# National Classification Scheme Review

SUBMISSION BY THE CLASSIFICATION BOARD
IN RESPONSE TO THE ALRC DISCUSSION PAPER ON THE
NATIONAL CLASSIFICATION SCHEME REVIEW (SEPTEMBER 2011)

Submitted 18th November 2011

The Classification Board has responded to a number of Proposals and Questions in the Australian Law Reform Commission's *National Classification Scheme Discussion Paper*. Unless stated otherwise, any numerical references listed in the responses refer directly to the numerical references in the *National Classification Scheme Discussion Paper*, and any underlines within quoted material have been inserted by the Classification Board to draw emphasis to a particular set of words. Whether or not the Classification Board has provided a response to a Proposal should not be seen as an indication that the Classification Board agrees or disagrees with that Proposal. Where the Classification Board has not provided a response to a Question or Proposal, the Classification Board has deemed it has no additional information to further contribute to what is already detailed, and/or that such Proposals and Questions are beyond the current remit of the Classification Board. The Classification Board notes that those proposals which suggest significant change may benefit from qualitative and quantitative community research being conducted.

All references to "the Board" refer to the Classification Board, all references to "the Director" refer to the Director of the Classification Board, and all references to RC refer to "Refused Classification".

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

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

**(a) what types of media content may, or must be classified;**

**(b) who should classify different types of media content;**

**(c) a single set of statutory classification categories and criteria applicable to all media content;**

**(d) access restrictions on adult content;**

**(e) the development and operation of industry classification codes consistent with the statutory classification criteria; and**

**(f) the enforcement of the National Classification Scheme, including through criminal, civil and administrative penalties for breach of classification laws.**

Response 5.2 (c): The Classification Board notes this approach of having a single set of statutory classification categories and criteria applicable to all media content appears to conflict with governments' current drafting of a separate set of Guidelines for Computer Games with the introduction of an R18+ classification for Computer Games.

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

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

**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.**

Response: The Board seeks clarity on the definition of "commercial" in "programs produced on a commercial basis" here, and in other references to "commercial" in proposals throughout the paper. "Commercial" could encompass a wide variety of revenue-raising business models, from traditional pay-per-view (rental/hire/purchase/download), to those that operate for a profit and charge a fee (eg subscription fees, bundled service fees) or rely on advertising revenue (where content may be free to view but carries paid advertising), etc.

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

Response: The Classification Board questions the rationale of this Proposal which provides that only computer games produced on a commercial basis likely to be classified MA15+ or higher must be classified before they are sold, hired, screened or distributed in Australia, and not those classified G, PG or M (which content providers may choose to classify voluntarily).

In support of its position, the ALRC says in 6.61: *"The ALRC proposes that only computer games likely to be classified MA 15+ or higher must be classified. These are the games that parents and guardians arguably most need to be warned about—the games with strong or high levels of violence, coarse language and other content. This is consistent with the ALRC's principles for reform concerning protecting children from material likely to harm or disturb them and providing consumers with classification information."*

However, the Classification Board notes the following comments from the ALRC:

In 6.51: *"Providing advice or information to consumers, in particular parents and guardians, to inform their entertainment choices is arguably the primary function of classification law. The fact that most films and computer games that are classified by the Classification Board receive advisory classifications to which no legal restrictions apply (now G, PG and M), highlights that providing advice is central to classification policy...*

*"Despite the impossibility of classifying all media content, a few reasons remain for continuing to require some content to be classified.*

*"First ..., the Australian community appears to expect classification information for* feature-length films, television programs and computer games*. This is a useful and valued service that many Australian content providers have given their customers for many years...*

*"Secondly, the content traditionally classified in Australia, and that the ALRC considers should continue to be classified, has a large Australian audience. Feature-length films and television programs, and computer games in particular, are likely to be watched by a significant Australian audience."*

In 6.38: *"If content will only be seen by a small audience of adults, then there may be less demand for classification information. The more people are likely to see a piece of content, the greater the likely demand for classification information. If children are likely to see the content, then the need for classification information may also grow."*

And in 6.44: *"Many parents and guardians rely on classification information to guide their choice of entertainment for young children. Children may also be more likely to be distressed or even harmed by content they view."*

The Classification Board would similarly contend that parents and guardians actively seek out sound, reliable and consistent classification information on media content, including computer

games, particularly when they are looking to purchase or provide to children, and that there are significant differences between, for example, a computer game that would be classified G and one that would be classified M in terms of its suitability for children, which may not be discernible in product information that does not include classification markings.

Further, it cannot be assumed that lower-level media content including computer games is "easy" or "straightforward" to classify. In 7.25, it is stated that *"some submissions suggested that, where the classification of content may be straightforward, it may not need to be classified by the Board, for example, children's content."*

In 7.51, "*[The content that industry may classify] represents content for which industry is not likely to get the classification wrong (because it is relatively straightforward to classify or industry has experience in classifying or assessing similar content); and the level of harm that might arise if it was incorrectly classified (that is, eg, the difference in G and PG content is not so great that it would cause much alarm if a DVD was classified G instead of PG)."*

However, classifying content that children may view requires careful assessment of "material likely to harm or disturb them" (as per the National Classification Code) and the impact level of classifiable elements (Under the *Guidelines for the Classification of Films and Computer Games*, and the *Guidelines for the Classification of Publications*). It can be challenging material to classify for the very reason that it is being recommended as suitable for a young audience. G/PG material is arguably the material on which parents and caregivers place most emphasis in terms of reliable, independent, expert classification information.

As an indication of the challenges that can arise in classifying G/PG material, it is useful to look to the Authorised Assessor Schemes currently in operation. Under the Authorised Computer Games Assessor Scheme, for example, the Classification Act provides for the Director to authorise a person, who has completed training approved by the Director, to make assessments as to a recommended classification and consumer advice for computer games that would, in the opinion of an applicant, be classified G, PG or M. Under Authorised Assessor Schemes, while the Board is responsible for the classification, its decision may be informed by the assessment and classification recommendation. However, the Classification Board is the decision-making body which determines the classification and consumer advice which appears on product. As a quality assurance check, the Board audits a proportion of applications made under these scheme. Under the Authorised Computer Games Assessor Scheme, from December 09 to October 2011, the Classification Board disagreed with the recommended classification in 25% of audits undertaken, and 87% of these disagreements related to G/PG classifications. In the Authorised TV Assessor Scheme, from Jan 2010 to October 2011, in audits undertaken, the Classification Board disagreed with 39% of recommended classifications, and of these, 51% related to G/PG classifications.

