The Senate

Legal and Constitutional Affairs References Committee

Review of the National Classification Scheme: achieving the right balance

June 2011

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EXECUTIVE SUMMARY

This inquiry was the first major review of the National Classification Scheme since it was introduced over 15 years ago. The inquiry presented the committee with an opportunity to examine a range of important issues relating to the National Classification Scheme and to assess the effectiveness of regulatory regimes for media not included in the National Classification Scheme.

In the committee's view, the National Classification Scheme is flawed, and cannot be sustained in its current form. This is primarily because the scheme has not been successful in achieving a uniform and consistent approach to classification in Australia. Further, the current situation where the National Classification Scheme is loosely paralleled by co-regulatory and self-regulatory systems is far from adequate, particularly given the increasing convergence of media.

Therefore, the committee recommends major reforms to the operation of the National Classification Scheme, in order to provide consistency and uniformity with regards to classification decision-making, while maintaining a touchstone to community standards.

Fundamentally, the committee recommends that an express statement should be included in the National Classification Code to clarify that the four key principles to be applied to classification decisions are to be given equal consideration and balanced against one another in all cases. Further, the committee recommends that the principles in the National Classification Code should be expanded to take into account community concerns about the sexualisation of society and the objectification of women.

Following adoption of these underpinnings, the committee recommends that the Australian Government take a leadership role through the Standing Committee of Attorneys-General in requesting the referral of relevant powers by states and territories to the Australian Government to enable it to legislate for a truly national classification scheme.

The committee further recommends that the scope of the National Classification Scheme should be expanded so that it covers all mediums of delivery. The committee supports a continued role for industry self-assessment for classification decision-making; however, this must be balanced with appropriate oversight, spot checks and compliance checks, and must include harmonised standards across all media.

The committee therefore recommends an expansion in the size of, and funding for, the Classification Liaison Scheme, including provision for representatives to be based in each state and territory. The committee also proposes that the Classification Review Board should become the final arbiter of classification decisions for all media in Australia in order to ensure uniformity and consistency. The committee believes that

the reforms it proposes will provide sufficient oversight of industry classification bodies, without overburdening them with excessive regulation.

The committee also recommends that complaints-handling should be improved with respect to classification matters, with the establishment of a 'one-stop shop' for processing complaints: a 'Classification Complaints' clearinghouse where complaints in relation to matters of classification can be directed and subsequently forwarded to the appropriate organisation for consideration and review.

The committee also makes a range of other recommendations covering topics including:

- classification of artworks;
- exemptions for cultural institutions to exhibit unclassified films;
- the development of national standards for the display and sale of material with a Restricted classification;
- prioritising enforcement actions for the failure to respond to call-in notices; and
- accreditation of industry bodies wishing to exercise classification decision-making functions.

ABBREVIATIONS

AANA	Australian Association of National Advertisers
ACCM	Australian Council on Children and the Media
ACL	Australian Christian Lobby
ACMA	Australian Communications and Media Authority
AHEDA	Australian Home Entertainment Distributors Association
ALRC	Australian Law Reform Commission
AMRA	Australian Music Retailers Association
AMRA/ARIA Labelling Code	*Labelling code of practice for recorded music product containing potentially offensive lyrics and/or themes* (ARIA/AMRA, 2003)
AMTA	Australian Mobile Telecommunications Association
APA	American Psychological Association
ARIA	Australian Record Industry Association
Arts Law Centre	Arts Law Centre of Australia
ASB	Advertising Standards Board
ASTRA	Australian Subscription Television and Radio Association
Board	Classification Board
CLA	Civil Liberties Australia
Classification Act 1995	*Classification (Publications, Films and Computer Games) Act 1995* (Cth)
CLS	Classification Liaison Scheme
CTS	Children's Television Standard
Code	National Classification Code
Council	South Australian Classification Council

DPP	NSW Director of Public Prosecutions
EFA	Electronic Frontiers Australia
IGEA	Interactive Games and Entertainment Association
ISP	Internet Service Provider
MMS	Multimedia Message Service
MSA	Media Standards Australia
NAVA	National Association of the Visual Arts
NCS	National Classification Scheme
NFSA	National Film and Sound Archive
OMA	Outdoor Media Association
OPP	Office of Public Prosecutions Victoria
PWAC	Portrayal of Women Advisory Committee
Queensland Publications Act	*Classification of Publications Act 1991* (Qld)
RC	Refused Classification
Review Board	Classification Review Board
RIM	Research In Motion
SCAG	Standing Committee of Attorneys-General
SMS	Short Message Service

RECOMMENDATIONS

Recommendation 1

12.79 The committee recommends that an express statement should be included in the National Classification Code which clarifies that the key principles to be applied to classification decisions must be given equal consideration and must be appropriately balanced against one another in all cases. Currently, these principles are:

- **adults should be able to read, hear and see what they want;**
- **minors should be protected from material likely to harm or disturb them;**
- **everyone should be protected from exposure to unsolicited material that they find offensive;**
- **community concerns should be taken into account in relation to:**
    - **depictions that condone or incite violence, particularly sexual violence; and**
    - **the portrayal of persons in a demeaning manner.**

Recommendation 2

12.80 Further to Recommendation 1, the committee recommends that the fourth key principle in the National Classification Code should be expanded to take into account community concerns about the sexualisation of society, and the objectification of women.

Recommendation 3

12.81 The committee notes that there has been no further consideration by the Senate of the Senate Environment, Communications and the Arts Committee's 2008 report, *Sexualisation of children in the contemporary media*. The committee recommends that the Senate should, as a matter of urgency, establish an inquiry to consider the progress made by industry bodies and others in addressing the issue of sexualisation of children in the contemporary media; and, specifically, the progress which has been made in consideration and implementation of the recommendations made in the *Sexualisation of children in the contemporary media* report.

Recommendation 4

12.82 The committee recommends that the *Guidelines for the Classification of Films and Computer Games* and the *Guidelines for the Classification of Publications 2005* should be revised so that the preamble to both sets of guidelines expressly states that the methodology and manner of decision-making should be based on a strict interpretation of the words in the respective guidelines.

Recommendation 5

12.83 The committee recommends that the emphasis on context and the assessment of impact should be removed as principles underlying the use and application of the *Guidelines for the Classification of Films and Computer Games*.

Recommendation 6

12.84 The committee recommends that the Australian Government introduce Standing Community Assessment Panels to assist in the determination of community standards for the purpose of classification decision-making.

Recommendation 7

12.85 The committee recommends that the classification of artworks should be exempt from application fees.

Recommendation 8

12.86 The committee recommends that the Australian Government, through the Standing Committee of Attorneys-General, pursue with relevant states the removal of the artistic merit defence for the offences of production, dissemination and possession of child pornography.

Recommendation 9

12.87 The committee recommends that provision be made in the *Classification Act 1995* for an exemption for cultural institutions, including the National Film and Sound Archive, to allow them to exhibit unclassified films. This exemption should be subject to relevant institutions self-classifying the material they exhibit and the Classification Review Board providing oversight of any decisions in that regard.

Recommendation 10

12.88 The committee recommends that the Australian Government take a leadership role through the Standing Committee of Attorneys-General in requesting the referral of relevant powers by states and territories to the Australian Government to enable it to legislate for a truly national classification scheme.

Recommendation 11

12.89 In the event that a satisfactory transfer of powers by all states and territories is not able to be negotiated within the next 12 months, the committee recommends that the Australian Government prepare options for the expansion of the Australian Government's power to legislate for a new national classification scheme.

Recommendation 12

12.90 The committee recommends that, as a matter of priority, the Standing Committee of Attorneys-General should consider the development of uniform standards for the display and sale of material with a Restricted classification.

Recommendation 13

12.91 The committee recommends that:

- **Category 1 and 2 Restricted publications, and R18+ films, where displayed and sold in general retail outlets, should only be available in a separate, secure area which cannot be accessed by children; and**
- **the exhibition, sale, possession and supply of X18+ films should be prohibited in all Australian jurisdictions.**

Recommendation 14

12.92 The committee recommends that, as a matter of priority, the Commonwealth and the states and territories should establish a centralised database to provide for information-sharing on classification enforcement actions.

Recommendation 15

12.93 The committee recommends that the Classification Liaison Scheme should substantially increase its compliance and audit-checking activities in relation to, for example, compliance with serial classification declaration requirements.

Recommendation 16

12.94 The committee recommends that the Classification Liaison Scheme should have at least one representative in each state and territory.

Recommendation 17

12.95 The committee recommends that the Classification Liaison Scheme should be charged with responsibility for establishing and maintaining the centralised database to provide for information-sharing on classification enforcement actions, as proposed in Recommendation 14.

Recommendation 18

12.96 The committee recommends that the Classification Liaison Scheme should provide assistance to state and territory law enforcement agencies in relation to enforcement actions for failure to respond to call-in notices issued by the Director of the Classification Board.

Recommendation 19

12.97 The committee recommends that more detailed information should be included in the Attorney-General's annual report about the operations of the Classification Liaison Scheme.

Recommendation 20

12.98 The committee recommends that the Australian Government should increase the size of, and commensurate funding to, the Classification Liaison Scheme as a matter of priority.

Recommendation 21

12.99 The committee recommends that the Australian Government should, through the Standing Committee of Attorneys-General, signal its intention to make enforcement actions for failing to respond to call-in notices a matter of priority.

Recommendation 22

12.100 The committee recommends that, to the extent possible, the National Classification Scheme should apply equally to all content, regardless of the medium of delivery.

Recommendation 23

12.101 The committee recommends that industry codes of practice under current self-regulatory and co-regulatory schemes, including those under the *Broadcasting Services Act 1992*, the ARIA/AMRA Labelling Code and the advertising industry, should be required to incorporate the classification principles, categories, content, labelling, markings and warnings of the National Classification Scheme. The adoption of these measures by industry should be legally enforceable and subject to sanctions.

Recommendation 24

12.102 The committee recommends that industry bodies wishing to exercise classification decision-making functions should be required to be accredited by the Australian Government.

Recommendation 25

12.103 The committee recommends that the Classification Board should be responsible for the development of a content assessor's accreditation, including formalised training courses for all industries covered under the National Classification Scheme.

Recommendation 26

12.104 The committee recommends that the accreditation of content assessors should be subject to disqualification as a result of poor performance.

Recommendation 27

12.105 The committee recommends that transgressions of classification requirements within codes of practice by industry participants should, if verified by the Classification Board, be punishable by substantial monetary fines.

Recommendation 28

12.106 The committee recommends that the terms of appointment for members of the Classification Board and the Classification Review Board should be for a maximum period of five years, with no option for reappointment.

