Australian Government
Australian Law Reform Commission

Classification—Content Regulation and Convergent Media

SUMMARY REPORT

ALRC Report 118 Summary

February 2012

This Summary Report reflects the law as at 29 February 2012.

The Australian Law Reform Commission was established on 1 January 1975 by the *Law Reform Commission Act 1973* (Cth) and reconstituted by the *Australian Law Reform Commission Act 1996* (Cth).

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Terms of Reference

Review of Censorship and Classification

Having regard to:

- it being twenty years since the Australian Law Reform Commission (ALRC) was last given a reference relating to Censorship and Classification
- the rapid pace of technological change in media available to, and consumed by, the Australian community
- the needs of the community in this evolving technological environment
- the need to improve classification information available to the community and enhance public understanding of the content that is regulated
- the desirability of a strong content and distribution industry in Australia, and minimising the regulatory burden
- the impact of media on children and the increased exposure of children to a wider variety of media including television, music and advertising as well as films and computer games
- the size of the industries that generate potentially classifiable content and potential for growth
- a communications convergence review, and
- a statutory review of Schedule 7 of the *Broadcasting Services Act 1992* and other sections relevant to the classification of content

I refer to the ALRC for inquiry and report pursuant to subsection 20(1) of the *Australian Law Reform Commission Act 1996*, matters relating to the extent to which the *Classification (Publications, Films and Computer Games) Act 1995* (the Classification Act), State and Territory Enforcement legislation, Schedules 5 and 7 of the Broadcasting Services Act 1992, and the Intergovernmental Agreement on Censorship and related laws continue to provide an effective framework for the classification of media content in Australia.

Given the likelihood of concurrent Commonwealth reviews covering related matters as outlined above, the Commission will refer relevant issues to those reviews where it would be appropriate to do so. It will likewise accept referral from other reviews that fall within these terms of reference. Such referrals will be agreed between the relevant reviewers.

1. In performing its functions in relation to this reference, the Commission will consider:

    1. relevant existing Commonwealth, State and Territory laws and practices
    2. classification schemes in other jurisdictions
    3. the classification categories contained in the Classification Act, National Classification Code and Classification Guidelines
    4. any relevant constitutional issues, and
    5. any other related matter.

2. The Commission will identify and consult with relevant stakeholders, including the community and industry, through widespread public consultation. Other stakeholders include the Commonwealth Attorney-General's Department, the Department of Broadband, Communications and the Digital Economy, the Australian Communications and Media Authority, the Classification Board and Classification Review Board as well as the States and Territories.

3. The Commission is to report by 30 January 2012.

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Summary Report

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Overview

This Summary Report provides an accessible overview of the policy framework and recommendations in the Australian Law Reform Commission (ALRC), *Classification—Content Regulation and Convergent Media* (ALRC Report 118). The full Report sets out in detail the issues raised in the Terms of Reference for the ALRC's review of the National Classification Scheme, and the research and evidence base upon which the ALRC's recommendations were formulated.

This Summary begins with a brief account of the background for the Inquiry, including the law reform brief and problems with the current framework for classification and content regulation in Australia, and a description of the principles underpinning the recommendations of the Report. This is followed by a description of the key features of the new scheme recommended by the ALRC, and the net effect of the ALRC's recommendations. This Summary concludes with an outline of each chapter in the full Report.

Background

This is the first comprehensive review of censorship and classification since the ALRC report, *Censorship Procedure*, published in 1991 (ALRC Report 55). That report recommended a legislative framework that would enable the Commonwealth, states and territories to take a national approach to classification. Its recommendations formed the basis of the *Classification (Publications, Films and Computer Games) Act 1995* (Cth) (*Classification Act*), and what is commonly referred to as the National Classification Scheme.

Censorship Procedure advanced classification policy in Australia by recommending a cooperative scheme between the Commonwealth, states and territories, and identified the important role to be played by an independent Classification Board and Classification Review Board. However, it was developed in a 'pre-internet' environment, when the wider implications of media convergence for content regulation generally were not yet understood.

In the context of ever greater convergence of media technologies, platforms and services, and more media being accessed from the home through high-speed broadband networks, the need for a comprehensive review of classification laws and regulations became apparent. In providing the reference for this Inquiry to the ALRC, the Attorney-General had regard to the rapid pace of technological change in media available to, and consumed by, the Australian community, and the needs of the community in this evolving technological environment.

The major principles that have informed media classification in Australia—such as adults being free to make their own informed media choices, and children being protected from material that may cause harm—continue to be relevant and important. While a convergent media environment presents major new challenges, there continues to be a community expectation that certain media content will be accompanied by classification information, based on decisions that reflect community standards.

Inquiry in context

This Inquiry was one of a number of related inquiries taking place in Australia. The Convergence Review was established through the Department of Broadband, Communications and the Digital Economy (DBCDE) in 2011 to review Australia's media and communications legislation in the context of media convergence, due to report in the first quarter of 2012.

Other significant inquiries and reviews relevant to this Inquiry included: public consultation on the introduction of an R 18+ classification for computer games; a review of measures to increase accountability and transparency for internet service provider (ISP) filtering of Refused Classification (RC) material; a Senate Committee review of Australia's classification system; inquiries into cyber-safety and outdoor advertising; the Independent Media Inquiry into newspapers and online news publications; and a proposed national cultural policy.

