



Australian Government

Australian Law Reform Commission

National Classification Scheme Review

DISCUSSION PAPER SUMMARY

You are invited to provide a submission
or comment on this Discussion Paper.

This Discussion Paper reflects the law as at 30 September 2011.

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Making a submission

Making a Submission to the Inquiry

Any public contribution to an inquiry is called a submission. The Australian Law Reform Commission seeks submissions from a broad cross-section of the community, as well as from those with a special interest in a particular inquiry.

The closing date for submissions to this Discussion Paper is 18 November 2011.

There are a range of ways to make a submission or comment on the proposals and questions posed in the Discussion Paper.

Online submission tool

The ALRC strongly encourages online submissions directly through the ALRC website <http://www.alrc.gov.au/inquiries/classification/respond-discussion-paper>, where an online submission form will allow you to respond to individual questions. Once you have logged into the site, you will be able to save your work, edit your responses, and leave and re-enter the site as many times as you need to before lodging your final submission. You may respond to as many or as few questions and proposals as you wish.

Further instructions are available on the site. If you have any difficulties using the online submission form, please email web@alrc.gov.au, or phone +61 2 8238 6333.

Alternatively, written submissions may be mailed, faxed or emailed to:

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Open inquiry policy

As submissions provide important evidence to each inquiry, it is common for the ALRC to draw upon the contents of submissions and quote from them or refer to them in publications. Non-confidential submissions are made available on the ALRC website.

The ALRC also accepts submissions made in confidence. Confidential submissions will not be made public. Any request for access to a confidential submission is determined in accordance with the *Freedom of Information Act 1982* (Cth), which has provisions designed to protect sensitive information given in confidence.

In the absence of a clear indication that a submission is intended to be confidential, the ALRC will treat the submission as non-confidential.

Discussion Paper Summary

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Introduction

This Discussion Paper Summary provides an overview of the policy framework and the proposals and questions contained in the full Discussion Paper—available online. The full Discussion Paper sets out in detail the issues raised by the Terms of Reference, the research behind the proposals and questions, a thorough analysis and discussion of stakeholder views and the ALRC’s views to date.

This document is designed specifically with stakeholders in mind. It provides the essential minimum for easy access to the ALRC’s thinking at this stage in the Inquiry.

This Summary begins with a discussion of the need for fundamental reform, the context of media convergence, and the guiding principles for reform. This is followed by an outline of the Discussion Paper—its 14 chapters divided in three parts—including the proposals and questions for response.

How to make a submission

With the release of the Discussion Paper, the ALRC invites individuals and organisations to make submissions in response to the specific proposals and questions to help advance the reform process.

There is no specified format for submissions and they may be marked ‘confidential’ if preferred. The ALRC prefers electronic communications and submissions, and strongly encourages stakeholders to make use of the online submission form available on the ALRC website. However, the ALRC will gratefully accept anything from handwritten notes to detailed commentary and scholarly analyses on relevant laws and practices.

Even simple dot-points are welcome. Submissions will be published on the ALRC website, unless they are marked confidential.

The ALRC appreciates that tight deadlines for making submissions place considerable pressure upon those who wish to participate in ALRC inquiries. Given the deadline for delivering the final report to the Attorney-General at the end of January 2012, and the need to consider fully the submissions received in response to this Discussion Paper, all submissions must be submitted on time—by Friday 18 November 2011.

It is the invaluable work of participants that enriches the whole consultative process of ALRC inquiries. The quality of the outcomes is assisted greatly by the understanding of contributors in needing to meet the deadline imposed by the reporting process itself. This Inquiry is no exception.

In order to ensure consideration for use in the final report, submissions addressing the questions and proposals in this Discussion Paper must reach the ALRC by **Friday 18 November 2011**.

The ALRC encourages stakeholders to use the online submission form available at <http://www.alrc.gov.au/content/online-submission-national-classification-review-discussion-paper>.

Submissions not marked confidential will be published on the ALRC website.