Recommendation 29

12.107 The committee recommends that the Australian Government should establish a 'Classification Complaints' clearinghouse where complaints in relation to matters of classification can be directed. The clearinghouse would be responsible for:

- **receiving complaints and forwarding them to the appropriate body for consideration;**
- **advising complainants that their complaint has been forwarded to a particular organisation for consideration; and**
- **giving complainants direct contact details and an outline of the processes of the organisation to which the complaint has been forwarded.**

Recommendation 30

12.108 The committee recommends that the Attorney-General should specifically direct the ALRC to consider, as part of its current review of the National Classification Scheme, all the findings, proposals and recommendations put forward in this report.

CHAPTER 1

Introduction

Referral of the inquiry

1.1 On 16 November 2010, the Senate referred the Australian film and literature classification scheme to the Legal and Constitutional Affairs References Committee (committee) for inquiry and report by 30 June 2011, with particular reference to:

(a) the use of serial classifications for publications;

(b) the desirability of national standards for the display of restricted publications and films;

(c) the enforcement system, including call-in notices, referrals to state and territory law enforcement agencies and follow-up of such referrals;

(d) the interaction between the National Classification Scheme and customs regulations;

(e) the application of the National Classification Scheme to works of art and the role of artistic merit in classification decisions;

(f) the impact of X18+ films, including their role in the sexual abuse of children;

(g) the classification of films, including explicit sex or scenes of torture and degradation, sexual violence and nudity as R18+;

(h) the possibility of including outdoor advertising, such as billboards, in the National Classification Scheme;

(i) the application of the National Classification Scheme to music videos;

(j) the effectiveness of the 'ARIA/AMRA Labelling Code of Practice for Recorded Music Product Containing Potentially Offensive Lyrics and/or Themes';

(k) the effectiveness of the National Classification Scheme in preventing the sexualisation of children and the objectification of women in all media, including advertising;

(l) the interaction between the National Classification Scheme and the role of the Australian Communications and Media Authority in supervising broadcast standards for television and Internet content;

(m) the effectiveness of the National Classification Scheme in dealing with new technologies and new media, including mobile phone applications, which have the capacity to deliver content to children, young people and adults;

(n) the Government's reviews of the Refused Classification (RC) category; and

(o) any other matter, with the exception of the introduction of a R18+ classification for computer games which has been the subject of a current consultation by the Attorney-General's Department.[1]

Context of the inquiry

1.2 In 1996, the National Classification Scheme was introduced with the aim of establishing a cooperative system between the Commonwealth and the state and territory governments to make Australia's censorship laws more uniform and simple.[2]

1.3 It has now been more than 15 years since the introduction of the National Classification Scheme. In that time technology has progressed at a rapid pace. People, and particularly children, access material through a variety of media and it is important that the classification system is able to be applied to media in a consistent and comprehensive manner.

1.4 Further, the committee is aware of community concerns in relation to several aspects of the National Classification Scheme, such as the effectiveness of the enforcement system and the availability of Restricted publications and films from general retail outlets. These issues have also been pursued by the Senate Legal and Constitutional Affairs Legislation Committee through the estimates process.

1.5 A complicating factor is that the National Classification Scheme does not apply to all media. For example, media such as billboards and outdoor advertising are regulated through industry codes. Given the very public nature of such media, the committee believes it is appropriate to consider the application of the National Classification Scheme to these types of media.

1.6 In this context, the committee has undertaken a comprehensive review of the National Classification Scheme:

- its ability to uniformly and consistently apply classification criteria to new media;
- its effectiveness in balancing the competing principles of protecting children from material that is likely to harm them, and protecting the community from exposure to unsolicited material that they find offensive, against the interests of adults being able to read, listen to and look at material of their choosing; and
- an assessment of whether the scope of the National Classification Scheme should be expanded to apply to all media.

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1 *Journals of the Senate*, 16 November 2010, p. 300.

2 *Intergovernmental Agreement on Censorship*, November 1995, item B.

Other current inquiries

1.7 The committee notes that there a number of ongoing inquiries which are also reviewing aspects of the regulatory framework for classification in Australia. Those inquiries are briefly outlined below.

ALRC's National Classification Scheme Review

1.8 On 24 March 2011, the Attorney-General referred the terms of reference for the National Classification Scheme Review to the Australian Law Reform Commission (ALRC). The terms of reference for the ALRC direct it to consider a range of issues including:

(i) the relevant existing Commonwealth, state and territory laws and practices;

(ii) the classification categories contained in the Classification Act, National Classification Code and Classification Guidelines; and

(iii) any relevant constitutional issues.[3]

1.9 The ALRC released an issues paper for its inquiry on 20 May 2011, and has called for submissions to the issues paper by 15 July 2011.[4] The ALRC is due to report to the Attorney-General by 30 January 2012.

House of Representatives billboard and outdoor advertising inquiry

1.10 On 14 December 2010, the Attorney-General referred to the House of Representatives Standing Committee for Social Policy and Legal Affairs an inquiry in relation to the regulation of billboards and outdoor advertising.[5]

1.11 Although there is no fixed tabling date for the inquiry, media reports have suggested that the House of Representatives committee will table its report by the end of June 2011.[6]

Convergence Review

1.12 The Convergence Review is an independent review established by the Australian Government to examine the policy and regulatory frameworks that apply to

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3 See Australian Law Reform Commission (ALRC), *Review of Censorship and Classification*, http://www.alrc.gov.au/inquiries/classification/terms-reference, (accessed 4 May 2011).

4 See ALRC, *National Classification Scheme Review – Respond to issue paper*, http://www.alrc.gov.au/inquiries/classification/respond-issues-papers, (accessed 30 May 2011).

5 See House of Representatives Social Policy and Legal Affairs Standing Committee, Inquiry into the regulation of billboards and outdoor advertising, http://www.aph.gov.au/house/committee/spla/outdoor%20advertising/index.htm, (accessed 30 May 2011).

6 Clare Kermond, 'When sex doesn't sell', *The Age*, 25 March 2011, p. 8.

converged media and communications in Australia. The review is being conducted by the Convergence Review Committee, whose members have been appointed by the government.[7]

1.13 On 28 April 2011, a Framing Paper was released for the inquiry.[8] The Convergence Review Committee is due to report in March 2012. Officers from the Department of Broadband, Communications and the Digital Economy were unable to indicate to this committee during the current inquiry if an interim report will be provided before March 2012.[9]

Review of Refused Classification category

1.14 On 9 July 2010, the Minister for Broadband, Communications and the Digital Economy announced a review of the Refused Classification category under the National Classification Scheme. The review arose as part of the Australian Government's consultations on measures to accompany the introduction of internet service provider (ISP) filtering of Refused Classification content. In announcing the review, the Minister indicated the legal obligations for ISPs to undertake mandatory filtering will not commence until the review is complete.[10]

1.15 Officers from the Department of Broadband, Communications and the Digital Economy indicated that the government's review of the Refused Classification category will be undertaken as part of the ARLC's National Classification Scheme Review.[11]

Joint Select Committee on Cyber-Safety

1.16 The Joint Select Committee on Cyber-Safety was established on 29 September 2010.[12] That committee has broad-ranging terms of reference, including:

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7 See Department of Broadband, Communications and the Digital Economy, *Convergence Review*, http://www.dbcde.gov.au/digital_economy/convergence_review, (accessed 30 May 2011).

8 Department of Broadband, Communications and the Digital Economy, *Convergence Review Framing Paper*, April 2011, http://www.dbcde.gov.au/__data/assets/pdf_file/0019/133903/Convergence_Review_Framing_Paper.pdf, (accessed 30 May 2011).

9 *Committee Hansard*, 27 April 2011, p. 35.

10 Senator the Hon. Stephen Conroy, Minister for Broadband, Communications and the Digital Economy, 'Outcome of Consultations on Transparency and Accountability for ISP filtering of RC content', Media Release, 9 July 2010, available at http://www.minister.dbcde.gov.au/media/media_releases/2010/068, (accessed 30 May 2011).

11 *Committee Hansard*, 27 April 2011, p. 34.

12 The resolution for appointment of the Joint Select Committee for Cyber-Safety was passed in the House of Representatives on 29 September 2010 and by the Senate on 30 September 2010.

- the online environment in which Australian children currently engage;
- the nature, prevalence, implications of and level of risk associated with cyber-safety threats;
- Australian and international responses to current cyber-safety threats, their effectiveness and costs to stakeholders; and
- opportunities for cooperation across Australian stakeholders and with international stakeholders in dealing with cyber-safety issues.

1.17 The Joint Select Committee on Cyber-Safety is due to table its report by 30 April 2012.[13]

Attorney-General's Department's consultation on R18+ classification for computer games

1.18 On 14 December 2009, the Minister for Home Affairs released a discussion paper on the introduction of an R18+ classification for computer games to the National Classification Scheme. The Attorney-General's Department undertook an initial consultation on this topic and released a final report on the public consultation in December 2010.[14]

1.19 The committee's terms of reference for the current inquiry specifically precluded the committee from considering the consultation by the Attorney-General's Department on the introduction of an R18+ categorisation for computer games. The committee notes, however, that this has been an issue which state and territory leaders have discussed. In particular, the committee notes that the South Australian Attorney-General has expressed support for the introduction of an R18+ category for computer games, on the condition that the current MA15+ category is abolished.[15] The Victorian Attorney-General has also expressed concerns that the introduction of an R18+ category for computer games will legalise games with high levels of graphic, frequent and gratuitous violence.[16]

1.20 On 25 May 2011, the Minister for Home Affairs announced draft *Guidelines for the Classification of Computer Games* which include an R18+ classification category. A decision about the introduction of an R18+ classification for computer

13 See the Joint Select Committee for Cyber-Safety's website, http://www.aph.gov.au/house/committee/jscc/index.htm, (accessed 30 May 2011).

14 See Attorney-General's Department, *An R18+ Classification for Computer Games*, http://www.ag.gov.au/gamesclassification, (accessed 30 May 2011).

15 Daniel Wills, 'Battle on for game ratings', *Adelaide Advertiser*, 17 March 2011, p. 27.

16 Melissa Fyfe, 'Censorship showdown, Victoria rejects R rating for video games', *Sunday Age*, 3 April 2011, p. 1.

games will be made at the July 2011 meeting of the Standing Committee of Attorneys-General.[17]

Conduct of the inquiry

1.21 The committee advertised the inquiry in *The Australian* newspaper on 24 November, 8 and 22 December 2010, and fortnightly from 2 February 2011 to 16 March 2011, and invited submissions by 4 March 2011. Submissions continued to be accepted after the official closing date. The committee also invited 236 organisations and individuals to make submissions. Details of the inquiry and associated documents were placed on the committee's website.