The law reform brief

Law reform recommendations cannot be based upon assertion or assumption and need to be anchored in an appropriate evidence base. A major aspect of building the evidence base to support the formulation of ALRC recommendations for reform is community consultation, acknowledging that widespread community consultation is a hallmark of best practice law reform.[1] Under the provisions of the *Australian Law Reform Commission Act 1996* (Cth), the ALRC 'may inform itself in any way it thinks fit' for the purposes of reviewing or considering anything that is the subject of an inquiry.[2]

The process for each law reform project may differ according to the scope of inquiry, the range of key stakeholders, the complexity of the laws under review, and the period of time allotted for the inquiry. For each inquiry the ALRC determines a consultation strategy in response to its particular subject matter and likely stakeholder interest groups. The nature and extent of this engagement is normally determined by the subject matter of the reference—and the timeframe in which the inquiry must be completed under the Terms of Reference. While the exact procedure is tailored to suit each inquiry, the ALRC usually works within a particular framework, outlined on the ALRC's website.[3]

Problems with the current framework

A strong underlying theme of many submissions to this Inquiry was that the current classification scheme does not deal adequately with the challenges of media convergence and the volume of media content now available to Australians. The *Classification Act* was described as 'an analogue piece of legislation in a digital world', and there were difficulties identified in how the *Classification Act* interfaces with the *Broadcasting Services Act 1992* (Cth), which covers broadcast and online media.

Respondents drew attention to aspects of the classification and content regulation framework that are failing to meet intended goals, and that create confusion for media content industries and the wider community. Among the problems identified were:

- inadequate regulatory response to changes in technology and community expectations;
- lack of clarity about whether films and computer games distributed online must be classified;
- 'double handling' of media content, with films and television programs being classified twice for different formats (eg, 2D and 3D) and different platforms (eg, broadcast television and DVD);

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1 B Opeskin, 'Measuring Success' in B Opeskin and D Weisbrot (eds), *The Promise of Law Reform* (2005) 202.

2 *Australian Law Reform Commission Act 1996* (Cth) s 38.

3 Australian Law Reform Commission, *Law Reform Process* <www.alrc.gov.au/law-reform-process> at 30 November 2011.

- concerns that the scope of the RC category is too broad, and that too much content is prohibited online, including some content that may not be prohibited in other formats, such as magazines;
- inconsistent state and territory laws concerning restrictions and prohibitions on the sale of certain media content, such as sexually explicit films and magazines;
- low compliance with classification laws in some industries, particularly the adult industry, and correspondingly low enforcement; and
- the need to clarify the responsibilities of the Classification Board and the Australian Communications and Media Authority (the ACMA) and other Australian Government agencies and departments involved with classification and media content regulation.

The context of media convergence

This Inquiry provided the opportunity to reform Australia's classification laws to meet the challenges of a convergent media environment. Developments associated with media convergence include:

- increased household and business access to high-speed broadband internet;
- the digitisation of media products and services, as seen with the rise of YouTube, Apple iTunes and other global digital media platforms;
- the convergence of media platforms and services, for both established and new media;
- the globalisation of media platforms, content and services, making nationally-based regulations more difficult to apply;
- the acceleration of innovation, characteristic of a more knowledge-based economy;
- the rise of user-created content, and a shift in the nature of media users from audiences to participants;
- greater media user empowerment, due to greater diversity of choices of media content and platforms and the increased ability to personalise media; and
- the blurring of lines between public and private media consumption, as well as the ability to apply age-based access restrictions, as more media is accessed from the home through converged media platforms.

Piecemeal regulatory responses to changes in technologies, markets and consumer behaviour have created uncertainty for both consumers and industry, and raise questions about where responsibilities lie for driving change. Current legislation is characterised by what the ACMA has described as 'broken concepts': laws built upon platform-based media regulation, that become less and less effective in a convergent media environment.

A new National Classification Scheme

Guiding principles for reform

The ALRC identified eight guiding principles for reform directed to providing an effective framework for the classification and regulation of media content in Australia. These principles underpin the 57 recommendations for reform in the Report. The ALRC considers that these principles should inform the development of a new National Classification Scheme that can more effectively meet community needs and expectations, while being more responsive to the challenges of technological change.

The eight guiding principles are that:

(1) Australians should be able to read, hear, see and participate in media of their choice;

(2) communications and media services available to Australians should broadly reflect community standards, while recognising a diversity of views, cultures and ideas in the community;

(3) children should be protected from material likely to harm or disturb them;

(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 concerns, including through complaints;

(5) the classification regulatory framework needs to be responsive to technological change and adaptive to new technologies, platforms and services;

(6) the classification regulatory framework should not impede competition and innovation, and not disadvantage Australian media content and service providers in international markets;

(7) classification regulation should be kept to the minimum needed to achieve a clear public purpose; and

(8) classification regulation should be focused upon content rather than platform or means of delivery.

Key features

In the Report, the ALRC recommends a new classification scheme for a new convergent media landscape. The key features of the ALRC's model are:

- **Platform-neutral regulation**—one legislative regime establishing obligations to classify or restrict access to content across media platforms.
- **Clear scope of what must be classified**—that is feature films, television programs and certain computer games that are both made and distributed on a commercial basis and have a significant Australian audience.

- **A shift in regulatory focus to restricting access to adult content**—imposing new obligations on content providers to take reasonable steps to restrict access to adult content and to promote cyber-safety.
- **Co-regulation and industry classification**—more industry classification of content and industry development of classification codes, subject to regulatory oversight.
- **Classification Board benchmarking and community standards—**a clear role for the Classification Board in making independent classification decisions using classification categories and criteria that reflect community standards.
- **An Australian Government scheme**—replacing the current classification cooperative scheme with enforcement of classification laws under Commonwealth law.
- **A single regulator**—with primary responsibility for regulating the new scheme.