The need for fundamental reform

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

However, industry submissions to this Inquiry were almost universal in condemning the current National Classification Scheme for not responding adequately to the challenges of media convergence. The *Classification (Publications, Films and Computer Games) Act 1995* (Cth) (*Classification Act*) was said to be ‘an analogue piece of legislation in a digital world’. Respondents drew attention to aspects of the current classification framework that have become dysfunctional, are failing to meet intended goals, and create confusion for the industries involved and the wider community. Among the problems identified are:

- inconsistent classification obligations for the same content delivered on different media platforms;
- inconsistent classification guidelines and markings across media platforms;

- pervasive ‘double handling’—with some content being classified multiple times for different platforms;
- cost and regulatory burdens applying unevenly across media industries;
- anomalies in the treatment of media content between different states and territories, such as inconsistent laws relating to the sale and distribution of sexually explicit adult content;
- the fragmentation of regulatory agencies and administrative oversight, and the division of authority between the Commonwealth, the states and territories;
- the need for Commonwealth, state and territory ministers to reach unanimous agreement on any amendments to the National Classification Code or to classification guidelines;
- low compliance with classification obligations in some industries;
- the breadth of the current Refused Classification (RC) category, particularly in light of its possible application in mandatory or voluntary internet service provider (ISP) level internet filters; and
- confusion and legal uncertainty surrounding schs 5 and 7 of the *Broadcasting Services Act 1992* (Cth), which regulate online content.

The context of media convergence

This Inquiry provides the opportunity for fundamental reform of 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 both 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 blurred questions of responsibility for driving change.

Guiding principles for reform

The ALRC has identified eight guiding principles for reform directed to providing an effective framework for the classification of media content in Australia. The ALRC proposes that these principles inform the development of a new National Classification Scheme that meets community needs and expectations, while being more effective in its application and responsive to the challenges of technological change. The principles are derived from existing laws, codes and regulations, as well as principles that have been identified in other relevant reviews and government reports.

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 should be clear in its scope and application; and
- (8) classification regulation should be focused upon content rather than platform or means of delivery.

Applying these principles, the ALRC has made 43 proposals for reform, on which it is seeking public input. These proposals focus on the introduction of a new Classification of Media Content Act covering classification on all media platforms—online, offline and television. The ALRC makes proposals regarding which media content should be classified and who should classify it, access to which content should be restricted to

adults, and who should have responsibility regulating and enforcing classification laws. The proposed new framework envisages:

- a greater role for industry in classifying content—allowing government regulators to focus on the content that generates the most community concern;
- that content will be classified using the same categories, guidelines and markings, whether viewed on television, at the cinema, on DVD or online;
- changes to classification categories, with age references—PG 8+ and T 13+ (Teen)—to help parents choose content for children; and
- the Australian Government taking full responsibility for administering and enforcing the new National Classification Scheme.

Overview of Discussion Paper

The Discussion Paper comprises 14 chapters divided into three parts. ‘Part 1—Introduction’ contains five chapters that introduce and provide background to the Inquiry, ‘Part 2—A New Classification System’ contains five chapters that outline the ALRC’s proposed new classification scheme, and ‘Part 3—Administering and Enforcing the New Scheme’ contains four chapters outlining the ALRC’s proposals with respect to the administration and enforcement of the proposed new scheme.

Part 1—Introduction

Chapters 1–5 introduce and provide background to the Inquiry. Chapter 5 presents centrepiece proposals establishing the new scheme, through the enactment of a new Classification of Media Content Act.

Chapter 1: Introduction to the Inquiry

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. The Terms of Reference are included at the end of this Discussion Paper Summary. Chapter 1 also describes the development of the evidence base to support the law reform response as reflected in the proposals and questions included throughout the Discussion Paper.

Chapter 2: The Current Classification Scheme

Chapter 2 begins by briefly describing the historical background to current classification laws. The chapter then describes the framework of the current National Classification Scheme, comprised of the *Classification Act*, state and territory enforcement legislation (referred to in this Discussion Paper as the ‘classification cooperative scheme’); and classification-related law as it applies to online and mobile content under the *Broadcasting Services Act*. The roles of the Classification Board, the Classification Review Board and the Australian Communications and Media Authority (the ACMA) are outlined, along with that of industry under co-regulatory codes of practice for online and broadcast content. Chapter 2 also 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 National Classification Scheme.