1.22 The committee received 70 submissions from various individuals and organisations, and a large quantity of additional information. All submissions and additional information are listed at Appendix 1. Submissions and additional information were published on the committee's website. However, due to the graphic nature of material contained in some submissions, the committee made a decision not to make such material available on the Parliament of Australia's website. That material is publicly available in hard copy format on request from the secretariat.

1.23 The committee held public hearings in Canberra on 25 March 2011 and 27 April 2011, and in Sydney on 7 April 2011. Witnesses who appeared at the hearings are listed at Appendix 2. The *Hansard* transcript is available on the Parliament of Australia's website at: http://aph.gov.au/hansard/.

Structure of the report

1.24 The committee's report is structured in the following way:

- Chapter 2 gives an historical overview of censorship and classification in Australia.
- Chapter 3 provides an overview of the National Classification Scheme.
- Chapter 4 discusses the effectiveness of serial classification decisions and also considers the desirability of national standards for the display of Restricted publications.
- Chapter 5 discusses the classification of Restricted films (R18+ and X18+) under the National Classification Scheme.
- Chapter 6 discusses the enforcement system for the National Classification Scheme, and the interaction between the National Classification Scheme and Customs regulations.

17 See Australian Government, *Proposed Draft Guidelines for R18+ Computer Games*, http://www.classification.gov.au/www/cob/classification.nsf/Page/InformationCentre_ProposeddraftGuidelinesforR18+ComputerGames, (accessed 1 June 2011).

- Chapter 7 covers the application of the National Classification Scheme to artworks; exemptions from classification for film festivals; and the treatment of material which advocates terrorism.
- Chapter 8 considers the ability of the National Classification Scheme to apply to new media.
- Chapter 9 outlines the regulation of television content (specifically music videos), radio and recorded music.
- Chapter 10 outlines issues with respect to the inclusion of billboards and outdoor advertising in the National Classification Scheme.
- Chapter 11 deals with the effectiveness of the National Classification Scheme and other regulatory mechanisms in preventing the objectification of women and the sexualisation of children.
- Chapter 12 sets out the committee's view on the issues canvassed in the inquiry, along with the committee's recommendations.

Acknowledgement

1.25 The committee thanks those organisations and individuals who made submissions and gave evidence at the public hearings.

Note on references

1.26 Submission references in this report are to individual submissions as received by the committee, not to a bound volume. References to the committee *Hansard* are to the official *Hansard* for the hearings held on 25 March and 7 April 2011, and to the proof *Hansard* for the hearing held on 27 April 2011. Page numbers may vary between the proof and the official *Hansard* transcript for 27 April 2011.

CHAPTER 2

History of censorship and classification in Australia

2.1 This chapter provides a brief overview of the historical development of censorship and classification in Australia.

Historical background

2.2 Censorship and classification has a long history in Australia, beginning with publications and extending to new media, including films for public exhibition in the early 20th century, and more recent additions such as videos and computer games.

2.3 The Commonwealth has no direct power of censorship, but has used other constitutional heads of power to this end, including:

- the trade and commerce power (section 51(i) of the Constitution), to restrict and prohibit the importation of books, films and videotapes;
- the telecommunications power (section 51(v) of the Constitution), to regulate radio, television and the internet; and
- the territories power (section 122 of the Constitution), in setting up national classification and censorship schemes.

Era of censorship

2.4 From 1901, the trade and commerce power enabled the Commonwealth to prohibit the import of 'blasphemous, indecent or obscene works or articles',[1] a function that was carried out by the Department of Trade and Customs. Australian-produced publications continued to be regulated by state legislation, such as various Police Offences Acts or Obscene and Indecent Publications Acts.[2]

2.5 The censorship of films in Australia began in 1917, with customs regulations prohibiting the import of films that were not first approved by the new Commonwealth Board of Censors.[3] The Board of Censors was authorised to ban any film that:

- was blasphemous, indecent or obscene;
- was likely to be injurious to morality, or to encourage or incite to crime;
- was likely to be offensive to any ally of Great Britain; or

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1 *Customs Act 1901*, para. 52(c).

2 For example, the *Obscene and Indecent Publications Act 1901* (NSW), and the *Police Offences Act 1890* (Vic).

3 Customs (Cinematograph Films) Regulations, No. 40 of 1917.

- depicted any matter the exhibition of which, in the opinion of the Board, was undesirable in the public interest.[4]

2.6 The Board of Censors was replaced in 1919 by a similar system involving a Chief Censor and Deputy Censor,[5] and in 1929 by the Commonwealth Film Censorship Board.[6]

2.7 This strict censorship regime, with the Commonwealth regulating imported books and films, and the states regulating Australian material, remained in place until the late 1960s.

2.8 During the 1960s, however, some steps were being taken to establish a uniform censorship regime. In 1961, after the unsuccessful prosecution of Penguin Books in England for publishing a paperback edition of *Lady Chatterley's Lover*, it was agreed that the states would not take legal proceedings against publications approved by Customs authorities, without prior consultation.[7] In 1965, negotiations commenced between the Commonwealth and the states on a uniform censorship regime, leading to an intergovernmental agreement signed on 15 November 1967.

2.9 The intergovernmental agreement established the National Literature Board of Review, which had the task of classifying books[8] as unsuitable for distribution in Australia if they:

- were blasphemous, indecent or obscene;
- unduly emphasised matters of sex, horror, violence or crime; or
- were likely to encourage depravity.[9]

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4 Customs (Cinematograph Films) Regulations 1917, Statutory Rule No. 40.

5 Customs (Cinematograph Films) Regulations 1919, Statutory Rule No. 137.

6 Customs (Cinematograph Films) Regulations 1928, Statutory Rule No. 132; the Commonwealth Film Censorship Board became part of the newly formed Office of Film and Literature Classification in 1988.

7 Harry Whitmore, 'Obscenity in Literature: Crime or Free Speech', *Sydney Law Review*, vol. 4. no. 2, 1963, p 179.

8 That is, works of prima facie literary, artistic or scientific merit, but not publications in general. See: Australian Parliament, *Agreement between the governments of the Commonwealth and of the states of Australia in relation to the administration of laws relating to blasphemous, indecent or obscene literature*, Parl. Paper 157, Canberra, 1968.

9 Australian Parliament, *Agreement between the governments of the Commonwealth and of the states of Australia in relation to the administration of laws relating to blasphemous, indecent or obscene literature*, Parl. Paper 157, Canberra, 1968.

2.10 The expectation was that books permitted by the National Literature Board of Review would be permitted by the state ministers, but enforcement decisions were ultimately matters for each state government.[10]

From censorship to classification: 1968–84

2.11 From the 1960s, the censorship regime was significantly liberalised, moving from a model of censorship to a model of classification which enabled adults to make well-informed choices about what they saw and read.

2.12 One of the first major developments occurred in March 1968. In the landmark case of *Crowe v Graham*, the High Court of Australia replaced the common-law test of obscenity—the 'tendency to deprave and corrupt', dating from 1868—with a community-standards test: whether material offends against contemporary community standards, or the 'modesty of the average man'.[11] This was a significant shift in the underlying principle behind censorship.

2.13 A second major development occurred in June 1970. The then Minister for Customs and Excise, the Hon. Don Chipp MP, commenced a new debate on censorship in a major parliamentary statement. Mr Chipp called for as little censorship as possible (within the limits set by community standards), greater public scrutiny, and community responsibility (in particular parental responsibility).[12]

2.14 The same year, the Film Censorship Board began to publish reasons for film-censorship decisions;[13] and, in 1971, an R classification was introduced for films, as well as a Film Board of Review, which provided an enhanced appeal mechanism for decisions of the Film Censorship Board.[14]

2.15 The policy of the Whitlam Government, elected in November 1972, was as follows:

- adult persons should be free to read, view and hear what they wish;
- persons and those in their care should be protected from exposure to unsolicited material offensive to them; and

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10 Australian Parliament, *Agreement between the governments of the Commonwealth and of the states of Australia in relation to the administration of laws relating to blasphemous, indecent or obscene literature*, Parl. Paper 157, Canberra, 1968.

11 *Crowe v Graham* (1968) 121 CLR 375 at 379.

12 The Hon. Don Chipp MP, Minister for Customs and Excise, *House of Representatives Hansard*, 11 June 1970, pp 3372–6.

13 Such reasons were published in the Film Censorship Board's *Film censorship bulletin* from May 1970 to January 1973.

14 Gareth Griffith, *Censorship in Australia: Regulating the Internet and other recent developments*, Briefing Paper, No. 4/02, NSW Parliamentary Library Research Service, March 2002, p. 6.

- the reasons for censorship decisions should be published.[15]

2.16 At a ministerial meeting in January 1974, the Commonwealth and all states except Queensland agreed that publications should be classified by the Commonwealth, although the states indicated that these decisions would be advisory only. Publications were to be classified in three categories, in keeping with the 1968 decision in *Crowe v Graham*:

- restricted, and not for sale to those under 18: material that was sexually explicit, or depicted extreme violence, horror or cruelty;
- for direct sale only, by mail order: 'hard core' pornography; and
- prohibited: publications which advocated or incited to crime, violence or the use of illegal drugs.[16]

2.17 A new round of general classification reform took place in 1983–4, prompted by the wide availability of films on videotape. The existing system focused on the importation of films for public 'exhibition' and did not include the display and sale of videos, especially sexually explicit videos. There was also no requirement for separate areas for displaying videos, no requirement for under-the-counter sale and no effective limitations on the sale of videos to minors.[17]

2.18 After an intergovernmental meeting in July 1983, the Commonwealth established a model law to apply in the Australian Capital Territory (ACT), based on the existing South Australian legislation. The *Classification of Publications Ordinance 1983* (ACT) commenced on 1 February 1984, along with associated changes to customs legislation.

2.19 The main features of the 1983–4 changes were as follows:

- a movement of the focus away from the customs barrier to the point of sale, so that the only material to be stopped at the customs barrier would now be child pornography, material which 'promotes, incites or encourages' terrorism,[18] or material gratuitously depicting extreme violence or cruelty, particularly in circumstances involving a sexual element;
- the continuation of compulsory classification of films for public screening;
- the establishment of a nationally uniform classification system, with the Commonwealth running the classification of publications, subject to some

15 'Ministerial meeting on censorship, 24 January 1974', *Australian Government Digest*, vol. 2, no. 1, 1974, pp 38–9.