Also noteworthy is that material classified G or PG can draw a disproportionately higher level of complaints than other material, around claims the classification is too low, or the consumer advice was not adequate. From complaints received, the concern of parents who sits their child down to watch a movie that, in their view, was erroneously given a G classification instead of a higher classification is clear.

In the *2009-2010 Classification Board and Classification Review Board Annual Reports*, G and PG classified public exhibition films were proportionately over-represented against other classification categories in the top five most complained about public exhibition films in that year. The second most complained about film was the G classified film *The Princess and the Frog* (complainants considered the scary scenes and supernatural and voodoo themes as being unsuitable for very young audiences); the fourth most complained about film was the PG classified *A Christmas Carol* (complainants considered the film's scary scenes and dark themes as being inappropriate for children); the fifth most complained about film was the PG classified *Land of the Lost* (complainants considered the coarse language and sexual references to be too strong or too frequent to be accommodated at the PG classification).

If it is accepted that providing advice or information to consumers, in particular parents and guardians, to inform their entertainment choices, is arguably one of the primary functions of classification law; that the Australian community appears to expect classification information for computer games; and that there appears to be a high level of community interest in classification

information for children's content, there is validity to the argument that all computer games produced on a commercial basis should be classified by either the Classification Board or an authorised industry assessor prior to being sold, hired, screened or distributed in Australia, and that of those, those likely to be classified higher than PG (as PG is currently defined under the *Classification (Publications, Films and Computer Games Act 1995*) must be classified by the Classification Board. For the computer games that must be classified by the Classification Board, the Board recommends the continuation of the Authorised Assessor Scheme for Computer Games, where authorised industry assessors provide the Board with a report including a contentious material statement and a recommended classification, together with a copy of the game and/or gameplay footage, as information to be considered by the Board in making its classification decision.

**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.**

Response: The Classification Board has further information to offer for consideration around the Proposal for films and computer games shown at all film festivals, art galleries and other cultural institutions to be defined as *"exempt content"* – and that is, some such events take place in public spaces that may be unintentionally accessed by young children.

The ALRC notes 8.71 that "*consumers do not, however, have ... control over media content shown in streets, shopping centres, parks and other public areas"*, and in 8.73, "*The ALRC considers that restrictions on the display of media content in public should be stricter than restrictions on the sale and distribution of content to be viewed in homes and cinemas."*

In a recent case, the Director received an application for an exemption from classification of films to be shown at the Open Air Screen at Melbourne's Federation Square, where children may have been passers-by. After consideration by the Acting Director of the Classification Board of information and synopses of the submitted films, the applicant agreed to withdraw from the programme six films which appeared to be unsuitable for screening to an unrestricted audience. Under Proposal 6.3, there would no longer be a requirement for an application to the Director of the Classification Board for an exemption from classification for films and computer games to be shown at film festivals, art galleries and other cultural institutions, and it would appear that, for such events, media material classified lower than R18+ would not require assessment, classification or restriction. The Classification Board questions how under this Proposal, in the example given, this would meet the ALRC's Guiding Principle 3: "*Children should be protected from material likely to harm or disturb them".*

The Classification Board proposes that such exemptions relating to films and computer games to be shown at film festivals, art galleries and other cultural institutions not be applied to films and computer games classified or likely to be classified above PG (as PG is currently defined under the *Classification (Publications, Films and Computer Games Act 1995*) and to be shown in a public domain.

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

**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.**

Response: In 6.77, the ALRC says: *"Content providers should also apply for the classification of any content they intend to publish that may be RC. Ideally, content providers should assess*

*content before they publish it, but of course many provide such a large quantity of content that this is clearly impractical. These content providers should have mechanisms that allow users to flag content that may be R 18+, X 18+ or RC."*

This seems to contradict Proposal 6.5, that the Classification of Media Content Act should provide that all media content that may be RC must be classified by the Classification Board. The Classification Board questions by what mechanism or process material that may be RC (other than content submitted by a government agency on the basis of a complaint, or content that needs to be classified for the purpose of enforcing classification laws) will come to the Classification Board. And if government agency referral or complaint are the only ways in which material that may be RC will come to the Classification Board, will this meet community expectations, and will this adequately address Guiding Principles 3 and 7, namely "*children should be protected from material likely to harm or disturb them"* and *"the classification regulation should be kept to the minimum needed to achieve a clear public purpose, and should be clear in its scope and application"?*

Given the ALRC has said in 6.77 that potentially RC material may not always be assessed before it is published, and content providers may rely on user-flagging of such material, the Classification Board questions whether, for such RC content, the proposed approach outlined in 8.13 for R18+ content would also apply. Namely, "*The ALRC considers that if the Regulator, perhaps after receiving a complaint, considers that a piece of content is likely to be R 18+, the Regulator should issue a notice to the content provider requiring it to restrict access to the content or have the content classified. This notice might be called a 'restrict or classify notice'. The proposed Classification of Media Content Act should not provide an offence for simply publishing R 18+ content without restricting access (a law that hosts of large quantities of user-created content may be unable to comply with), but rather should provide for an offence of failing to comply with a 'restrict or classify notice'."*

If the approach in 8.13 does apply to RC content, will this meet community expectations, and will this adequately address Guiding Principles 3 and 7, namely *"children should be protected from material likely to harm or disturb them"* and *"the classification regulation should be kept to the minimum needed to achieve a clear public purpose, and should be clear in its scope and application"*? Also, how does this approach sit with the intent of this proposal: namely, that all media content that may be RC must be classified by the Classification Board? If this approach will not apply to RC material, what approach is being proposed?

The issue of quantity of content being impractical to be assessed (classified? – is the ALRC drawing a distinction between material being "assessed" and material being "classified" and if so, what is this distinction?) is raised by the ALRC, and it may be assumed this is largely in reference to online content. However, the way in which such material is handled under the current scheme is manageable.

Currently, under Schedule 7 of the *Broadcasting Services Act 1992,* Australian commercial content service providers are required to make codes that address the engagement of trained content assessors by service providers, and prevent the provision of Potential Prohibited Content without the advice of a trained content assessor. The Classification Board receives referrals for classification of online material from the Australian Communications and Media Authority (the ACMA) in the following circumstances. ACMA, either acting on a complaint or by its own initiative, must refer material to the Classification Board if there is a substantial likelihood that material is Potential Prohibited Content and it is hosted in Australia or by a link service hosted in Australia. Potential Prohibited Content is content where there is a substantial likelihood that it would be classified MA15+ or R18+ and it is not subject to a restricted access system, or there is a substantial likelihood that the material would be classified X18+ or RC. The ACMA uses its own trained content assessors to assess the likely classification of such content. If such material is hosted outside of Australia, ACMA may refer it to the Classification Board (if, for example, it is unsure of what classification should be given to the material) or it may choose to assess the material itself. The exception to this is if the material is Potential Prohibited Content for being RC 1(b) under the Classification Code – under current policy, ACMA must refer this material to the Classification Board for classification as part of the voluntary ISP filter initiative.