Chapter 3: Media Convergence and the Transformed Media Environment

Chapter 3 outlines factors in the media environment that necessitate reform of media classification and the development of a new National Classification Scheme. It identifies the range of trends 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. It also draws attention to findings arising from the Australian Government's Convergence Review, and recent work undertaken by the ACMA on 'broken concepts' in existing broadcasting and telecommunications legislation and their relevance to media classification.

Chapter 4: Guiding Principles for Reform

Chapter 4 discusses eight guiding principles for reform directed to providing an effective framework for the classification of media content in Australia. These principles should inform the development of a new National Classification Scheme that meets community needs and expectations, while being more effective in its application and responsive to the challenges of technological change and media convergence. This chapter outlines the basis of each of these principles in legislation and other policy documents, and highlights relevant comments from stakeholders in this Inquiry.

Chapter 5: The Proposed Classification Scheme

Chapter 5 introduces the ALRC's proposed new National Classification Scheme. The chapter briefly summarises the overall rationale for the establishment of the proposed new scheme, highlighting its key benefits and how the scheme responds to the guiding principles of reform identified in Chapter 4, as well as the current problems and future challenges discussed in Chapters 2 and 3. The chapter presents centrepiece proposals establishing the new scheme, through the enactment of a new Classification of Media Content Act. Under the Act, a single agency (the Regulator) would be responsible for regulating the classification of media content. The proposed content of the new Act, and the functions and responsibilities of the Regulator, are discussed in more detail throughout the Discussion Paper.

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

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

- (a) what types of media content may, or must be classified;
- (b) who should classify different types of media content;

- (c) a single set of statutory classification categories and criteria applicable to all media content;
- (d) access restrictions on adult content;
- (e) the development and operation of industry classification codes consistent with the statutory classification criteria; and
- (f) the enforcement of the National Classification Scheme, including through criminal, civil and administrative penalties for breach of classification laws.

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

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

Part 2—A New Classification System

Chapters 6–10 outline the ALRC’s proposed new classification scheme. Chapter 6 addresses the issue of what content should be classified and contains a number of proposals. Chapter 7 discusses who should classify content and proposes, amongst other things, that more content be classified by authorised industry classifiers. Chapter 8 discusses the restriction of access to certain content, as well as the related issues of markings, advertising and display. Chapter 9 discusses the current classification categories and criteria. Chapter 10 focuses on reviewing the RC classification category.

Chapter 6: What Content Should Be Classified?

Chapter 6 considers what content should be classified under the proposed National Classification Scheme. It starts by considering distinguishing features of content that might be used to determine whether something must be classified. The ALRC then proposes that the following content (subject to some exemptions) must be classified before it is sold, hired, screened or distributed in Australia:

- feature-length films produced on a commercial basis;
- television programs produced on a commercial basis;
- computer games produced on a commercial basis and likely to be MA 15+ or higher;
- all media content likely to be X 18+ (ie, sexually explicit adult content); and
- all media content that may be RC.

The classification of most other media content—for example, books, magazines, websites, music and computer games now likely to be G, PG and M—should become or remain voluntary. However, the ALRC proposes that industry bodies should develop

codes of practice that encourage the voluntary classification of some of this other content, such as lower-level computer games, using the categories, criteria, and markings of the National Classification Scheme. In Chapter 8, the ALRC proposes that access must be restricted to all media content that is likely to be R 18+, including content that is not required to be classified.

In Chapter 6, the ALRC also proposes that media content should be classified before: enforcement agencies require someone to stop distributing content (whether on the internet or otherwise); enforcement agencies prosecute someone for distributing content; and before the content is added to any proposed list of content that must be filtered by ISPs.

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

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

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

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

Proposal 6–5 The Classification of Media Content Act should provide that all media content that may be RC must be classified. This content must be classified by the Classification Board: see Proposal 7–1.

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

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

- (b) issuing a person a notice under the new Act requiring the person to stop distributing the content, for example by taking it down from the internet; or
- (c) adding the content to the RC Content List (a list of content that the Australian Government proposes must be filtered by internet service providers).