16 'Ministerial meeting on censorship, 24 January 1974', *Australian Government Digest*, vol. 2, no. 1, 1974, pp 38–9.

17 Senator the Hon. Gareth Evans, Attorney-General, *Senate Hansard*, 4 April 1984, pp 1179–86.

18 *Classification of Publications Ordinance 1983* (ACT), para. 25(4)(b).

regional or state variations, and the Film Censorship Board classifying films and videos;

- the introduction of legislation by each state to establish appropriate point-of-sale controls for each category of material;
- the introduction of an X rating for sexually explicit videos, which could not be publicly screened; and
- the voluntary classification of all publications and other works, except films for public screening, though a person selling material later found to be Refused Classification would be liable to prosecution. This voluntary approach was adopted because it was not considered necessary for every video or every piece of literature to be classified, particularly material at the general-exhibition end of the scale.[19]

2.20 From June 1984, the classification of videotapes and videodiscs for sale was made compulsory. This change was made by an amendment to the 1983 ordinance by the *Classification of Publications (Amendment) Ordinance 1984* (ACT). The purpose of the amendments was to provide better guidance to purchasers of videos and, in particular, to parents wishing to distinguish between movies rated G (general), PG (parental guidance) and M (mature).[20]

Towards the 1996 scheme

2.21 Although the reforms introduced in the period 1983-84 were meant to herald greater coherence between the states and territories, there remained significant differences between approaches to classification in each jurisdiction.[21]

2.22 The difficulties in administering the classification laws prompted the Attorney-General to refer the matter to the Australian Law Reform Commission (ALRC) in May 1990. The ALRC reported in 1991, presenting model classification laws for both federal and state jurisdictions. The ALRC outlined the main problems with the existing scheme:

> Despite the recognition, at Ministerial level, among federal, State and Territory officers with responsibility for censorship matters and in the film and print distribution industries, that uniformity of policy and procedure is desirable, there is still a marked lack of uniformity in classification and censorship laws. While every State and the Northern Territory has legislation which, to some degree, imitates the Australian Capital Territory model, there are still significant differences.

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19 Senator the Hon. Gareth Evans, Attorney-General, *Senate Hansard*, 4 April 1984, pp 1179–86.

20 Senator the Hon. Gareth Evans, Attorney-General, *Senate Hansard*, 4 April 1984, pp 1179–86.

21 See Gareth Griffith, *Censorship in Australia: Regulating the Internet and other recent developments*, Briefing Paper, No. 4/02, NSW Parliamentary Library Research Service, March 2002, p. 10.

> **Determined markings and consumer advice**. The markings to be displayed on films and videos are not uniform throughout all jurisdictions. Most jurisdictions have not amended their legislation to require the display of consumer advice, despite an agreement made between Ministers in 1989.
>
> **Reclassification**. Australian Capital Territory, Tasmanian and Victorian laws provide that films and publications can be reclassified at the Board's own motion after two years. This is not the case in other jurisdictions.
>
> **Standing to have decisions reviewed**. Standing differs among jurisdictions. In New South Wales, for example, only the Minister or applicant for a classification can apply to have a classification decision reviewed. In Queensland, 'the exhibitor or distributor' can also apply. Under the Customs (Cinematograph Films) Regulations and under Victorian law, 'persons aggrieved' may also apply.
>
> **Classification of publications**. The classification of publications under the *Classification of Publications Ordinance 1983* (ACT) is not adopted or effective throughout Australia. Western Australia, Tasmania and Queensland operate their own schemes.
>
> This situation is exacerbated when agreement is reached on changes to the scheme, as some jurisdictions' legislation is updated more quickly than others. What has resulted is a set of State, Territory and federal legislation that is neither uniform nor comprehensive. Australia does not have a single, uniform classification procedure for the entire country.[22]

2.23 In a speech made in 1997, the then Attorney-General, the Hon. Daryl Williams AM QC MP, described the practical effects of the lack of uniformity under the pre-1996 scheme:

> In the case of films, each decision of the Classification Board was, in fact, made under up to 12 separate pieces of legislation. The problems...were compounded by the numerous differences between each set of legislation including the criteria under which decisions were made, the matters to be taken into account in making a decision and procedures for classification. For publications, it was not unusual for a classification officer to be required to make different decisions for different jurisdictions in light of the criteria to be applied.[23]

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22 Australian Law Reform Commission, *Report No. 55: Censorship Procedure*, September 1991, para. 1.11, pp 5–6.

23 The Hon. Daryl Williams AM QC MP, 'From Censorship to Classification: An Address by the Attorney-General the Hon Daryl Williams AM QC', *Murdoch University Electronic Journal of Law*, vol. 4, no. 4, December 1997, para. 17.

2.24 The Attorney-General concluded that 'the so called "national scheme"...was complex and lacked real uniformity. It was a mess'.[24]

24 The Hon. Daryl Williams AM QC MP, 'From Censorship to Classification: An Address by the Attorney-General the Hon Daryl Williams AM QC', *Murdoch University Electronic Journal of Law*, vol. 4, no. 4, December 1997, para. 16.

CHAPTER 3

National Classification Scheme

3.1 The historical background outlined in Chapter 2 has led to Australia's current system of classification. The major mechanism is the National Classification Scheme, which covers films (including videos and DVDs), computer games and certain publications.[1]

3.2 Media not covered by the National Classification Scheme includes audio-only recorded music, broadcast television content, outdoor advertising, and online content in some circumstances. These media are subject to a variety of codes of practice and other measures, and are discussed in Chapters 8, 9 and 10.

3.3 Censorship and classification in Australia are complicated by Australia's federal system, with significant differences to enforcement taken by each jurisdiction. While the National Classification Scheme improved upon pre-1996 existing classification mechanisms, the classification process continues to be complex and lacking in uniformity.

National Classification Scheme

3.4 The National Classification Scheme commenced in 1996 after the Commonwealth, and the states and territories entered into the *Intergovernmental Agreement on Censorship* (Intergovernmental Agreement). The aim of the scheme, as described in the Intergovernmental Agreement, is 'to make, on a cooperative basis, Australia's censorship laws more uniform and simple with consequential benefits to the public and the industry'.[2]

3.5 The Intergovernmental Agreement made clear that the National Classification Scheme was to reflect and maintain the balance of responsibilities that had been agreed between the Australian jurisdictions. Specifically, the Commonwealth and the participating states are equal partners in the scheme, with policy derived from agreement between all relevant jurisdictions.[3]

3.6 As part of the Intergovernmental Agreement, the Australian Parliament enacted the *Classification (Publications, Films and Computer Games) Act 1995* (Cth) (*Classification Act 1995*). Using the Commonwealth's territories power under section 122 of the Constitution, the *Classification Act 1995* sets up a classification

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1 Australian Government, *National Classification Scheme*, http://www.classification.gov.au/www/cob/classification.nsf/Page/ClassificationinAustralia_NationalClassificationScheme, (accessed 4 May 2011).

2 *Intergovernmental Agreement on Censorship*, item B.

3 *Intergovernmental Agreement on Censorship*, item C.

system for the ACT,[4] and is also intended to form part of the state and territory schemes.[5]

3.7 The *Classification Act 1995* creates classification categories for publications, films and computer games. Classification decisions are made by the Classification Board, and can be reviewed by the Classification Review Board. Both of these independent statutory bodies are established under the *Classification Act 1995*.

3.8 The operation of the *Classification Act 1995*, including classification decision-making, is supplemented by the Classification (Publications, Films and Computer Games) Regulations 2005 (Cth), the National Classification Code and two sets of guidelines: the *Guidelines for the Classification of Publications 2005* and the *Guidelines for the Classification of Films and Computer Games*. Together, the elements of this framework provide guidance regarding the type of content suitable for each level of classification.

3.9 The states and territories are responsible for the enforcement of classification decisions. Each state and territory has enacted enforcement legislation which sets out how films, publications and computer games can be sold, hired, exhibited, advertised and demonstrated within its own jurisdiction. There remain some differences, however, between states and territories in this respect.

Classification Board

3.10 As noted above, the classification given to a publication, film or computer game is a decision of the Classification Board.[6]

3.11 The Classification Board is an independent statutory authority established under the *Classification Act 1995*. It consists of no more than 30 members.[7] These members are to be 'broadly representative of the Australian community', but there is no other legislative requirement for any particular expertise.[8] Under the *Classification Act 1995*, the Classification Board's members are to be appointed by the Minister after consultation with the relevant state and territory ministers. Members are not to hold

4 Section 23 of the *Australian Capital Territory (Self-Government) Act 1988* reserved to the Commonwealth the right to make laws for 'the classification of materials for the purposes of censorship' in the ACT, to ensure that a national censorship scheme is preserved.

5 *Classification Act 1995*, s. 3.

6 Attorney-General's Department, *Submission 46*, p. 1.

7 This number was increased from 20 in 2007 (Classification (Publications, Films and Computer Games) Amendment Regulations 2007 (No. 2), SLI 2007/244).

8 *Classification Act 1995*, ss. 48(2).

office for longer than seven years.[9] Classification decisions can be made by a panel of members sitting as the Classification Board, as decided by its Director.[10]

3.12 Every film and computer game has to be classified before it can be legally made available to the public. Some publications also need to be classified.[11] The Classification Board may also classify advertisements for publications, films or computer games, either on application or on its own initiative.[12] In making classification decisions, the Classification Board applies principles outlined in the *Classification Act 1995*, the National Classification Code and relevant guidelines. Classification decisions must be made within 20 business days of an application being received.[13]

3.13 In addition, the Classification Board must determine consumer advice for all films and computer games it classifies, other than those suitable for a general audience (G-rated).[14] Consumer advice is intended to help consumers to make an informed choice about the material they, or those in their care, choose to read, view or play.[15] All classified items must carry appropriate classification markings.[16]

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9 *Classification Act 1995*, ss. 48(3) and 51(3).

10 *Classification Act 1995*, s. 57.

11 Australian Government, *Classification Board*, http://www.classification.gov.au/www/cob/classification.nsf/Page/ClassificationinAustralia_Whoweare_ClassificationBoard_ClassificationBoard, (accessed 26 May 2011).

12 *Classification Act*, s. 29; this approval process is rarely used (Attorney-General's Department, *Review of Advertising of Unclassified Material under the National Classification Scheme* Discussion Paper, August 2006, p. 6). For many years, different schemes have been in place to obviate the need for the approval of advertisements, including quotas for the number of films able to be advertised before classification. No applications under section 29 were received during 2008-09 and 2009-10.

13 *Classification Act 1995*, s. 87A.