The Classification Board proposes that online content likely to be classified RC continue to be subject to the current process as outlined above. Further, that any media material likely to be classified RC must be assessed by an authorised industry assessor and referred to the Classification Board for classification prior to being distributed or sold. Failure to do so would be deemed an offence.

**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).**

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

**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.**

Response: Should classification markings indicate if the media content was industry classified or Classification Board classified? As well as offering the consumer transparency as to who made the classification decision, would this assist in the complaints mechanism (knowing who to complain to) and increase the incentive to authorised industry assessors to prioritise community concerns in decision making?

Also, in 7.53 it is stated: *"While a key benefit of the new classification system is that media content is not required to be classified again simply because it is being released on a different platform, a content provider may choose to reclassify content that has been previously classified by another industry classifier. The ALRC does not consider it is appropriate or acceptable to compel a content provider to use the classification of another industry classifier in circumstances where they disagree with the original decision (for example, classified television series episodes may be reclassified when the series is distributed on DVD because the DVD distributor regards the original classifications were too low)."*

The Classification Board has concerns about the ability of different authorised industry assessors to deliver different classification outcomes on potentially the same piece of media content on different delivery platforms. This appears to be at odds with the intent of the proposed new scheme – that it should be platform neutral – and may create inconsistencies in classifications. Is it deemed satisfactory that, in a scheme that depends on consistency, uniformity and reliability of classifications to deliver public confidence, an industry classified television series could be reclassified by a DVD distributor because the DVD distributor "regards the original classifications as too low"? Would this meet community expectations? Rather than this being an anticipated and acceptable possibility, should it not be questioned how two assessors of the same content could arrive at different classifications, when their industry codes should embrace the same core statutory classification criteria, and what remedies could be applied to prevent the resulting outcome of inconsistencies in classification of like content in the marketplace?

The ALRC would appear to accept that consistency is paramount to any new Scheme:

*In 5.4: "The proposed new National Classification Scheme would promote platform neutrality in classification law ... Platform neutrality means that ... there should be a uniform approach to the same or similar content, regardless of the medium of delivery... This helps avoid inconsistencies that are manifest under the current scheme... "*

*In 7.49: "Furthermore, the content ordinarily sold on DVD, downloaded from the internet or screened on television is similar—and, consistent with the objectives of platform neutrality—as far as possible the same content should be treated the same way."*

*In 9.29: "The ALRC agrees that simple, clear and consistent classification information should be applied uniformly across all media content and platforms."*

*And in 9.60: "In the ALRC's view, there should be a consistent process for making classification decisions, regardless of who is classifying the media content, what industry sector they represent and the type of media content or delivery platform."*

The Classification Board proposes that the classification of media content should carry across all platforms, unless the media content has been modified. If an authorised industry assessor makes a classification, and another assessor disagrees with this classification, then the material must be submitted to the Classification Board, whose decision will be final and binding across all industry.

A further point is that a scheme that allows for classifications that have been undertaken by one content provider to be picked up by another content provider could give rise to "free-loading", where one entity bears the costs of classification while other entities simply draw down these decisions at no cost.

**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.**

Response: In 2.59, the ALRC states that: *"In the context of media convergence, there is a need to develop a framework that focuses upon media content rather than delivery platforms, and can be adaptive to innovations in media platforms, services and content. Failure to do so is likely to disadvantage Australian digital content industries in a highly competitive global media environment."*

And, in 5.8: *"Under the proposed new National Classification Scheme, the same content, for example a 'film', would be subject to the same basic classification obligation regardless of whether it was originally shown in a cinema, broadcast on television, purchased or hired as a DVD or equivalent format, or streamed from the internet. This would eliminate the current costly 'double handling' of the same media content for different media platforms. Further, all media content that is required to be classified will be classified according to a single set of classification categories and criteria."*

In 7.1 (a), it is proposed that the Classification Board classify all feature-length films produced on a commercial basis and for cinema release (only). The Board questions whether this Proposal, which adheres to the current delivery-platform model rather than a platform-neutral model, adequately plans for what could be the near future when, for example, major commercial feature-release movies may be released in the first instance as a digital download or stream to computer, TV or a mobile device.

As an example, there was a recent proposal by Universal Pictures to release a major new commercial feature film, *Tower Heist*, as a video-on-demand product in limited areas of the United States just 3 weeks after its cinema release, as a trial for a potential new video-on-demand business model. After protest by theatre owners, this plan was recently deferred. A statement released by the distributor said: "Universal Pictures today announced that in response to a request from theater owners, it has decided to delay its planned premium home video on demand (PVOD) experiment in which Comcast digital subscribers in Portland and Atlanta would have had the

opportunity to rent *Tower Heist* on demand just three weeks after its theatrical release on November 4, 2011. Universal continues to believe that the theater experience and a PVOD window are business models that can coincide and thrive and we look forward to working with our partners in exhibition to find a way to experiment in this area in the future."

While in this particular example, the release of the film into cinemas was still to come first, it's not beyond the realm of possibility that this plan could potentially be developed down the track to allow for first release of some such commercial feature films as VOD or similar or, as occurs now for films with low commercial expectations, straight to DVD or to online film libraries such as Quickflix or BigPond Movies.

Research by Screen Australia, which looked at the proportion of total audience viewings across multiple platforms for feature films with cinema release during 2007-2009, showed 9% of viewings were at the cinema, 61% were on DVD/Blu-Ray, 4% were online, 10% were on subscription TV and 16% on free-to-air television, and also noted that the gap between release on each platform was contracting.

It should also be noted that some controversial films – for example, *A Serbian Film* (a film which, in its various modifications, was classified Refused Classification and R18+ by the Classification Board, before being classified Refused Classification by the Review Board) – were released straight to DVD.

The ALRC rightly notes in 7.39 that *"feature-length films...have a high public profile and a large audience reach over time and across other media platforms... [and] often spawn major franchises, including merchandise and other media content such as computer games. Ultimately, this is media content that, in all its forms, will be consumed by a significant proportion of the Australian population. Furthermore, there appears to be stronger consumer expectation of reliable and independent classification information for films screened in cinemas."* The Classification Board does not believe there is any reason to suggest that the release of such films in the first instance in other formats or on other platforms would reduce this profile, audience reach or likelihood of brand extensions, or the community expectation of reliable and independent classification information.