Platform-neutral regulation

A new Classification of Media Content Act should be enacted incorporating all classification obligations applying to media content, including:

- publications, films and computer games currently subject to the *Classification Act* and state and territory classification enforcement legislation;
- online and mobile content currently subject to the regulatory regime under schs 5 and 7 of the *Broadcasting Services Act*; and
- broadcast and subscription television content currently regulated under the *Broadcasting Services Act*.

Traditional distinctions based on how content is accessed or delivered are becoming less relevant. Accordingly, the three key statutory obligations recommended in the Report are 'platform-neutral'—that is, they apply to certain media content, whether the content is screened in cinemas, broadcast on television, sold in retail outlets, provided online, or otherwise distributed to the Australian public. The Report recommends platform-neutral laws for what media content must be classified, platform-neutral laws for what media content must be restricted to adults, and platform-neutral laws for what media content is prohibited.

The intention is to avoid inconsistencies manifest under the current scheme, and enable a new classification framework to be more adaptive to changes in technologies, products and services arising out of media convergence. This would also eliminate costly 'double handling' or 'double classification' of similar content on different media platforms. Further, all media content that is required to be classified would be classified according to a single set of classification categories and criteria.

Clear scope of what must be classified

The volume of media content available to Australians has grown exponentially. There are over one trillion web sites, hundreds of thousands of 'apps' available for download

to mobile phones and other devices, and every minute over 60 hours of video content is uploaded to YouTube (one hour of content per second). As it is impractical to expect all media content to be classified in Australia, the scope of what must be classified should be confined to feature films, television programs and higher-level computer games.

A classification obligation that applies to content must be focused on material for which Australians most need and demand classification information. Therefore, importantly, feature films, television programs and computer games should only be required to be classified if they are both made and distributed on a commercial basis and likely to have a significant Australian audience.

Laws that stipulate what media content must be classified, and who undertakes classification activities, are currently platform-based and historic. The need to classify should be based upon the nature of the content itself—including its likely audience reach—rather than being based primarily upon the platform from which it is delivered and accessed.

Obligations to classify content would not generally apply to persons uploading online content on a non-commercial basis. Internet intermediaries, including application service providers, host providers and internet access providers, would also generally be excluded from classification-related obligations other than those concerning Prohibited content.

A shift in regulatory focus to restricting access to adult content

Content providers should be required to take reasonable steps to restrict access to all adult content that is sold, screened, provided online, or otherwise distributed to the Australian public. Adult content refers to media content that has been, or if classified would be, classified R 18+ or X 18+.

This approach to adult content recognises that formal classification is not the only response to concerns about media content, including concerns about protecting children from material likely to harm or disturb them. The sheer volume of adult content on the internet suggests that the focus should be on restricting access to this content, rather than having it formally classified by Australian classifiers. This approach also accords with the principle that classification regulation should be kept to the minimum needed to achieve a clear public purpose.

The new Act should provide for essential requirements for restricting access. The various ‘reasonable steps’ that different types of content provider might be expected to take should be prescribed in industry codes and Regulator standards, approved and enforced by the Regulator.

What steps are reasonable to take to restrict access will be based upon what is appropriate for delivery platforms. Restricting access offline may be straightforward in some instances, such as the packaging of certain content in plastic, or requiring proof of age on purchase.

While the challenges are clearly greater with online content, content providers will still be expected take reasonable steps to restrict access. Some content providers may be able to issue warnings and use age-verification systems. Others may be expected to promote self-regulatory initiatives to assist consumers to manage their own access to media content, and protect children and others in their care.

Measures to restrict access to adult content are complementary to other Government and industry cyber-safety initiatives. Measures to assist parents and guardians in particular may include:

- public education about the use of parental locks and other technical means to protect children from exposure to inappropriate media content;
- digital literacy and education programs;
- use of personal computer-based dynamic content filters; and
- user reporting—or 'flagging'—of inappropriate content.

Co-regulation and industry classification

A greater role for industry in classification can allow the Government to focus on the content that generates the most concern in terms of community standards and the protection of children. The new scheme would introduce additional elements of co-regulation into the classification system.

The scheme provides for innovative and efficient classification decision-making mechanisms. Most content that must be classified under the new scheme may be classified by authorised industry classifiers, but subject to regulatory oversight and review.

The Regulator should also have the power to approve other rigorous and transparent classification decision-making systems, perhaps developed in other jurisdictions or by digital and online content distributors. Classification decisions made under an approved system could be deemed to have an equivalent Australian classification. This would facilitate the provision of Australian classification information in a media environment characterised by vast volumes of content. New classification decision-making instruments, such as comprehensive online questionnaires that incorporate Australian classification criteria, should also be developed.

The new scheme also provides for the development and operation of industry classification codes. The intention is that such industry codes will provide flexibility for different industries to comply with regulatory requirements in a manner that is suited to their particular business models and is responsive to their particular audience and consumers. Industry codes would include details on matters such as the application of classification markings, display requirements for restricted content, reasonable steps for restricting access and complaints handling.

Industry classification and the extended use of codes will assist classification regulation to be responsive to technological change and adaptive to new technologies, platforms and services. It also provides the basis for greater 'buy-in' by industry

players to the classification scheme, thereby allowing industry knowledge and expertise to be directly applied to addressing consumer issues.

The Regulator would provide a critical 'back stop' to the scheme by providing for safeguards and oversight to ensure that the scheme is operating effectively, that industry is complying with regulatory obligations and that consumer needs and concerns are being adequately met.