14 *Classification Act 1995*, s. 20; the G-rating (general) is discussed in more detail later in the chapter. Consumer advice is not provided for films or games that are Refused Classification. The Classification Board, while not required to, has the option of providing consumer advice for G-rated films and games, and for unrestricted publications if it so chooses.

15 Australian Government, *Consumer advice*, http://www.classification.gov.au/www/cob/classification.nsf/Page/Classification_in_AustraliaWhat_we_do#Consumer, (accessed 9 May 2011); consumer advice is designed to let consumers know which classifiable elements (described below) have led to the classification.

16 See, for example, *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (NSW), s. 15, s. 20-22 and s. 34.

Classification Review Board

3.14 The Classification Review Board reviews decisions made by the Classification Board. It consists of between three and eight members appointed under the same conditions as members of the Classification Board.[17]

3.15 Application for review of a decision of the Classification Board can be made to the Classification Review Board by the Minister, the original applicant, the publisher, or an 'aggrieved person', including an activist or researcher, or an interested organisation.[18]

3.16 Decisions of the Classification Review Board must be made by at least three of its members, as decided by its convenor. Classification decisions must be made within 20 business days of receiving an application.[19] As an independent statutory body separate from the Classification Board, the Classification Review Board makes fresh classification decisions and provides new consumer advice.[20]

Classification categories

3.17 The *Classification Act 1995* sets out the classification categories used by the National Classification Scheme. The content permitted in each category is prescribed by the National Classification Code and the relevant guidelines. A description of the type of content in each of these classifications is included in Table 3.1 below.

Publications

3.18 Under the *Classification Act 1995*, publications may be classified as:

- Unrestricted;
- Category 1 restricted;
- Category 2 restricted; or
- RC (Refused Classification).[21]

3.19 It is not compulsory to submit all publications to the Classification Board. Publications are subject to a partially compulsory scheme, in which only 'submittable'

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17 See Part 7 of the *Classification Act 1995*.

18 *Classification Act 1995*, s. 42.

19 *Classification Act 1995*, s. 78 and s. 87B.

20 Australian Government, *Classification Review Board*, http://www.classification.gov.au/www/cob/classification.nsf/Page/ClassificationinAustralia_Whoweare_ReviewBoard_ReviewBoard, (accessed 6 May 2011).

21 *Classification Act 1995*, ss. 7(1).

publications must be submitted. Under the *Classification Act 1995*, a 'submittable' publication is:

> ...an unclassified publication that, having regard to section 9A or to the Code and the classification guidelines to the extent that they relate to publications, contains depictions or descriptions that:
>
> (a) are likely to cause the publication to be classified RC; or
>
> (b) are likely to cause offence to a reasonable adult to the extent that the publication should not be sold or displayed as an unrestricted publication; or
>
> (c) are unsuitable for a minor to see or read.[22]

3.20 Failure to submit such a publication for classification is an offence under state and territory legislation.[23]

3.21 A special process exists for the classification of serial publications. The Classification Board normally makes serial classification declarations to cover issues of a serial publication for 12 months.[24] Compliance checks are undertaken after a three-month period to determine whether any subsequent issues fit within the declared classification.[25] The Classification Board has a policy of auditing at least 10 per cent of publications with serial classification declarations each year.[26]

Films

3.22 Films may be classified as:

- G (General);
- PG (Parental Guidance);
- M (Mature);
- MA15+ (Mature Accompanied);
- R18+ (Restricted);
- X18+ (Restricted); or
- RC (Refused Classification).[27]

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22 *Classification Act 1995*, s. 5.

23 Before 1995, the classification of publications was voluntary, with publishers and vendors running the risk of prosecution if they dealt in publications later found to be classified at a high level.

24 Attorney-General's Department, *Submission 46*, p. 2.

25 Attorney-General's Department, *Submission 46*, p. 2.

26 Classification Board, *Annual Report 2008-09*, p. 20. Serial publication declarations are discussed further in Chapter 4.

27 *Classification Act 1995*, ss. 7(2).

3.23 Broadly speaking, films, videos and computer games are subject to compulsory classification before they can be exhibited, sold or hired out. Thirteen types of film are exempt from the requirement for classification: namely, business, accounting, professional, scientific, educational, current affairs, hobbyist, sporting, family, live performance, musical presentation, religious, and community or cultural films.[28] Film festivals may also operate under exemptions available under state and territory enforcement legislation.[29]

3.24 All films and computer games submitted for classification must be viewed or played by members of the Classification Board, who then assign each item a classification.[30]

Computer game classifications

3.25 Computer games may be classified as:

- G (General);
- PG (Parental Guidance);
- M (Mature);
- MA15+ (Mature Accompanied); or
- RC (Refused Classification).[31]

3.26 Five types of computer game are exempt from the requirement for classification: namely, business, accounting, professional, scientific and educational games.[32]

Classification decisions

3.27 Applications to the Classification Board for classification can be made by members of the public, usually publishers, film or game distributors. Additionally, Commonwealth, state and territory government agencies can apply to have material classified.[33]

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28 *Classification Act*, ss. 5B(1).

29 See, for example, *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* (Vic), Part 8; *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* (NSW), s. 51.

30 Attorney-General's Department, *Submission 46*, pp 1-2.

31 *Classification Act 1995*, ss. 7(3).

32 *Classification Act 1995*, ss. 5B(2).

33 The Classification (Publications, Films and Computer Games) Regulations prescribe the fees for applications to the Board and the Review Board. The fees were last revised in 2005, although a revised fee schedule is now being considered. More information can be found at http://www.classification.gov.au/www/cob/classification.nsf/Page/IndustryFees_for_Classification, (accessed 20 June 2011).

3.28 The decision to classify a work within one of the categories listed above is made by the Classification Board (or the Classification Review Board), and is informed by principles outlined in the *Classification Act 1995* itself, the National Classification Code, the *Guidelines for the Classification of Publications 2005* and the *Guidelines for the Classification of Films and Computer Games*.

Classification provisions within the Classification Act

3.29 In addition to the National Classification Code, the *Classification Act 1995* itself also lists several matters that must be taken into account in making a decision on the classification of a publication, film or computer game. These are:

> a) the standards of morality, decency and propriety generally accepted by reasonable adults;
>
> b) literary, artistic or educational merit (if any);
>
> c) the general character of the publication, film or computer game, including whether it is of a medical, legal or scientific character; and
>
> d) the persons or class of persons to or amongst whom it is published or is intended or likely to be published.[34]

3.30 In order to assist in determining the standard of morality, decency and propriety generally accepted by reasonable adults, Community Assessment Panels have, at times, been employed to ensure parity between Classification Board decisions and views of representative samples of community members.[35]

3.31 Additionally, the *Classification Act 1995* provides that a publication, film or computer game that advocates terrorist acts must be effectively banned through a refusal of classification.[36] This does not apply if the depiction or description of a terrorist act could reasonably be considered to be done merely as part of public discussion or debate, or as entertainment or satire.[37]

National Classification Code

3.32 The National Classification Code states that classification decisions are to give effect, as far as possible, to the following principles:

> a) adults should be able to read, hear and see what they want;
>
> b) minors should be protected from material likely to harm or disturb them;

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34 *Classification Act 1995*, s. 11.

35 Attorney-General's Department, answers to questions on notice, 6 April 2011. Three Community Assessment Panels were conducted in Sydney, Brisbane and Wagga Wagga between October 1997 and March 1998. A further three panels were conducted in Perth, Adelaide and Bendigo between July 1999 and April 2000.

36 *Classification Act 1995*, s. 9A.

37 *Classification Act 1995*, ss. 9A(3).

c) everyone should be protected from exposure to unsolicited material that they find offensive;

d) the need to take account of community concerns about:

(i) depictions that condone or incite violence, particularly sexual violence; and

(ii) the portrayal of persons in a demeaning manner.[38]

3.33 Additionally, the National Classification Code describes the type of content that will place a publication, film or computer game into a particular category specified in the *Classification Act 1995*. In summary, the categories are described in the following table:

Table 3.1: Summary of the National Classification Code

Publications[39]	
Classification	**Content**
RC (Refused classification)	describe, depict, express or otherwise deal with matters of sex, drug misuse or addiction, crime, cruelty, violence or revolting or abhorrent phenomena in such a way that they offend against the standards of morality, decency and propriety generally accepted by reasonable adults to the extent that they should not be classified; or describe or depict in a way that is likely to cause offence to a reasonable adult, a person who is, or appears to be, a child under 18 (whether the person is engaged in sexual activity or not); or promote, incite or instruct in matters of crime or violence
Category 2 restricted	explicitly depict sexual or sexually related activity between consenting adults in a way that is likely to cause offence to a reasonable adult; or depict, describe or express revolting or abhorrent phenomena in a way that is likely to cause offence to a reasonable adult and are unsuitable for a minor to see or read

38 National Classification Code, cl. 1.

39 National Classification Code, cl. 2.

Category 1 restricted	explicitly depict nudity, or describe or impliedly depict sexual or sexually related activity between consenting adults, in a way that is likely to cause offence to a reasonable adult; or describe or express in detail violence or sexual activity between consenting adults in a way that is likely to cause offence to a reasonable adult; or are unsuitable for a minor to see or read
Unrestricted	all other publications

Films[40]	
Classification	**Content**
Refused Classification	similar to publications
X18+	contain real depictions of actual sexual activity between consenting adults in which there is no violence, sexual violence, sexualised violence, coercion, sexually assaultive language, or fetishes or depictions which purposefully demean anyone involved in that activity for the enjoyment of viewers, in a way that is likely to cause offence to a reasonable adult; and are unsuitable for a minor to see
R18+	not RC or X18+, but unsuitable for a minor to see
MA15+	not RC, X18+ or R18+, but depict, express or otherwise deal with sex, violence or coarse language in such a manner as to be unsuitable for viewing by persons under 15
M	do not fall into above categories, but cannot be recommended for persons under 15
PG	do not fall into above categories, but cannot be recommended for persons under 15 without the guidance of their parents or guardians
G	all other films

40 National Classification Code, cl. 3.

Computer games[41]	
Refused Classification	similar to publications, but also including games that are unsuitable for a minor to see or play
MA15+	as for films
M	as for films
PG	as for films
G	as for films

3.34 The National Classification Code may only be amended by agreement with all the participating states and territories.[42] In its 1991 report, the ALRC made recommendations to the effect that changes to the National Classification Code or the guidelines must be preceded by three months of public comment. These recommendations have been implemented by a requirement in the Intergovernmental Agreement that public submissions must be taken before any amendments are made.[43]

Classification guidelines

3.35 The *Classification Act 1995* also provides for the Minister to determine guidelines to assist the Classification Board in applying the criteria in the National Classification Code.[44]

3.36 There are two separate sets of guidelines in existence: the *Guidelines for the Classification of Publications 2005*; and the *Guidelines for the Classification of Films and Computer Games*.