As such, the Classification Board raises for consideration that this Proposal be modified so that the Classification Board must classify new commercial feature-length films in whichever format, or on whatever platform, they are first commercially released onto the market.

In addition, this would also potentially widen (albeit in a manageable way), and prevent the attrition of, the pool of content available to the Board to perform its valued role of providing an expert benchmark for classification standards and classification decisions, which are broadly representative of the Australian community. And, it would also ensure that impactful commercial feature-length films, classified MA15+ and R18+ or potentially RC, released straight to DVD or download, with large audience reach, are classified by the Classification Board.

**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.**

Response: Currently, all classification decisions are recorded centrally by the Classification Branch of the Commonwealth Attorney General's Department. The database is accessible online at www.classification.gov.au for easy one-stop-shop public access; while all Classification Board decision reports, authorised industry assessor recommendation reports and other associated records and documentation are stored digitally and/or in hard copy records also kept by the Classification Branch.

In 7.104, it is stated: *"In order to provide industry classifiers with guidance on best practice and to assist them to avoid making incorrect decisions, industry codes of practice should include information on maintaining records of classification decisions and summaries, advising decisions to the Regulator and internal quality assurance controls."*

With the proposed increased role of industry assessments, how will "one-stop-shop" centralised recording keeping be maintained, for ease of public access and to meet other requirements?

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

Response: The Classification Board suggests that the Classification of Media Content Act provide that all media content likely to be X 18+ must be classified by an authorised industry assessor or the Classification Board prior to its sale, hire or distribution, and that any material likely to be classified RC must be referred to the Classification Board for classification.

**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.**

**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.**

Response: The Board notes a seeming contradiction in National Classification Scheme Review Discussion Paper on this Proposal, Proposal 12.1, and Point 7.76. Point 7.76 notes that, *"To ensure that all industry classifiers are classifying content consistently and properly applying the statutory classification criteria, industry classifiers should only be authorised to classify content if they have completed training approved by the Director."* However Proposal 7.4 puts that training be *"approved by the Regulator",* and 12.1 that the Regulator approve *"classification training courses provided by others."*

As the ALRC contends as one of the cornerstones of its proposed new National Classification Scheme, the Classification Board has an important role to play in benchmarking to *"ensure that classification decisions align with community expectations"* (5.9).

In 7.34: *"The Classification Board's greatest value perhaps lies in its role in providing an expert benchmark for classification standards and classification decisions. In line with the principle that communications and media services available to Australians should broadly reflect community standards, the independent Board, whose members are intended to be broadly representative of the Australian community, is suited to a bench-marking role.*

And in 7.35: *"Benchmarked standards are far more important under a system that anticipates decision making by many different decision makers and where more content may be classified directly by industry. There is already a high level of public confidence in the Board's decisions, given its independence, depth of experience and expertise."*

The Board feels this benchmarking role takes on equal, if not greater, significance in the approval of training course content which will equip authorised industry assessors to classify media content that aligns with community expectations in a consistent way, but that is also responsive and adaptive to any movement in benchmarks. The ALRC notes in 12.39: *"Consistency in training is essential for acceptance by the community of more material being classified by industry than is currently the case."* As such, the Classification Board contends that training courses and their content be subject to the approval of the Director of the Classification Board.

The Board also contends that any formal accreditation, qualification or award that flows to authorised industry assessors as a result of successfully completing such training should automatically flow to Classification Board members who, by definition of the role they perform, have also completed the equivalent in such training.

**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.**

**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?**

Response: The Classification Board proposes that training should be provided only by the Regulator. With the relatively small number of assessors that the industry could support (even with the proposed increased role of authorised industry assessors), the Board questions whether such courses operated commercially would be sufficiently robust in the long term in that, due to the size of the industry, it would be likely such courses would be conducted infrequently and in small numbers. The Board also questions what checks and balances would be applied to an organisation before it could be approved to run such courses. Having a number of people and organisations providing classification training also potentially exposes many more individuals to high-impact and/or offensive material such as RC material, which is a health and safety consideration.

In 7.35, the ALRC notes that *"there is already a high level of public confidence in the Board's decisions, given its independence, depth of experience and expertise."*

And, in 12.39: *"Consistency in training is essential for acceptance by the community of more material being classified by industry than is currently the case."*

It would be imperative under any model that increases the role of industry classification that this high level of public confidence in classification-decision making be maintained, and that classification training and accreditation be provided in such a way that it at all times remains beyond any perception that such training and accreditation may not be consistent, independent and/or free of influence, or unduly affected by commercial considerations. It is for these reasons that the Classification Board proposes classification training should be provided only by the Regulator.

**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.**

Response 7.6 (b): The Classification Board is currently able to undertake an auditing function on authorised industry assessor classification recommendations, and reports supporting such classification recommendations, by having ready access to all necessary records of such reports and recommendations, and the identical media content to view. As part of quality assurance procedures, as well as conducting random audits, the Classification Board is able to identify potentially problematic recommendations, and audit such recommendations, before such recommendations are validated as enduring decisions. Under the new Proposal, this ability will be lost, as any auditing of authorised industry assessor decisions will occur after such decisions have been made, after the media content is available in the market, and after any deleterious effects have arguably been felt.

The following (as outlined response to Proposal 6.2) may help to illustrate the pre-emptive role that the Classification Board plays in identifying erroneous classification recommendation reports by authorised industry assessors before they become classification decisions. Under the Authorised Computer Games Assessor Scheme (outlined in more detail in response to Proposal 6.2), from December 09 to October 2011, under audits conducted by the Classification Board, the Board disagreed with the recommended classification in 25% of cases. In the Authorised TV Assessor Scheme, from Jan 2010 to October 2011, under audits undertaken by the Classification Board, the Board disagreed with 39% of recommended classifications. Under the current system, it is the Classification Board decision, not the authorised industry assessor recommended classification, which appears on product released into the marketplace.

Given that under the Proposals, the Classification Board will not be party to authorised industry assessor decisions, it is not clear how the Classification Board will access recommendations and reports, as well as the identical media content in order to conduct audits of authorised industry assessor decisions. It is also not clear what will occur in those situations where the Classification

Board audits, and does not agree with, an authorised industry assessor classification, after such product is available in the marketplace.

**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.**

Response: These responsibilities all currently rest with the Director of the Classification Board, and the Board feels it would be important that the Director could still trigger such actions, by referring any such matter that came to its attention to the Regulator, who would be required to act.