Classification Board benchmarking and community standards

The Classification Board will be retained as an independent statutory body responsible for making key classification decisions and reviewing decisions. The Board, whose members are intended to be broadly representative of the Australian community, is suited to a benchmarking role and there is a high level of public confidence in the Board's decisions.

Independent decisions that reflect community standards become more important under a system that allows for more content to be classified by industry. In this context, the role of the Classification Board is particularly important. The ALRC therefore recommends that films for cinema release and computer games likely to be classified MA 15+ or above continue to be classified by the Board. It is important that independent benchmarks are established across a range of media content and classification categories.

Classification categories should be harmonised and the criteria combined so that the same categories and criteria are applied in the classification of all media content—irrespective of its form and the platform by which it is delivered or accessed. Classification criteria should also be reviewed periodically, to ensure they continue to reflect prevailing community standards. This requires comprehensive research, including a mix of quantitative and qualitative research.

One classification category that may no longer align with community standards is the 'RC' category. This category should be renamed 'Prohibited', and its scope narrowed. The Australian Government should review current prohibitions in relation to the depiction of sexual fetishes in films, and 'detailed instruction in the use of proscribed drugs'. Further, the Government should also consider confining the prohibition on content that 'promotes, incites or instructs in matters of crime' to 'serious crime'.

An Australian Government scheme

The new scheme based upon the Classification of Media Content Act should be enacted pursuant to the legislative powers of the Parliament of Australia and not as part of any new cooperative scheme. This conclusion is dictated by the need for classification law to respond effectively to media convergence and the desirability of consistent classification laws, decision making and enforcement.

At present, under the classification cooperative scheme, the enforcement of classification laws is primarily the responsibility of states and territories. These arrangements contribute to problems of inconsistency in offence and penalty provisions and low compliance with classification laws in some industries.

An important part of the rationale for replacing the existing classification scheme is to avoid such inconsistencies. The Australian Government should be responsible for the enforcement of classification laws and a regime of offences and penalties. The new Act should express an intention that it is to cover the field.

It is envisaged that consultation with the states and territories on classification matters, including enforcement, will continue to be an important element of the new National Classification Scheme.

A single regulator

A single regulator would have primary responsibility for regulating the new scheme. The Regulator would be responsible for a range of functions similar to some of those currently performed by the Classification Branch of the Australian Government Attorney-General's Department; the Director of the Classification Board; the DBCDE; and the ACMA.

The ALRC has identified advantages in having one regulator responsible for all forms of content regulation, including classification matters. These advantages are likely to increase significantly in the context of media convergence.

The Regulator's functions should include:

- encouraging, monitoring and enforcing compliance with classification laws;
- handling complaints about the classification of media content;
- authorising industry classifiers and providing and approving classification training;
- facilitating the development of industry classification codes and approving and maintaining a register of such codes;
- liaising with relevant Australian and overseas media content regulators, classification bodies and law enforcement agencies; and
- educating the public about the new National Classification Scheme and promoting media literacy more generally.

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

- providing administrative support to the Classification Board;
- maintaining a database of classification decisions;
- assisting with the development of classification policy and legislation; and
- conducting or commissioning research relevant to classification.

Net effect of the recommendations

The net effect of the ALRC's recommendations in the Report would be the establishment of a new National Classification Scheme that:

- applies consistent rules to content that are sufficiently flexible to be adaptive to technological change;
- places a regulatory focus on restricting access to adult content, helping to promote cyber-safety and protect children from inappropriate content across media platforms;
- retains the Classification Board as an independent classification decision maker with an essential role in setting benchmarks;
- promotes industry co-regulation, encouraging greater industry content classification, with government regulation more directly focused on content of higher community concern;
- provides for pragmatic regulatory oversight, to meet community expectations and safeguard community standards;
- reduces the overall regulatory burden on media content industries while ensuring that content obligations are focused on what Australians most expect to be classified; and
- harmonises classification laws across Australia, for the benefit of consumers and content providers.

Report outline

Chapter 1 provides an outline of the background to the Inquiry and an analysis of the scope of the Inquiry as defined by the Terms of Reference. It also describes the development of the evidence base to support the law reform response as reflected in the recommendations of the Report.

Chapter 2 describes the historical background to current classification laws, and the framework of the current National Classification Scheme, including the classification cooperative scheme for publications, films and computer games, and classification laws as applied to broadcasting, online and mobile content under the *Broadcasting Services Act*. The roles of the Attorney-General's Department, Classification Board, the Classification Review Board and the ACMA are outlined, along with that of industry under co-regulatory codes of practice for online and broadcast content. The chapter assesses the current scheme, looking at aspects that work reasonably well and those that are not working well and are in need of reform. The chapter concludes by noting the strong arguments made to the ALRC about the need for fundamental reform and for a new classification scheme.

Chapter 3 outlines factors in the media environment that necessitate reform of classification law and the development of a new scheme. It identifies the range of trends that have been associated with media convergence, including increased access to

high-speed broadband internet, digitisation, globalisation, accelerated innovation, the rise of user-created content and the changing nature of the media consumer, and the blurring of distinctions between public and private media consumption. The chapter also draws attention to recent work undertaken by the ACMA on 'broken concepts' in existing broadcasting and telecommunications legislation, and their relevance to media classification.

Chapter 4 identifies eight guiding principles for reform directed to providing an effective framework for the classification of media content in Australia, and the context in which the guiding principles relate to law reform and media policy. It is proposed that these principles inform the development of a new classification scheme that can best meet community needs and expectations, while being more effective in its application and responsive to the challenges of technological change and media convergence.