3.37 Both guidelines explain the different classification categories, and the scope and limits of material for each category. Three essential principles underpin the use of the guidelines: the importance of context; assessing impact; and the six classifiable

41 National Classification Code, cl. 4.

42 *Classification Act 1995*, s. 6. The current version of the National Classification Code is a legislative instrument made under the *Classification Act 1995*. While tabled in the Australian Parliament (and other parliaments), the National Classification Code is not a disallowable instrument.

43 The requirements for parliamentary scrutiny and public involvement were discussed in the Senate's report on the 1994 Bill: Senate Select Committee on Community Standards Relevant to the Supply of Services Utilising Electronic Technologies, *Report on the consideration of the Classification (Publications, Films and Computer Games) Bill 1994*, November 1994.

44 *Classification Act 1995*, s. 12.

elements. The six elements are themes, violence, sex, language, drug use, and nudity.[45]

3.38 The *Guidelines for the Classification of Films and Computer Games* provide specific criteria within each of these classifiable elements, adopting a hierarchy of impact for each category which ranges from 'very mild' (subject to a G classification) to 'very high' (Refused Classification).

3.39 A film may be Refused Classification under the *Guidelines for the Classification of Films and Computer Games* for specific content relating to crime or violence, sex or drug use.[46]

3.40 The *Guidelines for the Classification of Publications 2005* similarly describe criteria by which material may fall within classification categories. In considering each classifiable element, the Classification Board must consider the impact of individual elements and their cumulative effect. Both the content and treatment of elements contribute to the impact.[47] The guidelines also differentiate standards for the content and cover of a publication.[48] According to the guidelines, a publication may be refused classification for certain content relating to sex, crime or violence and drug use.[49]

Calling in material for classification and reclassification

3.41 In a case where a publication, film or computer game is not submitted to the Classification Board as required, the Director may 'call-in' the work for classification. The publishers must then submit an application for classification and pay the fee. The penalty for failure to comply is $2,200.[50]

3.42 Material can be reclassified after two years, at the request of the Minister or on the initiative of the Classification Board.[51] Classifications can also be revoked if supporting material (such as assessments by applicants, television-series assessors or additional-content assessors) neglected to mention classifiable elements.[52]

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45 Classification Board, answer to question on notice, received 16 May 2011.

46 *Guidelines for the Classification of Films and Computer Games*, May 2005, http://www.comlaw.gov.au/Series/F2005L01286, (accessed 20 June 2011).

47 *Guidelines for the Classification of Publications 2005*, p. 4.

48 *Guidelines for the Classification of Publications 2005*, p. 6.

49 *Guidelines for the Classification of Publications 2005*, pp 14-15.

50 *Classification Act 1995*, s. 23A and s. 24.

51 Part 4 of the *Classification Act 1995*.

52 *Classification Act 1995*, s. 21A, s. 21AA and s. 21AB.

State and territory classification procedures

3.43 Although referred to as the National Classification Scheme, the scheme does not apply uniformly across all jurisdictions. Four jurisdictions have reserved censorship powers and different classification processes outside the federal system. These are briefly set out below.[53]

Reserved censorship powers of states and territories

Queensland

3.44 Section 4 of the *Classification of Films Act 1991* (Qld) provides for the appointment of a Films Classification Officer. Section 4 also provides for a public service officer or police officer to be appointed as a classification inspector. Section 5 of the *Classification of Computer Games and Images Act 1995* (Qld) provides for a Computer Games Classification Officer who can classify an unclassified computer game on their own initiative or because of representations made to them. Section 6 of the *Classification of Publications Act 1991* (Qld) (Queensland Publications Act) provides for a Publications Classification Officer who can classify a publication that is unclassified under either the Queensland Publications Act, by applying the relevant Commonwealth provisions, on their own initiative or on the grounds of a complaint.

3.45 The committee understands that Queensland does not currently have any such officers appointed.[54]

South Australia

3.46 The *Classification (Publications, Films and Computer Games) Act 1995* (SA) establishes the South Australian Classification Council (Council). The Council consists of six members appointed by the Governor for a term not exceeding three years. The Council must contain one legal practitioner, one person with expertise relating to the psychological development of young children and adolescents, and one person with 'wide experience in education'.

3.47 The Council can classify a publication, film or computer game of its own initiative, or when required to do so by the Minister. Classifications are in accordance with the National Classification Code and the guidelines, and have an effect to the exclusion of any classification under the *Classification Act 1995*.

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53 Material in this section of the report is, unless otherwise indicated, taken directly from an answer to a question on notice received from the Attorney-General's Department on 6 April 2011.

54 Attorney-General's Department, answers to questions on notice, received 6 April 2011.

Tasmania

3.48 Legislation in Tasmania limits the classification of material outside of Commonwealth processes to films. Section 41A of the *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (Tas) allows the Minister to establish a review committee if the Minister considers that a classified film unduly emphasises matters of violence or cruelty. Section 41 allows a person to apply to the Minister for a review of a classified film, if they consider that it unduly emphasises matters of violence or cruelty. When an application is received under section 41, the Minister must establish a review committee.

3.49 A review committee would consist of no less than three persons who, in the opinion of the Minister, have suitable knowledge, expertise and qualifications to review the classification of a relevant film and make a recommendation to the Minister.

3.50 Depending upon the recommendation of a review committee, the Minister would either make an order prohibiting the sale and delivery of the film, assign a higher classification to the film, or request that the review committee reconsider its recommendation. An order assigning a classification has effect, notwithstanding the classification assigned under the *Classification Act 1995*.

3.51 The committee understands that no review committee has been established to date under the Tasmanian legislation.[55]

Northern Territory

3.52 The *Classification of Publications, Film and Computer Games Act* (NT) provides for a Publications and Films Review Board which may consist of five members, including at least one woman, one man, one lawyer and one person with qualifications in literature, art or education who are satisfactory to the Minister. The Publications and Films Review Board would have the same powers and functions as the federal Classification Board.

3.53 The Attorney-General's Department indicated to the committee that it is not aware of the establishment of a Publications and Films Review Board, under the Northern Territory legislation, to date.[56]

Enforcement of classification decisions

3.54 Participating states and territories use the National Classification Scheme to determine access to publications, films and computer games. Enforcement legislation enacted in each jurisdiction sets out how publications, films and computer games can

55 Attorney-General's Department, answers to question on notice, received 6 April 2011.

56 Attorney-General's Department, answers to question on notice, received 6 April 2011.

be sold, hired, exhibited, advertised and demonstrated in each state and territory. The exact restrictions vary somewhat between jurisdictions.[57]

Publications

3.55 Unrestricted publications may be required by the Classification Board to be sold in a sealed package. Otherwise, they are not subject to restriction. According to its annual report, the Classification Board pays particular attention to the covers of these publications so that everyone is protected from unsolicited exposure to material that they may find offensive – one of the principles of the National Classification Code.[58]

3.56 In most states and territories, Category 1 Restricted publications must be sold in sealed packages, and must not be sold to minors.[59] Similarly, Category 2 Restricted publications may only be sold or displayed in opaque wrapping and in restricted-publications areas which display a prominent sign that under-18s may not enter.[60]

3.57 In Queensland, however, neither Category 1 nor Category 2 Restricted publications may be sold or displayed.[61]

Film classifications

3.58 State and territory enforcement legislation varies slightly but, in general, the public exhibition of films classified MA15+ and R18+ is legally restricted to persons of the appropriate age.[62]

3.59 X18+ films may only be sold or exhibited (in certain premises) in the ACT and the Northern Territory.[63] Separate provisions have applied since 2007 to Indigenous communities affected by the Northern Territory Emergency Response, where possession of X18+ movies or Restricted publications is subject to fines beginning at $5,500. These provisions will expire in 2012.[64]

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57 This is further discussed in Chapters 4 and 5.

58 Classification Board, *Annual Report* 2009-10, p. 36.

59 See, for example, *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (NSW), s. 20.

60 See, for example, *Classification Enforcement Act 1995* (NSW), ss. 21(1).

61 *Classification of Publications Act 1991* (Qld), s. 12.

62 See, for example, *Classification Enforcement Act 1995* (NSW), Part 2. In New South Wales, the penalty for a corporation which exhibits an MA15+ film in the presence of a minor under 15 is 20 penalty units, or $2,200.

63 Australian Government, *Compliance for cinemas and other public exhibitors*, http://www.classification.gov.au/www/cob/classification.nsf/Page/HowtoComplywithClassificationLaws_ComplianceforCinemasandOtherPublicExhibitors, (accessed 9 May 2011).

64 *Classification Act 1995*, Part 10. There is provision in section 100A for the Indigenous Affairs Minister to consider community requests for the lifting of such a ban.

3.60 The sale or public exhibition of unclassified or Refused Classification films is prohibited by state and territory enforcement legislation.[65]

Computer games

3.61 Generally, computer games (including amusement arcade games) must be classified by the Classification Board or the Classification Review Board before they can be sold, hired or demonstrated in Australia. [66]

3.62 Computer games classified G, PG, M or MA15+ may generally be sold, hired or demonstrated in all states and territories.[67]

3.63 This includes games that are made for mobile phones and other mobile devices.

Classification Liaison Scheme

3.64 As noted above, responsibility for the enforcement of the National Classification Scheme lies with the states and territories. National coordination is provided by the Classification Liaison Scheme (CLS), a joint Commonwealth, state and territory government initiative aimed at improving industry compliance with classification laws. The Attorney-General's Department described the scheme as follows:

> The CLS has an educational role and is intended to assist retailers and distributors of publications, films (including videos and DVDs) and computer games to comply with their legal obligations under the National Classification Scheme. The Classification Liaison Scheme supports the work of State and Territory police and enforcement agencies.
>
> Under the Scheme, Classification Liaison staff visit premises and traders in all jurisdictions and provide advice about apparent breaches, restrictions applying to the sale or display of classified products, labelling requirements and other related matters.
>
> In addition, Classification Liaison staff investigate complaints about alleged breaches of legislation and meet with traders and industry representatives to investigate complaints through a program of site visits in each jurisdiction.

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65 See, for example, *Classification Enforcement Act 1995* (NSW), s. 6.