The Classification Board also proposes that repercussions for repeated errors in classification decisions by industry assessors should be felt not only by the assessor, but also by the employing company/classification applicant, and that these powers should also fall to the Regulator. It may be possible, for example, for an industry assessor to be placed under undue pressure by an employing company/classification applicant (whether they are an employee of that company or a consultant or contractor) to deliver a certain classification outcome, or for a company to "shop around" industry assessors to get the classification outcome they desire. A possible corporate sanction could be that all material to be classified by that company/classification applicant must be submitted to the Classification Board for classification for a prescribed period.

**Proposal 8–1 The Classification of Media Content Act should provide that access to all media content that is likely to be R 18+ must be restricted to adults.**

Response: The attention of the Classification Board is drawn to Proposals 6.1, 6.2 and 8.2, in which media content (other than feature-length films, television programs and computer games) likely to be classified R18+ – a legally restricted category – will not require classification, although it is proposed that access to such content be restricted to those 18+. Such content may, for example, include internet content, books and magazines.

Under the current *Guidelines for the Classification of Films and Computer Games*, the impact of R18+ content is high, and some material classified R18+ may be offensive to sections of the adult community. Content which exceeds a high impact (permitted under an R18+ classification) – for example material that is very high in impact – will fall into the RC category. The ALRC notes in 7.46: "*Classification of potentially RC content is complex for several reasons. The nature of the content that lies at the boundaries of R 18+/RC and X 18+/RC classifications is such that it is often controversial, morally contentious and highly emotive. The RC classification is also the only classification that is associated with laws that result in outright bans on the sale, hire or distribution of media content. The Board, as a body independent from government and industry, is the appropriate body to classify this content on the basis that it is often very complex and the risk of harm that may arise from a wrong decision is arguably greater than with other types of content. The Board, as opposed to industry, also has the experience and expertise necessary to classify content that may be RC, which spans a wide range of content, including extreme content such as child sexual abuse material*."

In 7.24, it is stated that the Australian Home Entertainment Distribution Association (AHEDA) *"asserted that industry should classify all content, except for content likely to be classified R18+ and X18+, because such content is high impact and often controversial in nature."*

The ALRC talks about "*the classification something would likely be given if it were classified"* (6.25) as being fundamental to its proposed approach to this content.

In 8.11 and 8.12, it is stated:

"*...The ALRC does not propose that content-providers should be expected in all cases to assess content to determine whether it is likely to be R 18+, although responsible content providers should also have mechanisms that allow users to flag certain content that may be R 18+, X 18+ or RC.*

*"This differs from the current provisions in sch 7 of the* Broadcasting Services Act 1992 (Cth) (Broadcasting Services Act) *and related industry codes, which provide that commercial content likely to be classified MA 15+ or R 18+ must be assessed by trained content assessors. The ALRC proposes that providers of content that is likely to be R18+ should not need to be trained to determine the likely classification of content. If access to the content is restricted, the objectives of the law—particularly the protection of minors from adult content—are met."*

Unless an assessment is applied to content, it is not possible to determine a "likely classification", or "the classification something would likely be given if it were classified".

By default, this approach relies on "post-classification" – a third party (a complainant or the Regulator) flagging such content after it has been sold, hired, accessed or distributed, and after the general public has been exposed to it. Children could therefore potentially be exposed to "*material likely to harm or disturb them*" (Guiding Principle 3), and it is arguably also at odds with Guiding Principle 4: "*That consumers should be provided with information about media content in a timely and clear manner"* – which reasonably could be taken to suggest such information being provided prior to viewing, access or purchase. The "third party flagging" approach requires the third party to have a detailed knowledge of the R18+ classification category in order to flag such content, and there may be confusion as to how and with whom such content should be flagged.

As detailed in response to Proposal 6.5, currently, under Schedule 7 of the *Broadcasting Services Act 1992*, Australian commercial content service providers are required to make codes that address the engagement of trained content assessors by service providers, and prevent the provision of Potential Prohibited Content without the advice of a trained content assessor. The Classification Board receives referrals for classification of internet material from the Australian Communications and Media Authority (the ACMA) in the following circumstances. ACMA, either acting on a complaint or by its own initiative, must refer material to the Classification Board if there is a substantial likelihood that material is Potential Prohibited Content and it is hosted in Australia or by a link service hosted in Australia. Potential Prohibited Content is content where there is a substantial likelihood that it would be classified MA15+ or R18+ and it is not subject to a restricted access system, or there is a substantial likelihood that the material would be classified X18+ or RC. The ACMA uses its own trained content assessors to assess the likely classification of such content. If such material is hosted outside of Australia, ACMA may refer it to the Classification Board (if, for example, it is unsure of what classification should be given to the material) or it may choose to assess the material itself. The exception to this is if the material is Potential Prohibited Content for being RC 1(b) under the Classification Code – under current policy, ACMA must refer this material to the Classification Board for classification as part of the voluntary ISP filter initiative.

The Classification Board proposes a modification to Proposals 6.1, 6.2 and 8.2, which currently state that media content (other than feature-length films, television programs and computer games) likely to be classified R18+ – a legally restricted category – will not require classification (although it is proposed that access to such content be restricted to those 18+), to allow the existing provisions of Schedule 7 of the *Broadcasting Services Act 1992* in relation to online content be maintained. Namely, that Australian commercial content service providers be required under industry codes to engage trained content assessors, that online material likely to be classified R18+ must be assessed by a trained content assessor, and that online content likely to be classified R18+ that is not subject to a restricted access system continue to be referred to the Classification Board as per the current process as outlined in the previous paragraph. Also, that "other" media content, including magazines likely to be classified R18+, must be classified by an authorised industry assessor prior to being distributed or sold. Failure to do so would be deemed an offence.

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

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

Response: The impact of MA15+ material is strong, and is considered unsuitable for persons under 15 years of age. It may, for example, include violence justified by context, implied sexual

violence if justified by context, implied sexual activity, and strong coarse language, as well as infrequent aggressive or very strong coarse language. How is the proposed change to remove mandatory access restrictions to MA15+ content reconciled under the Guiding Principle of *"Children should be protected from material likely to harm or disturb them?"*, and would this meet community expectations? If media content was deemed, under the Guiding Principle of *"Children should be protected from material likely to harm or disturb them"*, to require mandatory access restrictions, but may not reach the "high" impact level of R18+ content, would there be circumstances where consideration might be given to pushing such product up into access-restricted R18+ to satisfy community concerns; or conversely, in order to secure an unrestricted classification, could there be a perception by the community of pressure on authorised industry assessors to squeeze R18+ media material into an unrestricted MA15+ classification?