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

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

Chapter 7: Who Should Classify Content?

Any system that requires mandatory classification of content gives rise to questions about who should be responsible for making classification decisions. In Chapter 7, the ALRC proposes that some classification decisions now made by the Classification Board (the Board), may instead be made by authorised industry classifiers, subject to review and regulatory oversight.

The ALRC proposes that the Board should continue to classify certain films and computer games. The ALRC proposes that, apart from the media content that must be classified by the Board, all other media content may be classified by authorised industry classifiers, including: feature-length films not for cinema release, and television programs (for example, films and television programs on DVD, the internet, and television); and computer games likely now to be classified G, PG and M.

Proposal 7–1 The Classification of Media Content Act should provide that the following content must be classified by the Classification Board:

- (a) feature-length films produced on a commercial basis and for cinema release;
- (b) computer games produced on a commercial basis and likely to be classified MA 15+ or higher;
- (c) content that may be RC;
- (d) content that needs to be classified for the purpose of enforcing classification laws; and
- (e) content submitted for classification by the Minister, the Regulator or another government agency.

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

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

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

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

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

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

Proposal 7–6 The Classification of Media Content Act should provide that the functions and powers of the Classification Board include:

- (a) reviewing industry and Board classification decisions; and
- (b) auditing industry classification decisions.

This means the Classification Review Board would cease to operate.

Proposal 7–7 The Classification of Media Content Act should provide that the Regulator has power to:

- (a) revoke authorisations of industry classifiers;
- (b) issue barring notices to industry classifiers; and
- (c) call-in unclassified media content for classification or classified media content for review.

Chapter 8: Markings, Advertising, Display and Restricting Access

Chapter 8 proposes that access to all media content—online and offline—that is likely to be R 18+ must be restricted to adults. Content providers should restrict access so that minors are protected from high-level content, even if it is not possible to have all of the

content formally classified. The ALRC also proposes that access to content classified R 18+, or X 18+ where it is legal to distribute, must also be restricted to adults.

Chapter 8 then reviews methods of restricting access, including prohibitions on sale and hire to minors, restricted access systems, parental locks on televisions, home filters, ISP level filters, and broadcasting time-zone restrictions. The ALRC proposes that methods of restricting access to online and offline content should be set out in industry codes, approved and enforced by the Regulator. For content that must be classified and has been classified, content providers should have to display a suitable classification marking.

The new scheme should also provide for a principled rule that ensures advertisements for classified content—such as advertisements for films, television programs and computer games—are suitable for their audience. In assessing suitability, industry must have regard to the likely audience of the advertisement, the impact of content in the advertisement, and the classification or likely classification of the advertised content. The chapter concludes by considering whether the public display of some media content should be prohibited.

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

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

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

Proposal 8–4 The Classification of Media Content Act should provide that methods of restricting access to adult media content—both online and offline content—may be set out in industry codes, approved and enforced by the Regulator. These codes might be developed for different types of content and industries, but might usefully cover:

- (a) how to restrict online content to adults, for example by using restricted access technologies;
- (b) the promotion and distribution of parental locks and user-based computer filters; and
- (c) how and where to advertise, package and display hardcopy adult content.

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

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

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

- (a) the likely audience of the advertisement;
- (b) the impact of the content in the advertisement; and
- (c) the classification or likely classification of the advertised content.

Chapter 9: Classification Categories and Criteria

Chapter 9 considers the classification categories and criteria used to classify content across different media, formats and platforms in Australia. The ALRC proposes that these be consolidated and harmonised, and that the Classification of Media Content Act should provide for the following set of classification categories:

- C (Children);
- G (General);
- PG 8+ (Parental Guidance);
- T 13+ (Teen);
- MA 15+ (Mature Audience);
- R 18+ (Restricted);
- X 18+ (Restricted); and
- RC (Refused Classification).

The ALRC also proposes that classifiers must assign consumer advice—such as ‘Strong violence’ or ‘Moderate coarse language’—to all content they classify, except content classified C or G. Classifiers operating under the proposed new National Classification Scheme should also use the one set of statutory classification criteria to make classification decisions, although industry codes of practice may describe the criteria in more detail and explain their application to specific media. The statutory criteria and their elaboration in industry codes should be reviewed every five years in consultation with stakeholders and the community and in light of relevant research.