66 Australian Government, *Compliance for sale or hire of computer games*, http://www.classification.gov.au/www/cob/classification.nsf/Page/HowtoComplywithClassificationLaws_ComplianceforSaleorHireofComputerGames, (accessed 11 May 2011).

67 Australian Government, *Compliance for sale or hire of computer games*, http://www.classification.gov.au/www/cob/classification.nsf/Page/HowtoComplywithClassificationLaws_ComplianceforSaleorHireofComputerGames, (accessed 11 May 2011).

Community Liaison staff also attend industry conferences and trade shows.[68]

3.65 In 2009–10, Classification Liaison Scheme staff conducted 895 compliance checks across a range of restricted and non-restricted premises in capital cities, and regional and rural centres.[69]

Enforcement applications

3.66 The *Classification Act 1995* includes provision for Commonwealth, and state and territory governments and agencies to apply to the Classification Board for a classification for the purpose of investigating or prosecuting an offence.[70]

3.67 The Intergovernmental Agreement also provided for each state and territory to receive a quota of 100 free classifications or evidentiary certificates per year, with any further requests for classifications to be provided at half-fee, and further certificates at full-fee.

Other applications

3.68 In addition to classifying works submitted by members of the public, including publishers and game developers, the Classification Board also deals with referrals from the police, the Australian Customs and Border Protection Service and the Australian Communications and Media Authority (ACMA). The Classification Board also classifies internet sites referred by the ACMA and video content developed for distribution over mobile phone networks.[71]

68 Attorney-General's Department, *National classification scheme*, http://www.ag.gov.au/www/agd/agd.nsf/Page/Classificationpolicy_Nationalclassificationscheme#section9, (accessed 23 December 2010).

69 Attorney-General's Department, *Annual Report* 2009-10, p. 74.

70 *Classification Act 1995*, s. 22A.

71 Australian Government, *What we do*, http://www.classification.gov.au/www/cob/classification.nsf/Page/Classification_in_AustraliaWhat_we_do#Referrals, (accessed 11 May 2011).

CHAPTER 4

Serial classification declarations and display of Restricted publications

Introduction

4.1 This chapter will examine two parts of the inquiry's terms of reference:

- the use of serial classifications for publications (term of reference (a)); and
- the desirability of national standards for the display of restricted publications (term of reference (b)).

4.2 The first section of the chapter considers the serial classification declaration scheme. Under this scheme, publishers and distributors can apply for ongoing classification of a number of issues of a publication for a period of 12 months, based on the classification of a single issue of the publication. The discussion in this chapter outlines how serial classification declarations work, before moving to a review of the substantial evidence received by the committee which highlighted particular problems with this scheme.

4.3 The second part of the chapter describes the varying requirements between states and territories for the display of Restricted publications; discusses the need for national standards for the display of these publications; and considers options for a national standard, including calls to increase restrictions on access to these publications.

Serial classification declarations

4.4 The submission from the Attorney-General's Department (Department) explained the operation of the serial classification declaration for publications:

> ...a 'serial classification declaration' can be granted by the [Classification] Board so that a classification of a publication applied to a single issue of a periodical, also applies to some or all future issues of the periodical during a set period of time. The [Classification] Board currently limits the period of a serial classification declaration to 12 months from the date the declaration is granted.[1]

4.5 The Classification Board conducts compliance checks of all publications granted a serial classification declaration after a three-month period 'to determine whether future issues have higher content or breach any other conditions of the

1 Attorney-General's Department, *Submission 46*, p. 2. See also Mr Donald McDonald AC, Classification Board, *Committee Hansard*, 7 April 2011, p. 60.

declaration'.[2] In addition to these compliance checks, audits of publications may also take place in response to complaints:

> The Classification Board provides officers of the Classification Liaison Scheme with a report of scheduled audits and the titles of any publications that are the subject of complaint and requests the purchase of those publications.[3]

4.6 The Department's submission provided details on the numbers of publications that had serial classification declarations revoked in the last financial year:

> The [Classification] Board revoked the classification of seven adult publication titles in the 2009/2010 period from a total of 60 serial classification declarations. When a serial classification is audited and the classification is revoked, the audited issue and future issues (ie those published after the revocation) become unclassified. The Department advises relevant law enforcement agencies of unclassified publications by direct correspondence and through a regular bulletin.[4]

4.7 In response to a question on notice, the Classification Board advised that, for the calendar year 2010, 49 publications were audited and three publications failed the audit.[5]

4.8 The committee notes that members of the Senate Legal and Constitutional Affairs Legislation Committee have pursued the issue of compliance with revocations of serial classifications through the estimates process.[6]

4.9 The serial classification declarations were highlighted in submissions and by witnesses as one of the most flawed aspects of the National Classification Scheme. For example, the Family Council of Victoria argued:

> Serial classification for publications, such as *Playboy*, do not work. There is no reason that each print of a serial publication should not undergo classification. It is rather redundant to classify only a handful of issues and apply them to the complete series of publications.
>
> Furthermore, there is a lack of stringency in the system that regulates these classifications and it is not unknown for a publication to lapse into releasing an edition that does not meet the serial classification that has been imposed

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2 Attorney-General's Department, *Submission 46*, p. 2. See also Mr Donald McDonald AC, Classification Board, *Committee Hansard*, 7 April 2011, p. 60.

3 Attorney-General's Department, *Submission 46*, pp 2-3.

4 Attorney-General's Department, *Submission 46*, p. 3.

5 Classification Board, answers to questions on notice, received 20 April 2011.

6 See, for example, Senate Legal and Constitutional Affairs Legislation Committee, Budget Estimates 2010-2011, *Estimates Hansard*, 24 May 2010, p. 76; Supplementary Budget Estimates 2010-2011, *Estimates Hansard*, 18 October 2010, pp 13-14.

> upon it. This is a further compelling reason to require every edition of a publication to be classified.[7]

4.10 The committee received several examples of serious failings in relation to the use of serial classification declarations. For example, in evidence to the committee, Ms Barbara Biggins of the Australian Council on Children and the Media (ACCM) stated:

> We [have] very strong concerns...particularly [with] those which are showing pictures—and I will use the word 'offensive'—depictions of mainly girls who certainly appear to be under the age of 16 or 18 years. The way that they are presented was in a very sexually provocative manner. On closer examination, many of those magazines were either incorrectly classified, in other words, they were not displaying the classification that had been ascribed to them. In some cases they were on open display, they were not in plastic bags; and in some cases, they carried a lower classification sticker than they should have.
>
> We understand that the complaints made about that material have been very slow to be resolved, and any action about that material even slower to result. In our view, if that sort of malpractice is out there, then it warrants a much closer and more frequent examination of whether the enforcement obligations are being observed, and one year seems to be more appropriate than two.[8]

4.11 One issue to which a number of witnesses referred is the apparent breaching of serial classification declarations, with later issues of certain publications containing material of a higher classification level than was originally included. This appears to occur despite the compliance checking and auditing undertaken with respect to publications. For example, Kids Free 2B Kids asserted that distributors are 'flouting the law' and failing to maintain material in subsequent issues of a publication at the classification level that the Classification Board has given to the publication.[9]

4.12 Ms Melinda Tankard Reist from Collective Shout also referred to this issue in her evidence to the committee:

> We have a problem with the whole system of serial classification, where a porn distributor will submit one issue, which is probably a less graphic

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7 Family Council of Victoria, *Submission 22*, p. 9.

8 *Committee Hansard*, 25 March 2011, pp 70-71. The committee notes the submission of the Attorney-General's Department (*Submission 46*, p. 2) and the evidence of the Director of the Classification Board (*Committee Hansard*, 7 April 2011, p. 60) that the Classification Board currently limits the period for a serial classification declaration to 12 months from the date of the declaration.

9 Kids Free 2B Kids, *Submission 63*, p. 11. This submission is only published in part; hard copies of the remainder of the submission are available from the secretariat upon request.

> issue, and then they have been given permission to import two years worth. So they save the more graphic ones for after they get the tick-off.[10]

4.13 Similarly, the Australian Christian Lobby (ACL) drew attention to the apparent practice of publishers and distributors submitting 'milder' issues to the Classification Board for the purposes of obtaining a serial classification declaration:

> The [numbers of serial classification declaration revocations] strongly suggest that some publishers and distributors of classifiable publications have been submitting 'milder' editions of their publications for classification, before increasing the level of content once serial classification has been granted. This type of behaviour represents a breaking of confidence in the co-regulatory environment, where some publishers and distributors abuse the flexibility and trust afforded them by the classification system and the [Classification] Board.[11]

4.14 The committee also received evidence from the Eros Association, which stated in its submission that the serial declaration scheme 'is not working in its current format'.[12] The Eros Association offered the following reason for the failings of the system:

> The current scenario that plays out is that one supplier modifies the publication and then has it classified, often as a serial classification. That company then supplies the publication to its customers, modified according to the classification. Competitors of this company then often supply their customers with an unmodified version. When the unmodified version is found in the market place the company who invested in the serial classification and acted lawfully has their classification revoked because they are the only ones who the [Classification Board] can link to the publication. To appeal this decision they must fork out another $10,000.[13]

4.15 Submissions from both Collective Shout and FamilyVoice Australia outlined specific instances in which Ms Julie Gale, Director of Kids Free 2B Kids, had demonstrated the failings of the serial classification system:

> Ms Gale identified a number of publications on sale at service stations and corner stores bearing Category 1 or Category 2 'Restricted' labelling, but which contained material including pseudo child pornography and incitements to rape and incest, which should have resulted in the publications being Refused Classification.

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10 *Committee Hansard*, 27 April 2011, p. 27.

11 Australian Christian Lobby, *Submission 25*, p. 2. See also Media Standards Australia, *Submission 21*, p. 8.

12 Eros Association, *Submission 60*, p. 10.

13 Eros Association, *Submission 60*, p. 10. See also Mr Donald McDonald AC, Classification Board, Senate Legal and Constitutional Affairs Legislation Committee, Additional Estimates 2010-11, *Estimates Hansard*, 22 February 2011, p. 35.

