Victorian Government submission to the Australian Law Reform Commission National Classification Scheme Review

Discussion Paper 77

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Introduction

1. On 24 March 2011, the Commonwealth Attorney-General, the Hon Robert McClelland MP, asked the Australian Law Reform Commission ('ALRC') to inquire into and report on the framework for the classification of media content in Australia.
2. This referral came about with the agreement of Commonwealth, State and Territory Censorship Ministers as part of their consideration of classification and censorship policy issues through the Standing Committee of Attorneys-General (now known as the Standing Council on Law and Justice).
3. Victoria recognises that the National Classification Scheme ('NCS') is failing to keep pace with technological innovation and is ill adapted to accommodate the trend towards media convergence and the significant increase in online and user-generated content.
4. On this basis, the Victorian Government supports the comprehensive ALRC review of the NCS and welcomes the opportunity to re-examine content regulation in the context of a dynamic and changing media environment.

Scope of Victorian Government submission

5. The Victorian Government approaches this submission from a position of interest in the underlying purposes of content regulation. These are to ensure that children are protected from material that may harm them; to facilitate informed entertainment choices for consumers of media and to ensure that high-level content is appropriately restricted and in extreme circumstances, prohibited altogether.
6. The Victorian Government is keen to ensure that Victorian consumers enjoy the benefits of a robust, effective classification framework and that business operating out of Victoria are not unnecessarily burdened with unnecessary regulatory obligations.
7. The ALRC Discussion Paper canvasses a wide range of policy issues relating to content regulation in Australia. However, this submission will be confined to outlining the Victorian Government's position on the ALRC's proposals relating to the legislative and constitutional issues associated with the existing cooperative arrangements underpinning the governance of the NCS and proposals relating to enforcement (reflected in Chapters 13 and 14 of the Discussion Paper).
8. Primarily, this submission will respond to ALRC proposals to abolish the existing cooperative arrangements in favour of the Commonwealth taking on sole responsibility for the establishment, policy direction and enforcement of a new content regulation framework.
9. The Victorian Government supports the view that the existing cooperative arrangements would benefit from reform to create a robust nationally consistent method of content regulation, to the benefit of industry and consumers alike.
10. However, Victoria notes that sole Commonwealth responsibility is not the only method by which effective nationally consistent regulation can be achieved. The Victorian Government considers that alternatives including model legislation or an applied law regime should be discussed by all jurisdictions at an appropriate time, and the merits of such alternatives thoroughly tested.
11. The Victorian Government looks forward to considering the final recommendations of the ALRC relating to broader policy issues canvassed in the Discussion Paper when the ALRC's final report is handed down in 2012.

Current cooperative arrangements under the NCS

12. The NCS currently operates as a national cooperative scheme. The Commonwealth *Classification (Publications, Films and Computer Games) Act 1995* ('the Commonwealth Classification Act') establishes the framework of the NCS, outlining the classification categories and establishing the bodies (the Classification Board and Classification Review Board) responsible for classification decisions. The Commonwealth also establishes the ancillary legislative instruments that form the basis of classification decision-making, being the National Classification Code and Classification Guidelines, which are created on the basis of unanimous agreement of all Censorship Ministers.

13. States and Territories have complementary legislation providing for restrictions and offences relating to films, computer games and certain publications as well as other miscellaneous enforcement provisions relating to advertisements, exemptions and on-line information services. In Victoria, this is found in the *Classification (Publications, Films and Computer Games)(Enforcement) Act 1995* ('Victoria's Classification Act').

14. The NCS is underpinned by an Intergovernmental Agreement ('IGA') signed by the Commonwealth, States and Territories, which stipulates the governance and decision-making framework that regulates the policy basis of the NCS.

15. Classification policy development occurs through the Standing Council on Law and Justice (formerly the Standing Committee of Attorneys-General).

Challenges facing the current cooperative arrangements

16. The existing cooperative framework represented an attempt to streamline significantly disparate classification arrangements following the ALRC *Report on Film and Literature Censorship Procedure* (Report 55) in 1991, which highlighted the benefits of greater uniformity of classification processes in Australia.