Chapter 5 presents the ALRC's central recommendations to establish a new scheme regulating the classification of media content, through the enactment of a new Classification of Media Content Act. Under the Act, a single agency would be responsible for regulating the classification of media content and other classification-related laws. The new Act will impose obligations to classify and restrict access to some content. Chapter 5 also explains the obligations of content providers under the new Act, including online content providers.

Chapter 6 outlines what content should be required to be classified under the new scheme. It is recommended that the question of whether something must be classified should no longer turn upon the platform on which the content is accessed, but rather on whether the content is made and distributed on a commercial basis and has a significant Australian audience.

The ALRC recommends that the following content should be required to be classified before it is sold, screened, provided online or otherwise distributed to the Australian public: feature films; television programs; and computer games likely to be classified MA 15+ or higher. However, this content should only be required to be classified if it is both made and distributed on a commercial basis, and likely to have a significant Australian audience. The classification of most other media content—for example, books, magazines, websites, music and computer games likely to be G, PG and M—should become or remain voluntary, but industry bodies should develop codes of practice that promote classification of some of this other content.

Chapter 7 outlines who should be responsible for making classification decisions and mechanisms for appropriate review and regulatory oversight of classification activities. The ALRC recommends that the Classification Board should continue to have sole responsibility for classifying certain media content, including films for Australian cinema release and computer games likely to be MA 15+ or higher. The remaining media content that must be classified, including feature films not for cinema release and television programs, may be classified by authorised industry classifiers.

The chapter also discusses how the classification scheme may respond more flexibly to the evolving media content environment, recommending that the Regulator have

powers to: determine the media content that must be classified by the Board; and determine that certain media content that has been classified under an authorised classification system may be 'deemed' to have an equivalent Australian classification. The ALRC also recommends the introduction of authorised classification instruments, such as online questionnaires that reflect Australian classification criteria.

Chapter 8 deals with laws that attach to content that must be classified—laws which prescribe how such content should be marked, packaged and advertised, and when and where this content may be screened. The ALRC recommends that the new Act should provide that, for content that must be classified, content providers must generally display a classification marking, but that the detail concerning precisely when and how such markings should appear should be provided for in industry codes approved by the Regulator. The chapter also discusses when classified content is changed in such as way that it should be reclassified, or given new consumer advice, proposing a more flexible modifications policy. The ALRC also considers the phasing out of time-zone restrictions imposed on commercial broadcasting services, in the context of the digital switchover and as parental locks become used more widely.

Chapter 9 discusses classification categories and criteria for making classification decisions. The ALRC recommends that the existing classification categories should be harmonised and classification criteria combined, in order to ensure that the same categories and criteria are applied to the classification of all media content. The objective of these changes is that all classifiers use the same classification tools to make decisions, so that consumers can be assured of receiving clear and consistent classification information that has the same meaning no matter what the media content or the platform from which it is accessed.

The ALRC recommends the following statutory classification categories for uniform application across all media content: G, PG, M, MA 15+, R 18+, X 18+ and Prohibited. This recommendation involves several changes, including: the abolition of the publications-specific classifications, 'Unrestricted', 'Category 1 Restricted' and 'Category 2 Restricted'; the abolition of the MAV 15+ and AV classifications used by some television broadcasters; and renaming of the RC category as 'Prohibited'.

Chapter 10 discusses 'adult content' (media content that has been, or is likely to be, classified R 18+ or X 18+) and how content providers will be expected to take reasonable steps to restrict access to the adult content they distribute to the Australian public. The R 18+ and X 18+ classifications are high thresholds, but when the thresholds are met, the ALRC recommends that such content should be restricted across all platforms, both online and offline. While it is acknowledged that restricting access to this content presents difficulties online, the ALRC considers that providers of this content should have some obligation to try to warn potential viewers and help prevent minors from accessing it, irrespective of the platform used to deliver the content.

The chapter reviews various methods of restricting access, noting that some methods may only be suitable for some content providers. It is also noted that protecting minors from adult content will continue to rely to a significant degree upon parental

supervision and the effective use of PC-based filters and parental locks, and promoting the use of these tools may be one important way content providers can comply with their statutory obligation to take reasonable steps to restrict access to adult content. The ALRC recommends that methods of restricting access to online and offline content should be set out in industry codes and Regulator standards, enforced by the Regulator.

Chapter 11 discusses the scope of the current RC category and the legislative framework defining RC content. Under the current framework, RC content is essentially banned, and its sale and distribution is prohibited by Commonwealth, state and territory enforcement legislation. The ALRC recommends that, under the Classification of Media Content Act, the RC category should be named 'Prohibited', to better reflect the nature of the category. The ALRC also recommends that the Classification of Media Content Act should frame the 'Prohibited' category more narrowly than the current RC category, and suggests a range of possible changes to the existing criteria, that government might consider.

Chapter 12 discusses prohibitions on the distribution of Prohibited content, including the existing mechanisms both 'offline' and 'online'. The ALRC recommends that the Classification of Media Content Act should provide that content providers must not distribute Prohibited content (whether so classified or likely to be so classified). The ALRC also recommends that content must be classified Prohibited by the Classification Board before a person can be charged with a relevant offence under the Act or issued a notice to stop distributing the content. Further, the ALRC recommends that the Act should enable the Regulator to notify Australian or international law enforcement agencies or bodies about Prohibited content without having the content first classified by the Classification Board. The chapter also discusses voluntary and mandatory internet filtering, and debates about the scope of Prohibited content online.

In Chapter 13, the ALRC recommends that the Classification of Media Content Act should provide for the development and operation of industry classification codes, consistent with statutory obligations to classify and restrict access to media content and with statutory classification categories and criteria. The chapter examines the possible processes for the development of industry classification codes, and recommends mechanisms for the approval and enforcement of codes by the new Regulator.