In Britain, for example, access restrictions are applied from 12 upwards. The website of the British Board of Film Classification says, "U*nder the terms of the Video Recordings Act 1984 it is illegal to supply a video, DVD or video game which carries a British Board of Film Classification age rating to anyone under the age stated. Failure to comply with this can lead to a fine or imprisonment. The BBFC certificates are 12A: No one under 12 may be supplied with a work with a 12 certificate. 15: Suitable for 15 and over. No one under 15 may be supplied with a work with a 15 certificate. 18: Suitable only for adults. No one under 18 may be supplied with a work with an 18 certificate."* In terms of how age is verified, a major multiplex cinema chain in the UK, Cineworld, for example, says on its website, "*it will refuse admission to any person who, in the opinion of an authorised Cineworld employee or representative, is under the minimum age required by the BBFC classification for a presentation and cannot prove that they are at least the minimum age required. Cineworld expressly reserves the right to request photographic identification verifying the age of the customer (e.g. a driving licence or passport) for entry into 12A, 15 and 18 certificated films. Photocopies of birth certificates, passports and driver's licences are acceptable. Children under the age of 12 must be accompanied by someone who is at least 18 years of age to be admitted after 7.00pm. Children under the age of 8 must be accompanied by someone who is at least 18 years of age at all times (regardless of film classification)."*

The Classification Board assessment is that removing the access restrictions on MA15+ may cause community concerns – this assessment could be tested by community research.

**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.**

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

**Proposal 8–5 The Classification of Media Content Act should provide that, for media content that must be classified and has been classified, content providers must display a suitable classification marking. This marking should be shown, for example, before broadcasting the content, on packaging, on websites and programs from which the content may be streamed or downloaded, and on advertising for the content.**

Response: In 8.58, the ALRC proposes *"that the Classification of Media Content Act contain a high-level principled rule concerning the display of classification markings. The detail of how and where such markings should be displayed—where this detail is necessary—should be in industry codes."*

In 8.54, it is noted: *"The primary purpose of requiring some content to be classified is to provide people with information or warnings to help guide their choice of entertainment. Classification markings and consumer advice are the primary methods of communicating that information"*, and *in 6.51: "Providing advice or information to consumers, in particular parents and guardians, to inform their entertainment choices is arguably the primary function of classification law."*

In 9.41: *"Consumer advice is an efficient way to highlight content that may be of particular concern as well as demonstrate to the community that the Board has considered a specific matter in its deliberations."*

In 9.40: *"Submissions confirmed that consumers value this extra information [consumer advice]."*

And in 9.43: *"In the interests of consistency, the ALRC also suggests that the Classification Board publish guidelines for generating standardised consumer advice including a list of familiar consumer advice lines that classifiers may choose to use with each classification category."*

The Classification Board wishes to make special note to the ALRC of the importance of consistency of consumer advice and its placement, compliance in use of such consumer advice, and that such consumer advice be tailored to the content (rather than, for example, including a catch-all advice detailing all possible classifiable elements, whether they are contained in the media content or not) with a view to properly informing the consumer in making their viewing choices. The Classification Board suggests that some elements dealing with classification markings and consumer advice may be more effectively dealt with as part of the statutory classification criteria.

**Proposal 8–6 The Classification of Media Content Act should provide that an advertisement for media content that must be classified must be suitable for the audience likely to view the advertisement. The Act should provide that, in assessing suitability, regard must be had to:**

**(a) the likely audience of the advertisement;**

**(b) the impact of the content in the advertisement; and**

**(c) the classification or likely classification of the advertised content.**

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

Response: The Board believes the starting position on classification categories is that the current categories are long-standing and have a high level of public awareness. *Classification Study*, quantitative market research conducted online for the Office of Film and Literature Classification (OFLC) in 2005, showed that awareness of the classification symbols was high, and of the six film symbols, the G symbol was most widely understood in the strictest sense.

In the ALRC paper, in point 9.6, it is stated: *"The ALRC asked about the community's understanding of the existing categories and the merits of other possible classification categories. Many submissions argued that classification categories are not themselves a significant problem. The Arts Law Centre of Australia, for example, observed that the current classification categories are well-promoted and appear to be well understood. Civil Liberties Australia said there is little need for new classification categories.*

"9.7 *Some submissions cautioned against major change in this area, because significant resources have been expended since the early 1990s to harmonise classification categories across media (for example, between television and films and computer games) and to educate consumers about their meaning.*[13] *The Australian Home Entertainment Distributors Association (AHEDA) submitted that it 'would not support any changes to a system that is on the whole well understood and supported' "*

The Board notes the ALRC proposal to change the existing PG classification to PG8+. The addition of the age descriptor or "8+" to PG may not be helpful for material of mild impact that may be suitable for under-8s to view, with appropriate parental guidance. It is noted that consumer

advice that is required with PG classifications provides parents with additional information as to whether the content may be suitable. The Classification Board suggests the PG8+ classification be maintained as PG.

The Classification Board notes the ALRC's proposal to rename the M classification as T13+, to address confusion in the community about the differences between the M and MA15+ categories, where "M – Mature is not recommended for persons under 15 years of age" and there are no legal restrictions on access, and "MA15+ – Restricted. Not suitable for people under 15. Under 15s must be accompanied by a parent or adult guardian".

9.17 *"Rather than remove a category, the ALRC proposes renaming the M classification as 'T 13+ Teen: Teenage audiences and above'. The classification guidelines for the T category should be amended to state that 'T classified material is not recommended for persons under 13 years of age'. This proposed change clearly distinguishes the classification from the MA 15+ classification in its visual representation, the category descriptor and by referring to a different age."*

The Classification Board notes that the Proposal to rename the M classification (for mature audiences) as "*T 13+ Teen: Teenage audiences and above"* would mean that T13+ would capture material that is of moderate impact. Material that is of moderate impact does not necessarily mean it would be suitable for a teen market, and yet it is likely this is what parents and caregivers would understand this category ("teen") to mean. While T13+ may work well for a *Harry Potter* movie with a teen viewership, it may not work for a film encompassing material of moderate impact but with mature concepts – for example a *Law and Order: Criminal Intent* DVD – that doesn't reach the strong impact level of MA15+. To address this gap, the Board suggests that, in addition to the T13+ Teen category, both the M and MA15+ classification categories be maintained, with the M category possibly having no age descriptor attached to it.

The Board also questions whether the proposed new C category adds anything, or whether it may cause confusion around the already well understood G category. It also raises the question of how "children" are defined – "children" could be interpreted to mean anyone under the age of 18.

The Classification Board proposes the categories of G, PG, T13+, M, MA15+, R18+, X18+, RC for consideration. However, the Classification Board recommends community research be conducted into any proposed new classification category make-up.