17. To some extent, measures to create a more efficient national system of content regulation have been successful. The establishment of uniform classification categories and a single statutory body to make classification decisions that would apply nationally went a significant way in rationalising previously fragmented approaches to classification. However, as the ALRC highlights, there are currently significant inconsistencies across jurisdictions in relation to permissible content, packaging requirements and offences and penalties under the NCS, which have further diverged over time. The diminishing relevance of State and Territory borders in an era of national distribution and the shift of entertainment media online arguably makes such inconsistencies harder to justify.

18. Some of the particular challenges with the existing scheme are outlined below.

Media convergence

19. There have been represented unprecedented changes to the nature of the entertainment industry during the last decade that were not anticipated when the NCS was created. The NCS is predicated on the distinctions between traditional media forms (tangible computer games, films and publications), which have become largely redundant with the convergence of media platforms.

20. The NCS is primarily designed to regulate 'offline' or 'hardcopy' media, which until comparatively recently was easily distinguishable from online media (which is the regulatory responsibility of the Commonwealth pursuant to the *Broadcasting Services Act 1992*). However, with the emergence of mobile tablet devices, e-books, online

21. The Victorian Government recognises that treating identical entertainment media differently based on the media platform on which it is viewed or played (i.e. creating different regulatory obligations for a film that is rented from the local video shop compared to a film that is downloaded and viewed on a mobile tablet device) creates confusion, inconsistencies and inefficiencies.

Inconsistency across jurisdictions

22. As the ALRC Discussion Paper notes, there are significant inconsistencies in classification restrictions, offences and penalties in Australia. There are also differences in the availability of concurrent classification arrangements, with certain jurisdictions having preserved concurrent classification bodies within their jurisdiction.

23. Because the NCS primarily aims to regulate media content in a commercial context, most industry bodies captured by the NCS distribute, sell or exhibit material nationally. Jurisdictional differences have the effect of creating significant compliance burdens on such industry groups, that are then required to comply with eight different regulatory frameworks. Unnecessary complexity inevitably leads to higher rates of non-compliance and increases costs to business.

24. Furthermore, inconsistency can lead to consumer confusion, particularly in relation to the disparate availability of certain material across jurisdictions (for example, X18+ films).

ALRC proposals relating to cooperative arrangements

25. In the Discussion Paper, the ALRC notes the deficiencies with the existing cooperative arrangements and proposes the Commonwealth create a new Classification of Media Content Act ('CMC Act') covering all aspects of content regulation, relying on a range of constitutional powers in the Australian Constitution.[i]

26. The ALRC concedes that the combination of these powers may not be sufficient for the Commonwealth to cover the field. On this basis, the ALRC recommends that states refer power to the Commonwealth for the avoidance of constitutional uncertainty.

27. Furthermore, the ALRC recommends enforcement of the proposed CMC Act be undertaken by the Commonwealth, with the Australian Federal Police ('AFP') enforcing serious criminal breaches and with the Commonwealth Director of Public Prosecutions tasked with prosecuting administrative or civil actions. Enforcement activity of the Commonwealth legislation by States and Territories would not be precluded; however, the issue of funding of such enforcement activity would need to be resolved.

28. The Discussion Paper notes that an alternative (though not preferred) would be for States and Territories to retain responsibility for the enforcement of offences related to 'offline' computer games, films and publications. This would involve carving these particular mediums from the proposed platform neutral definition of 'media content'.

29. The Discussion Paper is silent on any potential role for States and Territories in contributing and informing policy in the area of content regulation, providing views on the appointment of Classification Board members or any scope for State and Territory

Ministers to request a review of classified material. It is presumed that there is no such role envisaged.

30. This represents a significant shift from the existing collaborative emphasis in the NCS. For example, the IGA recognises that "…in relation to the Code and the classification guidelines, the Commonwealth, and the Participating States are equal partners and that the policy on these matters is derived from agreement between all jurisdictions."[ii]

Benefits of State and Territory involvement in policy development

Introduction

31. The Victorian Government strongly supports the establishment of a consistent, effective and robust content regulation framework. While it is conceded that there are difficulties with the existing cooperative arrangements, the Victorian Government is of the view that there are a range of benefits to a cooperative and collaborative approach to the development of policy underpinning content regulation. Victoria suggests that these can be accommodated in any future scheme without undermining the efficiency and effectiveness of the content regulation framework.

