earners in the country with about one third living below the poverty level (the median income for artists from their creative and arts related work is around $25,800[1]).

NAVA recommends that the cost for the accreditation of 'authorised classifiers' take into account the low-income levels of artists. Accreditation as a regulator for the art industry could be connected to tertiary and TAFE art schools and colleges, but a pre-

[1] This applies to the period of 2007/2008 in '*Do You Really Expect to Get Paid*, *An economic study of professional artists in Australia'* David Throsby and Anita Zednik 2010 pg. 45

selection process should be included where applicants have to demonstrate highly proficient visual literacy levels and a history of employment/engagement with the visual art, craft, media art and design sector.

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

NAVA agrees in principle, however, would recommend a mechanism should be put in place to ensure transparency and avoid any perceived conflict of interest. This could be executed in two ways. Firstly, as the Arts Law Centre of Australia suggests, the Board's classification review process should operate similarly to that of the Federal Court, where the Full Court of the Federal Court hears appeals of judgements of a single Federal Court judge.

Secondly NAVA proposes the appointment of a Standing Committee of Art Experts which could be convened as necessary to advise on 'artistic merit' and criteria for assessment, where matters of fine judgement are required about works which may be outside the experience of members the Classification Board.
NAVA would recommend that these experts should be drawn from amongst:

- senior curators at major art institutions
- art academics
- well established artists
- reputable gallery owners

Proposal 7–7 The Classification of Media Content Act should provide that the Regulator has power to:
(a) revoke authorisations of industry classifiers;
(b) issue barring notices to industry classifiers; and
(c) call-in unclassified media content for classification or classified media content for review.

NAVA in principle supports this proposal but would request that clarification is given for ensuring transparency and notification.

Proposal 8–4 The Classification of Media Content Act should provide that methods of restricting access to adult media content—both online and offline content—may be set out in industry codes, approved and enforced by the Regulator. These codes might be developed for different types of content and industries, but might usefully cover:
(a) how to restrict online content to adults, for example by using restricted access technologies;
(b) the promotion and distribution of parental locks and user-based computer filters; and
(c) how and where to advertise, package and display hardcopy adult content.

As discussed above, NAVA is in favour of self regulation by the industry and its developing appropriate codes. In relation to the on-line environment, as discussed by NAVA in its July 2011 submission, internationally and in Australia, proposed internet regulation has been met with judicial and community protest as it is seen as infringing the citizenry's rights to freedom of speech, expression and access. This is particularly relevant as many countries have different internet censorship laws and

classification systems for website access. These international differentiators mean that regulating classification systems is not feasible as it is fundamentally unable to be applied to all internet content. Local prohibitions are relatively easy to bypass.

The shifts in technology have enabled artists to expand their business practices, develop new markets, income and creative capital. Artists who address particularly sensitive issues in their works are often self regulatory, providing warnings and descriptions of the content on their websites, alerting users to ensure they can make the choice whether to access content or not. This is pertinent in recognising the responsibility and role of individual users, parents or guardians of vulnerable individuals in monitoring and restricting access to information.

Classification and ratings systems can be applied to Australian internet content. However, the sheer volume of information would make this activity impractical and would potentially reduce competitiveness for Australian content in a global market and restrict access to legal content for adults.

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

NAVA agrees with this proposal.

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

Whilst a review may be plausible for age suitability, NAVA asserts that community standards are not static, and by the Government imposing regulation, there is the potential for a failure to recognize the full spectrum of interests/views across diverse communities. In a truly tolerant society, there is respect for difference – difference in culture, race, ethnicity, gender and sexuality, economic circumstances and in this case, of tolerance, taste and opinion. When judgments are to be made by the state or its delegated authorities, this principle of respect for difference needs to be carried through. The responsibility therefore of a classification authority in making its determinations should be to be able to know about and understand not just the middle ground of opinion of the 'average' person, but to take into account specialist 'fringe' positions within the boundaries of the law.

As stated in the Arts Law Centre of Australia's submission, care must be taken that such a review would only assist in the classification markings and not be used for the purposes of classification decisions, particularly in regards to RC content.

While NAVA takes it as self-evident that artistic freedom is an indispensable condition of a mature and civilised society, it does not in any regard condone the production or consumption of illegal material. However, it does not want to see artists become the scapegoats for 'community concern' over the availability of material like child pornography on the internet and the increasing sexualisation of children in advertising. Because of sensationalising media coverage, in the public mind, there is increasing confusion over who is really responsible for law breaking material like child pornography and lewd or sexist advertising material and the establishment of a single standard would not assist in this, as differentials such as context, intention and meaning must be taken into account.

Part Three

P14-2 If the Australian Government determines that the states and territories should retain powers in relation to enforcement of classification laws, a new intergovernmental agreement should be entered into under which the states and territories agree to enact legislation to provide for enforcement of classification laws with respect to publications, films and computer games.

It is hard to see how different standards can be justified around a cohesive country with a small population like Australia, especially in the digital age where communication is instantaneous. These differences serve only to cause confusion, especially where state borders are simply lines on maps. This especially is the case where currently some state legislation can be used to override the decisions of the Classification Board and NAVA supports the ALRC's work and proposals (with amendments) to ensure consistency across the country.

NAVA as the peak industry body for the visual arts would be willing to work with or funded by the Commonwealth Government on a suitable industry code, the provision of industry advice and the establishment of an expert panel. NAVA has already prepared some guidelines for the visual arts industry on its responsibilities in relation to making art available to the public, especially work which is likely to be regarded as contentious.

We would be happy to provide any further information or speak to this submission and can be contacted at nava@visualarts.net.au or (02) 9368 1900.

Yours sincerely

Tamara Winikoff
Executive Director
National Association for the Visual Arts (NAVA)