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

media content classified under the proposed National Classification Scheme must be assigned one of these statutory classification categories.

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

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

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

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

Chapter 10: Refused Classification Category

Chapter 10 outlines the relevance of the RC category to this Inquiry and describes the legislative framework for RC content. The current scope of the category is discussed and criticisms are noted of: the breadth of the current RC category; questions relating to its purpose, including the validity of ‘community standards’ and ‘offensiveness’ as bases for refusing classification of material; and whether the scope should be narrowed by focusing on content which is illegal to create or possess, such as real depictions of actual child sexual abuse.

It is argued that the proposed Classification of Media Content Act should provide that, if content is classified RC, the classification decision should clearly state whether the content comprises real depictions of actual child sexual abuse or actual sexual violence. Identified in this way, such content may be added to any blacklist of content for the purpose of filtering at the ISP level. The chapter also discusses a pilot study being conducted by the ALRC to research community standards with regard to the current higher level classification categories—MA 15+ up to and including RC.

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

Part 3—Administering and Enforcing the New Scheme

Chapters 11–14 discuss the ALRC’s proposals with respect to the administration and enforcement of the proposed new scheme. Chapter 11 discusses industry classification codes of practice, which introduce some further flexibility to the regulatory scheme.

Chapter 12 discusses the ALRC's proposal for a single regulator to be responsible for most regulatory activities related to the classification of media content. Chapter 13 proposes that the new Classification of Media Content Act be enacted pursuant to the legislative powers of the Parliament of Australia. Chapter 14 outlines the current regime for the enforcement of classification laws and concludes that the Australian Government should be responsible for enforcement. An alternative framework is also outlined if it is considered necessary for the states and territories to retain some enforcement powers.

Chapter 11: Codes and Co-regulation

In Chapter 11, the ALRC proposes that the Classification of Media Content Act provide for the development and operation of industry classification codes of practice, consistent with the statutory classification obligations, categories and criteria contained in the Act. The intention is that these codes would assist in the interpretation and application of the statutory classification categories and criteria and introduce some additional flexibility to the regulatory scheme.

Chapter 11 examines the possible processes for the development of industry classification codes, and proposes mechanisms for the approval and enforcement of codes by the new Regulator. The ALRC also proposes that where an industry classification code of practice relates to media content that must be classified or access to which must be restricted, the Regulator should have power to enforce compliance with the code against any participant in the relevant part of the media content industry.

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

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

- (a) guidance on the application of statutory classification obligations and criteria to media content covered by the code;
- (b) methods of classifying media content covered by the code, including through the engagement of accredited industry classifiers;
- (c) duties and responsibilities of organisations and individuals covered by the code with respect to maintaining records and reporting of classification decisions and quality assurance;
- (d) the use of classification markings;
- (e) methods of restricting access to certain content;
- (f) protecting children from material likely to harm or disturb them;
- (g) providing consumer information in a timely and clear manner;

- (h) providing a responsive and effective means of addressing community concerns, including complaints about content and compliance with the code; and
- (i) reporting to the Regulator, including on the handling of complaints.

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

- (a) the code is consistent with the statutory classification obligations, categories and criteria applicable to media content covered by the code;
- (b) the body or association developing the code represents a particular section of the relevant media content industry; and
- (c) there has been adequate public and industry consultation on the code.

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

Chapter 12: The New Regulator

Chapter 12 discusses the ALRC’s proposal for a new Regulator with primary responsibility for regulating the new National Classification Scheme. The Regulator would be responsible for a range of functions that are currently performed by the Classification Branch of the Australian Government Attorney-General’s Department; the Director of the Classification Board; and the ACMA. The Regulator would also have a range of new functions necessary for the operation of the 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, reviewing decisions, and auditing decisions made by industry classifiers.

The Regulator need not be a stand-alone agency, but might form one part of the ACMA with its broader responsibilities for the regulation of broadcasting, the internet, radio-communications and telecommunications.