32. The Victorian Government recognises that the ALRC strongly recommends the Commonwealth Government taking full legislative and enforcement responsibility for content regulation as the solution to the existing challenges to the scheme. However, the Victorian Government is of the view that reforms to the existing cooperative arrangements could ameliorate many of the acknowledged problems with the efficient operation of the NCS.

33. For example, problems associated with inconsistency across jurisdictions could be overcome through the creation of model provisions that could be adopted either through an applied laws regime or through mirror legislation. Difficulties associated with media convergence could be offset through more clearly describing and distinguishing the regulatory responsibility of Victoria and the Commonwealth and by ensuring that the regulation of online content is complementary to 'offline' content and applies the same standards, where appropriate (i.e. ensuring that online and offline computer games are regulated in the same or similar ways). Furthermore, the governance and decision-making processes underpinning the NCS could be revised with a view to enhancing efficiency and cooperation between participating jurisdictions.

34. The Victorian Government recommends the ALRC give consideration to such alternatives that could serve to preserve the existing cooperative arrangements. However, this submission also seeks to address how Victoria could continue to play a significant and valuable role in a future regulatory framework, in the context of the ALRC's proposals.

Ensuring policy development is appropriately representative

35. Classification policy is inherently a politically sensitive area. Issues about whether particular material is permissible or prohibited, and decisions about the scope of content restrictions within classification categories are highly subjective and attract a wide spectrum of views across the community.

36. The current NCS has sought to offset the significant diversity of views by designing processes to ensure decision-making is appropriately representative and collaborative. This is currently achieved in the following ways:

36.1. providing for a collaborative process of policy development to underpin the NCS, which involves all State and Territory Censorship Ministers' agreement (and consequentially, the canvassing of a diversity of views) as part of any changes to the NCS[iii];

36.2. the requirements that Classification Board and Classification Review Board members represent broad and varied demographics to facilitate consumer confidence in classification decision-making[iv] (and the requirement that State and Territory Censorship Ministers are consulted on proposed appointments to ensure this level of broad representation);

36.3. the requirement that significant changes to the NCS (via amendments to the Classification Code and Classification Guidelines) be the subject of public consultation as determined by participating Ministers[v].

37. Classification issues are frequently the subject of constituent concerns that are brought to the attention of local members and the Victorian Censorship Minister.

38. The current scheme recognises that in a contested policy area, consumer and industry confidence is obtained through a process of aggregation of a diverse range of views and through the existence of appropriate checks and balances.

Facilitating local input into content regulation policy

39. While the NCS seeks to operate on the basis of aggregated community values, its cooperative nature allows for the appropriate reflection in policy development of circumstances where the values and views of the community differ depending on geographical location or where specific issues arise in parts of the community.

40. Victoria can also offer unique policy input that is informed by local industry, particularly in circumstances where particular industry groups are highly concentrated in the state. For example, the most recent data obtained by the Games Developers' Association of Australia suggests that approximately 48% of the games development industry is based in Victoria[vi].

41. Issues relating to classification and content regulation are also frequently the subject of constituent concerns to local members of Parliament and to the Victorian Censorship Minister. The NCS currently creates an avenue for Censorship Ministers to appropriately reflect the concerns of their constituents in a collaborative policy setting environment, beyond limited and infrequent public consultation processes. Ensuring Victoria plays a role in any future scheme will ensure that the Victorian Government can continue to advocate on behalf of constituents on issues of concern in promoting reform.

42. It appears the ALRC envisages all policy-setting functions will fall to the Commonwealth Minister with the portfolio responsibility for content regulation. The Victorian Government believes that the total centralisation of policy development functions in this policy area is undesirable as it would allow a single Minister to make critical decisions on the availability of content without appropriate scrutiny or fetters on decision-making. The lack of collective decision-making also risks increasing the perception of politicisation of the policy development process.