In relation to magazines, 9.32 states: "*Most publications that are currently required to be classified are sexually explicit magazines. Under the scheme proposed by the ALRC, these publications would be classified X 18+, rather than Category 1 restricted or Category 2 restricted."*

There are currently different display/packaging/cover requirements for Category 1 and Category 2 publications, and it is not clear how these would be affected if Category 1 and Category 2 publications were rolled into one X18+ category. Currently, Category 1 – Restricted publications must be distributed in a sealed wrapper, and covers must be suitable for public display (as per "Unrestricted Covers", *Guidelines for the Classification of Publications*). Category 2 – Restricted may not be publicly displayed and may only be displayed in premises that are restricted to adults.

The Classification Board seeks clarification on public display, packaging and cover requirements for publications classified X18+ under the ALRC.

The Classification Board also notes that in 9.32, it is stated that "*In the ALRC's view, this (X18+) is the appropriate classification for this content, because the X18+ classification is specifically for depictions of consensual sexually explicit activity".* However, under the current Guidelines for the Classification of Publications, Category 1 specifies "actual sexual activity may not be shown in realistic depictions... Simulated or obscured sexual activity involving consenting adults may be shown in realistic depictions ... Genital contact is not permitted to be shown in realistic depictions". As such, it may be arguable as to whether Category 1 contains "depictions of consensual sexually explicit activity" as per the current wording in 9.32, and that under the current *Guidelines for the Classification of Films and Computer Games*, Category 1 publications may fit more appropriately into the R18+ category (where "sexual activity may be realistically simulated" and "nudity is permitted").

The Classification Board also seeks clarification as to whether serial classifications of publications – as per Section 13, *Classification (Publications, Films and Computer Games) Act 1995* – will continue to apply to publications classified X18+. Due to the quick turnaround of magazines – which may be published weekly or monthly – it can be difficult for publishers to meet classification requirements within publishing schedules, if every edition of the magazine needs to be classified.

**Proposal 9–2 The Classification of Media Content Act should provide for a C classification that may be used for media content classified under the scheme. The criteria for the C classification should incorporate the current G criteria, but also provide that C content must be made specifically for children.**

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

**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.**

**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.**

Response: The Director of the Classification Board should also have the power to request research or review of community standards, or other matters pertaining to classification, at his or her discretion, in consultation with the Regulator.

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

**Proposal 11–1 The new Classification of Media Content Act should provide for the development of industry classification codes of practice by sections of industry involved in the production and distribution of media content.**

**Proposal 11–2 Industry classification codes of practice may include provisions relating to:**

**(a) guidance on the application of statutory classification obligations and criteria to media content covered by the code;**

**(b) methods of classifying media content covered by the code, including through the engagement of accredited industry classifiers;**

**(c) duties and responsibilities of organisations and individuals covered by the code with respect to maintaining records and reporting of classification decisions and quality assurance;**

**(d) the use of classification markings;**

**(e) methods of restricting access to certain content;**

**(f) protecting children from material likely to harm or disturb them;**

**(g) providing consumer information in a timely and clear manner;**

**(h) providing a responsive and effective means of addressing community concerns, including complaints about content and compliance with the code; and**

**(i) reporting to the Regulator, including on the handling of complaints.**

Response 11.2 (h): Include the words "within a statutory timeframe."

**Proposal 11–3 The Regulator should be empowered to approve an industry classification code of practice if satisfied that:**

**(a) the code is consistent with the statutory classification obligations, categories and criteria applicable to media content covered by the code;**

**(b) the body or association developing the code represents a particular section of the relevant media content industry; and**

**(c) there has been adequate public and industry consultation on the code.**

Response: In relation to Proposal 11-1, 11-2 and 11.3, the Classification Board has the following feedback, in relation to whether the increased role of industry classification will meet Guiding Principle 7 in the new National Classification Scheme, namely that "*classification regulation should be kept to the minimum needed to achieve a clear public purpose, and be clear in its scope and application".*

In 9.60, the ALRC expresses a view that there should be a *"consistent process for making classification decisions, regardless of who is classifying media content, what industry sector they represent and the type of media content or delivery platform".*

Proposal 9.4 says: *"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."*

In 9.61: *"Uniformity and consistency in decision-making are best achieved by establishing statutory classification categories and criteria that represent the same minimum standards and requirements for classification decision-making by all classifiers."*

In 9.64: *"The ALRC agrees that legislation should set out the classification categories and the matters that must be taken into account when making a classification decision, but it need not contain the detailed classification guidelines. This would better facilitate periodic review of the classification guidelines that should be undertaken every five years in consultation with key stakeholders and the broader community.*

*"To assist classifiers and consumers alike, the 'statutory classification criteria'—the classification categories and matters set out in the Act plus the Code and the detailed classification guidelines—should be contained in a separate legislative instrument that consolidates all decision-making information.*

*"Industry codes of practice might describe classification criteria in more detail or provide additional guidance on the application of the criteria, for example, by providing relevant examples."*

In 9.67: *"Classification criteria used in making classification decisions, including the appropriate limits and thresholds for content at each individual category, should reflect community standards and also be evidence-based. Periodic reviews of classification decision-making criteria would therefore be usefully informed by relevant research."*

And, 11.56: *"The ALRC proposes that the Regulator under the new Classification of Media Content Act similarly be empowered to approve a code of practice. The code should also be required to be consistent with the statutory classification obligations, categories and criteria applicable to media content covered by the code."*

Classification Board members are drawn from the wider Australian community, and are intended to represent the community and to interpret and apply classification criteria on behalf of the community. In making its decisions, the Board applies benchmarks which provide a level of consistency in classification decisions, while retaining the flexibility to deal with novel content or changes in community standards which may be indicated, for example, through correspondence received, or community or media discussion. At its weekly Board meeting, the Classification Board discusses decisions made or pending on unusual, novel or particularly challenging content, as well as complaints or correspondence received relating to decisions. All of this comes together to help promote consistency in the Classification Board's interpretation and application of classification criteria and in its decision-making.

The ALRC has proposed that detailed guidelines be contained within a legislative instrument, whilst industry codes of practice *"might describe classification criteria in more detail or provide*

*additional guidance on the application of the criteria, for example, by providing relevant examples."*

The Classification Board notes that if the proposed guidelines contain similar or less detail than the current *Guidelines for the Classification of Publications* and *Guidelines for the Classification of Films and Computer Games*, significant detail on their application and interpretation would be required in the industry codes of practice. This could challenge the concept of a single, uniform, consistent set of classification criteria, as each industry code would contain detail which would differ to suit that particular industry's individual requirements (albeit the industry code would be subject to Regulator approval). Could there be community concerns that such industry codes won't adequately represent or prioritise community interests? And in the Classification Board's role as a "review" body, what will form the basis for testing decisions – the industry's code of practice, the statutory classification criteria, or both (and if so, in what balance?).