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

Proposal 12–1 A single agency (‘the Regulator’) should be responsible for the regulation of media content under the new National Classification Scheme. The Regulator’s functions should include:

- (a) encouraging, monitoring and enforcing compliance with classification laws;
- (b) handling complaints about the classification of media content;
- (c) authorising industry classifiers, providing classification training or approving classification training courses provided by others;
- (d) promoting the development of industry classification codes of practice and approving and maintaining a register of such codes; and
- (e) liaising with relevant Australian and overseas media content regulators and law enforcement agencies.

In addition, the Regulator's functions may include:

- (f) providing administrative support to the Classification Board;
- (g) assisting with the development of classification policy and legislation;
- (h) conducting or commissioning research relevant to classification; and
- (i) educating the public about the new National Classification Scheme and promoting media literacy.

Chapter 13: Enacting the New National Classification Scheme

Chapter 13 discusses the legislative and constitutional basis for the existing Commonwealth-state cooperative scheme for the classification of publications, films and computer games and the *Broadcasting Services Act*. The chapter proposes that the new Classification of Media Content Act be enacted pursuant to the legislative powers of the Parliament of Australia, supplemented by state referrals of power, if necessary.

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

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

Chapter 14: Enforcing Classification Laws

Chapter 14 discusses enforcement of classification laws under the existing Commonwealth-state cooperative scheme for the classification of publications, films and computer games; and schs 5 and 7 of the *Broadcasting Services Act*.

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 between Australian jurisdictions and lack of compliance with classification laws. These problems and possible solutions to them are discussed in this chapter.

An important part of the rationale for having a new National Classification Scheme is to avoid inconsistency in enforcement of classification laws and associated penalties. The ALRC concludes that the Australian Government should, therefore, be responsible for the enforcement of classification laws and makes proposals for a regime of offences and penalties.

For political or pragmatic reasons, it may be considered necessary that the states and territories retain some enforcement powers. The chapter presents an alternative framework for a National Classification Scheme, applicable if the Australian Government determines that the states and territories should retain enforcement powers. In this circumstance, the ALRC proposes that a new intergovernmental agreement be entered into under which the states and territories agree to enact legislation to provide for the enforcement of classification decisions made under the new Classification of Media Content Act, but only with respect to publications, films and computer games.

Proposal 14-1 The new Classification of Media Content Act should provide for enforcement of classification laws under Commonwealth law.

Proposal 14-2 If the Australian Government determines that the states and territories should retain powers in relation to the enforcement of classification laws, a new intergovernmental agreement should be entered into under which the states and territories agree to enact legislation to provide for the enforcement of classification laws with respect to publications, films and computer games.

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

- (a) restrictions on the sale, screening, distribution and advertising of classified material;
- (b) statutory obligations to classify media content;
- (c) statutory obligations to restrict access to media content;
- (d) an industry-based classification code; and
- (e) directions of the Regulator.

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

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

Table of key proposals from Chapters 6–8

Must be classified	Who classifies	Proposals
Feature-length films produced on a commercial basis and for cinema release	Classification Board	6–1 and 7–1
Feature-length films and television programs produced on a commercial basis, but not for cinema release—eg, films and programs on DVD or the internet or broadcast on television	Classification Board or an authorised industry classifier	6–1 and 7–2
Computer games produced on a commercial basis and likely to be MA 15+ or higher	Classification Board	6–2 and 7–1
All media content that may be RC	Classification Board	6–5 and 7–1
All media content likely to be X 18+, including magazines, films and websites	Industry classifiers, or only the Board?	6–4 and Question 7–1

May be classified	Who classifies	Proposals
All media content eg, lower-level computer games	Classification Board, an industry classifier, or a person using an authorised instrument	6–8, 7–2 and 7–3

Access must be restricted to adults	Proposals
Media content classified R 18+ or X 18+	8–2
All other media content <i>likely</i> to be R 18+, including content that is not required to be classified	8–1

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.

A handwritten signature in blue ink, reading "Robert McLennan". The signature is fluid and cursive, with a long horizontal stroke at the end.