Options for facilitating Victoria's contribution to content regulation

43. The Victorian Government suggests that there may be ways to preserve aspects of the cooperative arrangements without compromising consistency or the ability of the regulatory model to respond to emerging policy issues.

Establishment of consultation requirements on significant policy matters

44. If the Commonwealth were to take responsibility for content regulation as proposed by the ALRC, the Victorian Government would advocate for the establishment of consultation obligations with Victoria on policy matters of significance within the scheme.

45. For example, Victoria advocates the future scheme establish requirements for ongoing consultation on, and endorsement of, significant policy changes such as:

    45.1. the amendment of the classification categories (and changes to the legality or availability of classification categories);

    45.2. any amendments to the Classification Code and Guidelines (or other matters pertaining to the level of content permissible in classification categories);

    45.3. significant changes to restrictions (for example, packaging requirements) or offences and penalties;

    45.4. codes of conduct utilised as part of self/co-regulatory arrangements with industry; and

    45.5. the format, structure or content of any public consultation in relation to classification matters.

46. The Victorian Government submits that in these circumstances, Victoria's views on proposals should be sought, with a view to obtaining Victoria's endorsement.

Entrenchment of consultation obligations

47. Victoria submits that entrenched consultation mechanisms should be established to ensure consultation is meaningful and to allow Victoria to make informed contributions to policy proposals. For this reason, Victoria supports consultation obligations being entrenched in the governance framework underpinning the content regulation scheme.

48. The Victorian Government suggests that in such circumstances, Victoria be provided with:

    48.1. sufficient detail of the policy or reform proposal to allow for a considered response;

    48.2. adequate time to assess the policy or reform proposal (this may vary depending on the complexity and scope of the proposed reform) and with sufficient time to provide a response.

49. In the interests of transparency and to allow stakeholders and the community to be appraised of any potential diversity of views, the Victorian Government submits that the Commonwealth be obliged to publish Victoria's written comments upon Victoria's request on an appropriate publicly accessible website (for example, a website dedicated to classification policy matters). This requirement would facilitate appropriate community

50. The suggestion of formal obligations outlined above are not intended to preclude informal discussions and dialogue between jurisdictions on policy matters.

Aspects of current scheme that warrant retention

51. The Victorian Government submits that there are a number of cooperative aspects of the NCS that operative effectively and warrant retention in any future scheme.

Classification Board composition and consultation requirements

52. The Victorian Government supports the retention of the existing requirement that Victoria be consulted on the appointment of members (including the Director) of the Classification Board[vii] and the Review Board[viii]. This consultation obligation has been an effective mechanism in ensuring the Classification Board and Review Board remain appropriately representative and allowed Victoria to suggest recruitment mechanisms to encourage greater diversity of Board members.

Independent review of classification decisions

53. The Victorian Government is of the view that the availability of independent review of classification decisions ensures appropriate transparency and accountability of the classification decision-making process.

54. The Victorian Government notes the ALRC proposal to abolish the Classification Review Board, noting the high cost associated with reviews conducted by the Classification Review Board. The Discussion Paper also cites arguments that the limited exposure of the Classification Review Board members to media content may impede its ability to make review decisions within the context of what is available in the broader media market.

55. Victoria is of the view that it is essential that rigorous independent oversight over the decisions of the Classification Board be retained. Victoria considers the Classification Review Board's current 'arms length' structure and limited exposure to routine classification decision-making allows it to effectively consider Classification Board decisions afresh and consider whether legislative instruments underpinning decisions have been appropriately applied.

56. The fact that the Classification Review Board supplements the Classification Board as an appropriate independent 'check and balance' is demonstrated by a number of recent decisions, which overturned classification decisions made by the Classification Board.[ix]

57. Furthermore, Victoria strongly supports the retention of its ability to request a review of classification decisions made by the Classification Board.[x] The ability of States and Territories to request a review given participating Ministers a mechanism to ensure the integrity of the classification decision-making process and allows constituent concerns about classification decisions to be appropriately addressed. This is particularly important given the limited scope for ordinary citizens to seek a review of classification decisions.[xi]

58. The ability of States and Territories to request reviews of classification decisions has not represented an impediment to the efficient operation of the NCS and has in fact, resulted in contentious Classification Board decisions being overturned. For instance, the Commonwealth Censorship Minister recently sought a review (following a request from the South Australian Attorney-General) of the Classification Board's decision to classify a

film entitled *A Serbian Film* as R18+. The Classification Review Board overturned the decision of the Classification Board and re-classified the film as Refused Classification on 20 September 2011. Similarly, the R18+ classification given by the Classification Board to the film *A Human Centipede II* was overturned by the Classification Review Board on 28 November 2011, when it unanimously found the film to be Refused Classification. The review of *A Human Centipede II* was initiated by the NSW Attorney-General.