Chapter 14 discusses the establishment of a single Regulator with primary responsibility for regulating the new classification scheme. The Regulator would be responsible for most regulatory activities related to the classification of media content—both offline and online. The Classification Board would be retained as an independent statutory body responsible for making some classification decisions and reviewing decisions.

Chapter 15 discusses the legislative and constitutional basis for the existing classification cooperative scheme and the *Broadcasting Services Act*. The ALRC recommends that the new Classification of Media Content Act be enacted pursuant to the legislative powers of the Parliament of Australia and not as part of any new cooperative scheme.

Chapter 16 discusses enforcement of classification laws under the classification cooperative scheme. While the enforcement of classification laws has primarily been the responsibility of states and territories, these arrangements contribute to problems of inconsistency in offence and penalty provisions between Australian jurisdictions and lack of compliance with classification laws. The ALRC concludes that the Australian Government should be responsible for the enforcement of classification laws and makes recommendations for a regime of offences and penalties.

Recommendations

5. The New National Classification Scheme

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

Recommendation 5–2 The National Classification Scheme should be based on a new Act, the 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; and

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

Recommendation 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 National Classification Scheme.

Recommendation 5–4 The Classification of Media Content Act should provide that obligations to classify or restrict access to content apply to persons or organisations who sell, screen, provide online, or otherwise distribute content to the public ('content providers').

Recommendation 5–5 The Classification of Media Content Act should provide that a 'content provider' includes non-commercial and commercial content providers. However, obligations to classify or restrict access to content would not generally apply to persons uploading content online other than on a commercial basis.

Recommendation 5–6 The Classification of Media Content Act should provide that a 'content provider' includes online content providers and content platforms that control how online content is uploaded, generated or displayed; but excludes other internet intermediaries, including application service providers, host providers and internet access providers.

Recommendation 5–7 The Classification of Media Content Act should provide that obligations in relation to Prohibited content apply to content providers and internet intermediaries, including application service providers, host providers and internet access providers.

Recommendation 5–8 The Classification of Media Content Act should provide content providers and internet intermediaries—including application service providers, host providers and internet access providers—with protection from civil proceedings in respect of anything done in compliance with the Act or industry codes approved by the Regulator.

Recommendation 5–9 The Classification of Media Content Act should provide that obligations to classify or restrict access to online content apply to any content with an appropriate Australian link. This may include content:

(a) hosted in Australia;

(b) controlled by an Australian content provider; or

(c) directed to an Australian audience.

6. Films, Television Programs and Computer Games

Recommendation 6–1 The Classification of Media Content Act should provide that feature films and television programs that are:

(a) likely to have a significant Australian audience, and

(b) made and distributed on a commercial basis,

should be classified before content providers sell, screen, provide online, or otherwise distribute them to the Australian public. The Act should provide for platform-neutral definitions of 'feature film' and 'television program' and illustrative examples. Examples of television programs may include situation comedies, documentaries, children's programs, drama and factual content.

Recommendation 6–2 The Classification of Media Content Act should provide that computer games that are:

(a) likely to be classified MA 15+ or higher; and

(b) likely to have a significant Australian audience; and

(c) made and distributed on a commercial basis,

should be classified before content providers sell, screen, provide online, or otherwise distribute them to the Australian public.

The Act should provide for platform-neutral definitions of 'computer game' and illustrative examples.

Recommendation 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. 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. Providers of this content should not be exempt from obligations to take reasonable steps to restrict access to adult content.

Recommendation 6–4 The Classification of Media Content Act should enable the Regulator to approve industry codes that provide for the voluntary classification and marking of content that is not required to be classified. The Regulator should encourage the development of such codes for:

(a) computer games likely to be classified below MA 15+;

(b) magazines likely to be classified R 18+ or X 18+; and

(c) music with a strong impact.

Recommendation 6–5 The Classification of Media Content Act should enable the Regulator to issue a 'classify notice' to a content provider who provides unclassified content that the Act mandates must be classified. Such notices may relate to a specific piece of content, or for a category or class of content.

7. Classification Decision Makers

Recommendation 7–1 The Classification of Media Content Act should enable the Regulator to determine, of the content that must be classified, what content must be classified by the Classification Board. The determination should be set out in a legislative instrument.

Recommendation 7–2 The Classification of Media Content Act should provide that the Regulator, in determining the content that must be classified by the Classification Board, should have regard to matters including:

(a) the need for a classification benchmark, particularly for popular or new types of media content;

(b) the need for content to be classified by an independent decision maker;

(c) the classification of similar content in other jurisdictions;

(d) evidence of rigorous and reliable industry classification decision making;

(e) the capacity of the Classification Board to make timely classification decisions; and

(f) the cost to content providers of Classification Board decisions.

Recommendation 7–3 The Classification of Media Content Act should provide that, on commencement of the new National Classification Scheme, of the content that must be classified, the following content must be classified by the Classification Board:

(a) feature films for Australian cinema release; and

(b) computer games that are likely to be MA 15+ or higher.

Recommendation 7–4 The Classification of Media Content Act should provide that, other than media content that must be classified by the Classification Board, media content may be:

(a) classified by the Classification Board;

(b) classified by an authorised industry classifier; or

(c) deemed to be classified because it has been classified under an authorised classification system.

Recommendation 7–5 The Classification of Media Content Act should provide that industry classifiers must have completed training approved by the Regulator and be authorised by the Regulator to classify media content.