However, if the intent is to include much greater and more prescriptive detail in the proposed guidelines (and arguably increasing the level of prescriptive regulation in classification), would the result be a classification system that is less flexible and less able to respond to evolving community standards in a timely manner?

One method of dealing with this issue may be that rather than high-level detail being contained within industry codes, there may be a requirement that codes include an agreement to apply the "community standards" as set by the Board. The Board would then publish, when deemed appropriate and taking into account data from the periodic reviews of community standards, a set of standards providing additional detail and clarifying the application of the guidelines and providing relevant examples which allow industry assessors, regardless of sector or delivery platform, to make consistent classification decisions. It is noted that such a publication could incorporate the ALRC's suggestion in 9.43 that the Classification Board publish guidelines for generating consumer advice.

**Proposal 11–4 Where an industry classification code of practice relates to media content that must be classified or to which access must be restricted, the Regulator should have power to enforce compliance with the code against any participant in the relevant part of the media content industry.**

**Question 12–1 How should the complaints-handling function of the Regulator be framed in the new Classification of Media Content Act? For example, should complaints be able to be made directly to the Regulator where an industry complaints-handling scheme exists? What discretion should the Regulator have to decline to investigate complaints?**

Response: In 4.41, it is stated that the current National Classification Scheme framework has been criticised as being confusing to the public. *"The Senate Legal and Constitutional Affairs References Committee observed that the current framework for complaints handling is confusing to the public, and recommended the establishment of a classification complaints 'clearinghouse' as a one-stop shop for administering complaints: Consumers need to be provided with clear information about how to make complaints in relation to classification matters. In order to make a complaint, a consumer should not be required to have a detailed knowledge of the classification system, along with the role of the various bodies involved in classification and their associated responsibilities*.

In 12.28, the ALRC notes: *"However, in some cases, it may be difficult for consumers to know where to complain.....*

*"In this context, the Senate Committee recommended the establishment of a classification complaints 'clearinghouse', where complaints in relation to classification can be directed and that would be 'responsible for forwarding them to the appropriate body for consideration'.*

*"The ALRC agrees that a consumer should not be required to have a detailed knowledge of the classification system, along with the role of the various bodies involved in classification and their associated responsibilities'. As an adjunct to its complaints-handling functions, the Regulator might usefully perform the sort of central coordination role suggested by the Senate Committee. This might involve, for example, running a classification 'hotline' or internet portal for the lodgement of complaints."*

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

The Classification Board contends that with any new National Classification Scheme where complaints are an important mechanism for flagging inappropriately classified material and other concerns, it would be important that there be a clear, well-understood, well-promoted complaints handling system, and preferably one "port of call" for all complaints. As such, the role of the Regulator as a complaints clearing house that could process complaints expeditiously and refer them correctly, with an accompanying ability to "triage" complaints according to level of seriousness – such as those about online child sexual abuse material, or those complaints that raise systemic issues concerning the operation of industry classification arrangements – would appear to have merit. To ensure a timely, effective and responsive complaints-handling system, response to complaints should be provided within a statutory timeframe.

This Proposal would appear to more comfortably meet Guiding Principle 4 (*"Consumers should be provided with information about media content in a timely and clear manner, and with a responsive and effective means of addressing their concern, including through complaints")* than the Proposal outlined in 12.27. In 12.27, *"The ALR considers that the starting point should be that complaints about classification matters should be dealt with by the Regulator only where they have not been handled satisfactorily by content providers or industry complaints-handling bodies. This accords with best practice in complaint handling mechanisms, where complaints are dealt with as close as possible to the point of origin, and helps to ensure that the Regulator will deal only with the complaints that are most difficult to resolve or raise systemic issues."*

The Regulator should have discretion to decline to investigate complaints if it has reasonable grounds to believe such complaints are frivolous, harassing or vexatious in nature.

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

**(a) encouraging, monitoring and enforcing compliance with classification laws;**

**(b) handling complaints about the classification of media content;**

**(c) authorising industry classifiers, providing classification training or approving classification training courses provided by others;**

**(d) promoting the development of industry classification codes of practice and approving and maintaining a register of such codes; and**

**(e) liaising with relevant Australian and overseas media content regulators and law enforcement agencies.**

**In addition, the Regulator's functions may include:**

**(f) providing administrative support to the Classification Board;**

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

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

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

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

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

**<u>Proposal 14–1</u> The new Classification of Media Content Act should provide for enforcement of classification laws under Commonwealth law.**

**Proposal 14–2 If the Australian Government determines that the states and territories should retain powers in relation to the 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 the enforcement of classification laws with respect to publications, films and computer games.**

**Proposal 14–3 The new Classification of Media Content Act should provide for offences relating to selling, screening, distributing or advertising unclassified material, and failing to comply with:**

**(a) restrictions on the sale, screening, distribution and advertising of classified material;**

**(b) statutory obligations to classify media content;**

**(c) statutory obligations to restrict access to media content;**

**(d) an industry-based classification code; and**

**(e) directions of the Regulator.**

Response: Who will be the liable party for such offences, particularly for non-physical product such as online material, and how will they be identified? Will ISP providers or search engines carry any responsibility or liability in this regard? In other words, if fines or sanctions are to be issued, who will they be issued against?

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

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

**Pertinent issues identified in the Classification Board's *ALRC Pre- Issues Paper submission* that remain unaddressed in the ALRC's *National Classification Scheme Review Discussion Paper*.**

- *Examine the logistics of classifying products sold/distributed/displayed in Australia that are in non-English languages. How will the new Classification of Media Content Act deal with such content (much of which is directly imported) – will there be an obligation to ensure media content that is required to be classified by the Classification Board or authorised industry assessors includes English captions?*
- *Examine whether it should be mandatory for applicants to provide advertising and marketing material with media content to be classified, to assist in assessing the target age group of a product.*
- *Examine whether, for computer games to be classified by the Classification Board, it should be mandatory for a sample of gameplay to be provided together with a full copy of the game.*
- *Examine the new Classification of Media Content Act alongside the* Australian Human Rights Commission Act 1986 [Section 3 (1) and 11 (1)(f)] *and* Article 30 *of the* Convention on the Rights of Persons with Disabilities – *for example, the Board receives applications to classify films that do not provide closed captioning for people with hearing disabilities, and this has been drawn to the attention of the Board as potentially being in breach of this Act and Convention.*