59. The Victorian Government is of the view that amendments to the governance of the Classification Board and the retention of an appropriate independent oversight body will serve to ensure decisions regarding media content are transparent and that decision-makers are appropriately accountable. Such measure s are essential to encouraging community confidence in decision-making bodies and any content regulation scheme more broadly.

Role of States and Territories in enforcement

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60. States and Territories' primary role under the NCS lies in enforcing breaches of restrictions and offences relating to films, computer games and publications.

61. Victoria Police was consulted on this section of the submission, as the body responsible for all enforcement activity under Victoria's Classification Act.

ALRC proposals

62. In the Discussion Paper, the ALRC proposes that all enforcement shift from the States and Territories to the Commonwealth; with the Australian Federal Police ('AFP') policing serious criminal breaches and the Commonwealth Director of Public Prosecutions ('CDPP') and potentially the Regulator becoming responsible for the enforcement of civil penalties and the issuing of infringements.

63. As an alternative (though not preferred) option, the ALRC notes the possibility of States and Territories retaining responsibility for the enforcement of breaches relating to publications, films and computer games. This arrangement would be underpinned by an Intergovernmental Agreement under which States and Territories would agree to enact relevant enforcement provisions through either an applied laws or mirror laws cooperative arrangement.

Existing difficulties for enforcement of the NCS

64. Previously, enforcement activity was easily applied to 'offline' hard copy films, computer games and publications. However, technological innovation and the convergence of media has blurred enforcement boundaries by expanding the range of material captured by media definitions within the NCS, to include online material. As online material is already regulated by the Australian Communications and Media Authority pursuant to the *Broadcasting Services Act 1992*, this has led to the potential for dual regulation and jurisdictional confusion.

65. The enforcement of classification offences can be laborious and complex; requiring search warrants, seizure and disposal of large commercial quantities of material. Furthermore, enforcement bodies are required to request classification decisions (or proof of classification in the form of evidentiary certificates) for materials to establish breaches.

Options for cooperative enforcement arrangements

66. The Victorian Government acknowledges the benefits of uniform restrictions, offences and penalties relating to media content applying Australia-wide. Uniformity will provide greater certainty to industry and will reduce the regulatory burden associated with compliance with disparate enforcement legislation, thereby encouraging greater compliance with classification requirements.

Continued Victorian involvement in enforcement

67. The Victorian Government is of the view that guaranteeing a continued role for Victoria Police to continue to undertake enforcement activity would improve enforcement outcomes under the scheme. On this basis, the Victorian Government endorses a joint or shared enforcement arrangement that allows both the Commonwealth and Victoria to cooperatively investigate and enforce breaches of classification laws.

68. Facilitating a role for the continued enforcement by Victoria Police allows it to be responsive to community complaints without sole reliance on the AFP or other Commonwealth bodies to take appropriate action to remedy breaches. This is particularly in circumstances where the ALRC acknowledges that it is unclear what level of prioritisation the AFP will be able to place on enforcement of breaches under a new classification regime.

69. Cooperative enforcement would also allow Victoria Police to address breaches of classification laws in the context of other enforcement activity (for example, when investigating organised crime), thereby generating investigatory efficiencies. For this reason, it may be beneficial for such cooperative enforcement to be allocated along intelligence and expertise lines. For example, where the suspected breach involves importation or online transmission of material, it may be more appropriate for the AFP to investigate and prosecute such a breach. However, if non-compliance arises in the context of Victoria Police's organised crime operations, local adult shops or involves local production or distribution of prohibited material, Victoria Police may be best placed to undertake the enforcement action.