Recommendation 7–6 The Classification of Media Content Act should enable the Regulator to determine, in a legislative instrument, that certain films, television programs and computer games with a classification made under an authorised classification system, are deemed to have an equivalent Australian classification.

Recommendation 7–7 The Classification of Media Content Act should provide that in determining whether a classification system is an authorised classification system, the Regulator should have regard to matters including:

(a) the comparability of classification decision-making processes, classification categories and criteria with the Australian classification scheme;

(b) the independence and composition of decision-making bodies;

(c) the endorsement or adoption by national classification regulatory regimes;

(d) the transparency of classification decision-making processes and classification criteria;

(e) complaints and review mechanisms;

(f) public reporting of classification activities; and

(g) research and development activities.

Recommendation 7–8 The Classification of Media Content Act should enable the Regulator to develop and authorise classification decision-making instruments, such as online questionnaires.

Recommendation 7–9 The Classification of Media Content Act should provide that, in addition to classifying media content submitted for classification, the Classification Board is responsible for reviewing classification decisions, including its own, on application. Therefore the Classification Review Board would cease to operate.

Recommendation 7–10 The Classification of Media Content Act should enable the Regulator to conduct audits of industry classification decisions.

Recommendation 7–11 The Classification of Media Content Act should enable the Regulator to call in:

(a) unclassified media content for classification by the Classification Board; and

(b) deemed content or content classified by authorised industry classifiers, for review of the classification decision by the Classification Board.

The call-in power should be confined to content that must be classified or to which access must be restricted.

Recommendation 7–12 The Classification of Media Content Act should provide for civil and administrative penalties in relation to improper classification decision making. The Regulator should be enabled to:

(a) pursue civil penalty orders against content providers;

(b) issue barring notices to industry classifiers; and

(c) revoke the authorisation of industry classifiers.

8. Markings, Modifications, Time Zones and Advertising

Recommendation 8–1 The Classification of Media Content Act should provide that content providers must display a classification marking for content that must be classified and has been classified. This marking should be shown, for example, before broadcasting the content, on packaging, on websites and programs from which the content may be accessed, and on advertising for content directed to Australian audiences.

Recommendation 8–2 The Classification of Media Content Act should provide that if classified media content is modified, so that the modified content is likely to have a different classification from the original content, the modified content becomes unclassified. The Act should not prescribe specific types of modifications that operate to declassify content.

Recommendation 8–3 The Classification of Media Content Act should provide that if classified content is changed, so that the consumer advice no longer gives accurate information about the content, then the content must be given new consumer advice, even if the content does not need to be given a different classification.

Recommendation 8–4 The Classification of Media Content Act should not mandate time-zone restrictions for broadcasting services, but these restrictions may be provided for in industry codes.

Recommendation 8–5 Advertisements for content that must be classified should continue to be subject to the existing voluntary advertising codes, with complaints being handled by the Advertising Standards Board. These voluntary codes should be amended to provide that, in assessing the suitability of an advertisement for media content that must be classified, the following matters should be considered:

(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.

9. Classification Categories and Criteria

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

Recommendation 9–2 The Classification of Media Content Act should provide that classification decisions for content that must be classified, other than G content, must also be assigned consumer advice. The Classification Board should publish consumer advice guidelines as a reference for all industry classifiers.

Recommendation 9–3 The Classification of Media Content Act should provide for one set of statutory classification criteria and that classification decisions be made applying these criteria.

Recommendation 9–4 The Regulator's functions should include conducting or commissioning a range of research activities that consider matters such as:

(a) community standards in relation to media content;

(b) awareness of classification information;

(c) adequacy of classification categories, the classifiable elements and the impact test;

(d) content permitted in different classification categories; or

(e) alignment of classification decisions with the views of the public.

10. Restricting Access to Adult Content

Recommendation 10–1 The Classification of Media Content Act should provide that content providers should take reasonable steps to restrict access to adult content that is sold, screened, provided online or otherwise distributed to the Australian public. Adult content is:

(a) content that has been classified R 18+ or X 18+; or

(b) unclassified content that, if classified, would be likely to be classified R 18+ or X 18+.

The Classification of Media Content Act should not mandate that all adult content must be classified.

Recommendation 10–2 The Classification of Media Content Act should provide the Regulator with the power to issue 'restrict access notices' to providers of adult content. For the purpose of issuing these notices, the Regulator should be empowered to determine whether the content is adult content.

Recommendation 10–3 The Classification of Media Content Act should provide that the reasonable steps that content providers must take to restrict access to adult content may be set out in:

(a) industry codes, approved and enforced by the Regulator; and

(b) standards, issued and enforced by the Regulator.

These codes and declarations may be developed for different types of content, content providers and industries, but could include:

(a) how and where to advertise, package and display hardcopy adult content;

(b) the promotion of parental locks and user-based computer filters;

(c) how to confirm the age of persons accessing adult content online; and

(d) how to provide warnings online.

Recommendation 10–4 The Classification of Media Content Act should not require access restrictions on MA 15+ media content. Voluntary access restrictions on MA 15+ content should be developed under industry codes, for example, for cinemas and retail outlets.

11. The Scope of Prohibited Content

Recommendation 11–1 Under the Classification of Media Content Act, the 'Refused Classification' category of content should be named 'Prohibited'.

Recommendation 11–2 The Classification of Media Content Act should frame the 'Prohibited' category more narrowly than the current 'Refused Classification' category. In particular, the Australian Government should review current prohibitions in relation to:

(a) the depiction of sexual fetishes in films; and

(b) 'detailed instruction in the use of proscribed drugs'.

The Government should also consider confining the prohibition on content that 'promotes, incites or instructs in matters of crime' to 'serious crime'

12. Prohibiting Content

Recommendation 12–1 The Classification of Media Content Act should provide that content providers must not sell, screen, provide online, or otherwise distribute Prohibited content, that is:

(a) content that has been classified Prohibited; or

(b) unclassified content that, if classified, would be likely to be classified Prohibited.

Recommendation 12–2 The Classification of Media Content Act should provide that content must be classified Prohibited by the Classification Board before a person is:

(a) charged with an offence under the Act that relates to Prohibited content; and

(b) issued a notice requiring the person to stop distributing the Prohibited content, for example by taking it down from the internet.

Recommendation 12–3 The Classification of Media Content Act should enable the Regulator to notify Australian or international law enforcement agencies or bodies about Prohibited content without having the content first classified by the Classification Board.

13. Codes and Co-regulation

Recommendation 13–1 The Classification of Media Content Act should provide for the development of industry classification codes by sections of industry or persons involved in the production and distribution of media content; and for the Regulator to request that a body or association representing a particular section of industry develop a code.

Recommendation 13–2 Industry classification codes may include provisions relating to:

(a) methods of restricting access to certain content;

(b) the use of classification markings;

(c) methods of classifying media content, including by authorised industry classifiers;

(d) guidance on the application of statutory classification criteria;

(e) maintaining records, reporting classification decisions and quality assurance;

(f) protecting children from certain content;

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

(h) providing a responsive and effective means of addressing community concerns, including complaints handling; and

(i) reporting to the Regulator on the administration of the code.

Recommendation 13–3 The Classification of Media Content Act should enable the Regulator to approve an industry classification code if satisfied that:

(a) the code is consistent with statutory obligations to classify and restrict access to media content and statutory classification categories and criteria;

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

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

Recommendation 13–4 The Classification of Media Content Act should enable the Regulator to determine an industry standard if:

(a) there is no appropriate body or association representing a relevant section of industry; or

(b) a request to develop an industry code is not complied with.

Recommendation 13–5 The Classification of Media Content Act should enable the Regulator to enforce compliance with a code against any participant in the relevant section of the media content industry, where an industry classification code relates to media content that must be classified or to which access must be restricted.

14. The Regulator

Recommendation 14–1 A single agency ('the Regulator') should be responsible for regulation under the Classification of Media Content Act. 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 and providing and approving classification training;

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

(e) liaising with relevant Australian and overseas media content regulators, classification bodies and law enforcement agencies; and

(f) educating the public about the National Classification Scheme.

In addition, the Regulator's functions may include:

(g) providing administrative support to the Classification Board;

(h) maintaining a database of classification decisions;

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

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

(k) promoting media literacy and cyber-safety.

Recommendation 14–2 The Classification of Media Content Act should provide the Regulator with broad discretion whether to investigate complaints.

15. Enacting the New Scheme

Recommendation 15–1 The Classification of Media Content Act should be enacted pursuant to the legislative powers of the Parliament of Australia.

Recommendation 15–2 The Classification of Media Content Act should express an intention that it cover the field, so that any state legislation operating in the same field ceases to operate, pursuant to s 109 of the *Constitution*.

16. Enforcing Classification Laws

Recommendation 16–1 The Classification of Media Content Act should provide for enforcement of classification laws under Commonwealth law.

Recommendation 16–2 The Classification of Media Content Act should provide a flexible range of compliance and enforcement mechanisms allowing the Regulator, depending on the circumstances, to:

(a) issue notices to comply with provisions of the Act, industry codes or standards;

(b) accept enforceable undertakings;

(c) pursue civil penalty orders;

(d) refer matters for criminal prosecution; and

(e) issue infringement notices.

Recommendation 16–3 The Classification of Media Content Act should provide for the imposition of criminal, civil and administrative penalties in relation to failing to comply with:

(a) notices of the Regulator;

(b) an industry code or standard;

(c) restrictions on the sale, screening, online provision and distribution of media content;

(d) statutory obligations to restrict access to media content; and

(e) statutory obligations to classify and mark media content.

Recommendation 16–4 The Classification of Media Content Act should require the Regulator to issue enforcement guidelines outlining the factors it will take into account and the principles it will apply in exercising its enforcement powers.

Appendix: Key Obligations Under the New Scheme

The key statutory obligations	Who must comply
1. The classification obligation: To classify and mark the following content: • feature films; • television programs; and • computer games likely to be MA 15+ or higher. However, this content must only be classified if it is both: • made and distributed on a commercial basis; and • likely to have a significant Australian audience.	**Content providers**, such as film and computer game distributors, broadcasters, cinemas, retailers, and online content platforms. This obligation only applies to commercial content. For some, complying will mean not distributing content unless someone else (eg, a distributor) has had it classified.
2. The restrict access obligation: To take reasonable steps to restrict access to 'adult content'—ie, content that has been, or is likely to be, classified R 18+ or X 18+. These reasonable steps will vary, depending on the content and the content provider. For some, it might mean trying to verify the age of customers. For others, it might mean promoting parental locks and internet filters. This obligation does not require content providers to classify their content.	**Content providers** (see above), and particularly retailers, publishers and distributors of adult films and magazines, and online content platforms that provide adult content. This obligation applies to both commercial and non-commercial content, but more would be expected of commercial content providers.
3. The Prohibited content obligation: Not to distribute Prohibited content—ie, content that has been, or is likely to be, classified Prohibited. This will involve identifying, or taking reasonable steps to identify, Prohibited content, and responding to notices from the Regulator.	**Content providers** (see above), and **internet intermediaries**, such as application service providers, host providers and internet access providers.