70. Such cooperative enforcement measures would need to be supplemented by augmentation of existing information sharing arrangements between Victoria Police and the AFP. If enforcement were to occur under Commonwealth legislation, appropriate consideration should be given to funding arrangements.

Improving enforcement outcomes

71. Improving enforcement outcomes requires addressing existing enforcement difficulties previously outlined. One method of facilitating improved enforcement has been foreshadowed by the ALRC, in proposing increased use of infringement notices and civil penalties for low level breaches, retaining criminal offences for only more significant breaches.

72. The Victorian Government supports the introduction of more flexible enforcement arrangements that allow for the appropriate allocation of enforcement resources in relation to breaches of classification requirements. For example, the use of infringement notices for lower level breaches rather than criminal penalties.

73. The Victorian Government supports efforts at collaboration and communication with Commonwealth, State and Territory counterparts on enforcement issues into the future, with a view to collectively improving enforcement outcomes.

Conclusion

74. The Victorian Government welcomes the opportunity to contribute to the ALRC review of the classification framework in Australia. A reconsideration of the issues relating to content regulation is timely in a context where technological advancement has significantly altered the media landscape and undermined the efficacy of existing regulatory arrangements.

75. The Victorian Government supports the establishment of a modern, flexible and proactive model for content regulation that is able to accommodate future technological innovation and respond proactively to emerging policy issues. However, Victoria is of the view that the creation of a nationally consistent, streamlined system of content regulation does not preclude the possibility of an ongoing contribution from Victoria in matters relating to policy development and enforcement. In particular, Victoria would welcome the opportunity to further discuss alternative options for preserving and enhancing existing cooperative arrangements.

76. Ensuring any classification system remains representative of Australian society requires cooperation and dialogue. Effective collaboration and the sharing of ideas can greatly benefit the quality of policy and offset perceptions of politicisation or conflicts of interest in a politically charged policy area.

77. For this reason, Victoria strongly advocates for a continued role within any future content regulation framework. This submission has outlined some ways in which Victoria could continue to make a valuable contribution to the operation of the classification system in Australia, while overcoming some of the difficulties associated with the current cooperative framework.

78. The Victorian Government looks forward to considering and discussing the ALRC's final proposals with Commonwealth, State and Territory governments, with a view to designing a contemporary, robust content regulation system that will operate effectively into the future.

[i] Specifically, ss51(i), (v), (xx) and s122.
[ii] Part C, *Agreement relating to a revised co-operative legislative scheme for censorship in Australia,* ratified 28 November 1995.
[iii] Part H, *Agreement relating to a revised co-operative legislative scheme for censorship in Australia,* ratified 28 November 1995.
[iv] For example, one of the considerations in the *Guidelines for the Selection of Members of the Classification Board* is to ensure Classification Board members is comprised of "…persons from different geographical locations within Australia" at paragraph 22.
[v] Part 9(b), *Agreement relating to a revised co-operative legislative scheme for censorship in Australia*, ratified 28 November 1995
[vi] Victorian Games Industry Profile, September 2009, Game Developers' Association Australia.
[vii] Section 48(3) of the *Classification (Publications, Films and Computer Games) Act 1995*.
[viii] Section 74(3) of the Commonwealth Classification Act. Victoria notes the proposal to abolish the Review Board.
[ix] For example, the film entitled *A Serbian Film* was reclassified from R18+ to Refused Classification on 20 September 2011, the computer game *House of the Dead: Overkill Extended Cut* was re-classified from Refused Classification to MA15+ upon review on 26 September 2011, while the film *The Twilight Saga: Breaking Dawn Part 1* was found to be M rather than MA15+ on 14 November 2011.
[x] Section 42(2) provides that "if a participating Minister asks the Minister, in writing, to apply for a review of a decision, the Minister must do so."
[xi] Section 42 of the Commonwealth Classification Act broadly provides that reviews are limited to the Minister, the applicant for classification of the content, the publisher of the content or 'a person aggrieved'. Section 42(3) broadly describes 'a person aggrieved' as a person or organisation who is engaged in activities, purposes or research relates to the contentious aspects of the content.