> After this material was submitted to the Classification Board the classifications given by the Board to eight publications were eventually revoked: *Best of Cheri*, *Finally Legal*, *Swank*, *The Very Best of High Society*, *Hawk*, *Gallery*, *Purely 18* and *Live Young Girls*.
>
> *Live Young Girls* had been given repeated 24-month serial classifications as Category 1 Restricted based on issues Vol. 26, no. 5, May 2005 and Vol. 29, no. 5, May 2008. After Ms Gale submitted three issues of *Live Young Girls* (December 2006, August 2007, and April 2008) to the Classification Board, the Director informed Ms Gale in January 2009 that each of these issues had been found to contain Refused Classification content and that the serial classification based on the May 2005 issue was revoked. Inexplicably, the later 24-month serial classification based on the May 2008 issue was left in place. It was only when Ms Gale submitted copies of the June 2008, September 2008 and December 2008 issues of *Live Young Girls* that the Board moved to revoke this second classification. Had Ms Gale not pressed the issue further, it is unlikely any further action would have been taken.[14]

4.16 As can be seen from this example, a serial classification declaration for a publication can be revoked. However, there does not appear to be a process in place for steps to be taken in relation to checking the compliance of the publication with a subsequent serial classification declaration which it may have been granted.

4.17 ACL submitted that the number of revocations of serial classification declarations indicates a system which is not capable of responding to community expectations:

> As of February 2010, the Classification Board had, 'revoked the serial classification declarations of 55 publications since the scheme began in December 2005. Forty-eight of these were originally classified Category 1 restricted'...
>
> ACL believes that the above figure, of 55 classification revocations in just five years operation of the serial classification system, demonstrates a system incapable of adequately responding to community expectations. Serial classification of publications for two years has proven too long, providing publishers and distributors of classifiable publications with too much flexibility, especially when enforcement under the Scheme is ineffective.[15]

4.18 The committee received a number of suggestions in relation to how the failings of serial classification declarations should be addressed. Media Standards Australia (MSA) suggested that there should be 'random spot checks' of publications, made without notice, to ensure that all issues of a publication adhere to the serial

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14 Collective Shout, *Submission 65*, pp 1-2. See also FamilyVoice Australia, *Submission 15*, pp 1–2.

15 Australian Christian Lobby, *Submission 25*, p. 2.

classification declaration.[16] In evidence to the committee, Mr Paul Hotchkin from MSA expressed his dissatisfaction with the current level of compliance checking and auditing of serial classification declarations:

> If it is happening at the moment, why are some of the publications that are not supposed to be coming through coming through?[17]

4.19 ACL recommended increasing the number of issues of a publication on which a serial classification declaration is based, and shortening the period for the declaration:

> ...the first six issues of any new classifiable publication entered into the Australian market [should] be subject to mandatory submission for classification to demonstrate the content of that publication consistently matches the conditions and restrictions of sale. Serial classification may then be granted for periods not exceeding six months. The [Classification] Board may request submission for classification any other issue of the publication. Failure to comply with that request should result in immediate revocation of serial classification for that publication, and for any other publication from the same publisher or distributor. A strong deterrent of this nature is required if the community is to trust the co-regulatory nature of the serial classification system.[18]

4.20 The Catholic Women's League Australia highlighted the need for clarity regarding the content of each classification category:

> ...the use of serial classifications for publications—is good so long as it is clear what can be found under each category and everyone is clear as to what the classification means. An index of the title and content of the catalogued material ought to be available and individuals given the right to challenge the item's location and give reason why its classification should be changed.[19]

4.21 Ms Melinda Tankard Reist of Collective Shout called for the serial classification declaration system to be 'ended immediately'.[20]

4.22 Despite clear evidence pointing to the failings of the serial classification declarations, the committee notes that some support for this system remains. For example, Ms Irene Graham argued:

> Repeal of the serial classification system would, in effect, penalise law abiding publishers/distributors (collateral damage resulting from possibly illegal activity by others), and very likely result in increased costs to

16 Media Standards Australia, *Submission 21*, p. 8.

17 *Committee Hansard*, 7 April 2011, p. 38.

18 Australian Christian Lobby, *Submission 25*, p. 2.

19 Catholic Women's League Australia, *Submission 11*, p. 6.

20 *Committee Hansard*, 27 April 2011, p. 27.

> consumers and taxpayers (due to increased costs to law abiding publishers/distributors which would be passed on to customers, and a need to increase the number of tax-payer funded members of the Classification Board to deal with weekly/monthly submissions of single publications for classification).[21]

4.23 Mr Matthew Whiteley maintained that serial classification for magazines 'makes sense as most content in adult magazines is similar from issue to issue'.[22] Mr Whiteley went on to suggest that there should, in effect, be no classification for magazines:

> ...as a whole, print media in other western countries are rarely subjected to government classification, especially magazines published on a regular basis, in which the publisher or distributor has to pay exorbitant fees to have their publication classified. As print media is being hammered to death by internet publications, it seems absurd to add extra costs to publishers, especially when there is no obvious benefit to the community. Adult publications in Western Europe and North America are not required to submit magazines, yet there is no scientific or anecdotal evidence which shows the populations in these regions have been adversely affected by lack of government classification...Mandatory classification for adult publications also makes it prohibitively expensive to publish niche or self published publications.[23]

Display of Restricted publications

4.24 The states and territories are responsible for enforcement legislation which sets out how publications can be sold, hired, exhibited, advertised and demonstrated. For this reason, the requirements for the display of Restricted publications vary between the states and territories.

Requirements for display of Restricted publications

4.25 The submission from the Attorney-General's Department outlined the 'similar, but slightly different requirements' for the display of Restricted publications:

> ...in the case of Restricted publications, Queensland does not permit their sale at all. In Victoria, South Australia, Northern Territory and Western Australia the packaging must be sealed and use plain opaque material. New South Wales and the Australian Capital Territory also require sealed packaging though it may be transparent. Tasmania allows packaging to be transparent though no more than the top six centimetres of the publication can be displayed or exhibited in a public place. In all States and Territories

21 Ms Irene Graham, *Submission 20*, p. 2.

22 Mr Matthew Whiteley, *Submission 19*, p. 2.

23 Mr Matthew Whiteley, *Submission 19*, p. 2.

except Queensland, the publication must display the determined classification markings.[24]

4.26 An 'Information Sheet for Magazine Retailers' on the Australian Government's Classification website also provides details about the differences between the states and territories for the display of publications:

Unrestricted

These magazines are not legally restricted, however, some are not recommended for people under 15 years.

Category 1 Restricted

In QLD, it is illegal to sell Category 1 Restricted magazines and in prescribed areas of the NT.

In all other States and Territories, Category 1 Restricted magazines:

- are legally restricted and can only be sold to people 18 years and over, and
- can only be displayed for sale in general outlets (eg a newsagency, convenience store or service station) if they are in sealed wrapping. In SA, VIC, NT and WA the wrapping must be opaque.

In WA, a retailer needs to be registered with the WA Censorship Office before they can sell Category 1 Restricted magazines.

Category 2 Restricted

In QLD, it is illegal to sell Category 2 Restricted magazines and in prescribed areas of the NT.

In ACT, NSW, NT, SA and Victoria, Category 2 Restricted magazines can only be displayed for sale or sold in a restricted publications area, for example an adult shop.

In Tasmania and WA, Category 2 Restricted magazines can be sold in premises that are not restricted publications areas, provided certain conditions are met. In WA, a retailer needs to be registered with the WA Censorship Office before they can sell Category 2 Restricted magazines.

Category 2 Restricted magazines are legally restricted and can only be sold to people 18 years and over.[25]

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24 Attorney-General's Department, *Submission 46*, p. 4.

25 Australian Government, Classification Website, *Information for Magazine Retailers*, http://classification.gov.au/www/cob/rwpattach.nsf/VAP/(3A6790B96C927794AF1031D9395C5C20)~740+Fact+Sheet+-+Magazine+Retailers+Apr+09+Final+doc.pdf/$file/740+Fact+Sheet+-+Magazine+Retailers+Apr+09+Final+doc.pdf, (accessed 16 May 2011).

Desirability of national standards for display of Restricted publications

4.27 The committee notes that there appeared to be a general consensus among submissions for a national standard for the display of publications. Civil Liberties Australia (CLA) stated that achieving national standards is a 'positive goal' as '[there] is nothing inherently different about Australians from different states'.[26] The Eros Association noted the inconsistency across the states and indicated that a national uniformity to the display and sale of Restricted publications is 'generally supported by [the adult retail] industry'.[27] Salt Shakers submitted that '[n]ational standards provide uniformity and reliability in the display of publications...[T]his is something we would encourage'.[28]

4.28 While conceding that there are arguments for and against national standards, Mr Johann Trevaskis noted that it is 'very likely' that costs savings could be made through the introduction of national standards for the display of Restricted publications.[29]

4.29 In contrast to much of the evidence received by the committee on this issue, Ms Irene Graham expressed the following view:

> ...the manner of shelf display in sale/hire premises should not be a 'national standard', but [should] remain the role/responsibility of each State and Territory Government in the context of their classification enforcement legislation.[30]

Appropriate national standard for display of Restricted publications

4.30 While there was strong support for national standards for the display of Restricted publications, submissions differed in their views about what the national standard should be.

4.31 A particular concern was raised about the availability of Category 1 Restricted publications in retail outlets where those publications can be seen by children. Many submissions noted that, in several jurisdictions, Category 2 Restricted publications are only available in restricted areas, where children cannot access them; these submissions called for similar requirements to be placed on Category 1 Restricted publications. For example, FamilyVoice Australia argued that because Category 1 Restricted material is 'designed for the sole purpose of sexual arousal [the sale] of such material in general retail outlets such as newsagents and petrol stations is

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26 Civil Liberties Australia, *Submission 34*, p. 36.

27 Eros Association, *Submission 60*, p. 11.

28 Salt Shakers, *Submission 23*, p. 10. See also Family Council of Victoria, *Submission 22*, p. 9.

29 Mr Johann Trevaskis, *Submission 32*, pp 1-2.

30 Ms Irene Graham, *Submission 20*, p. 3.

inappropriate'.[31] FamilyVoice Australia recommended that the sale of Category 1 Restricted material should be 'rigorously restricted to adults by limiting display and sale to premises restricted to adults, as is the case with Category 2 material in most jurisdictions'.[32]

4.32 ACL asserted that Restricted publications are 'pornographic in nature' and 'are published for an adult market'. Accordingly:

> ...there is no need to display, or promote for sale, publications with pornographic content in general retail outlets where children will inevitably be present, such as in milk bars, convenience stores and petrol stations.[33]

4.33 Collective Shout also noted that, in its view, Category 1 Restricted publications are offensive to women:

> It is offensive for women – often accompanied by children – to have to confront graphic pornographic titles every time they have to buy milk and petrol. The material is often [at] children's eye level, frequently next to lollies.[34]

4.34 Collective Shout called for a national standard requiring that Category 1 and 2 Restricted publications should only be available from a 'secure, physically separated area to ensure no children can enter the area'.[35]

4.35 The Australian Council on Children and the Media (ACCM) also noted the problem of displaying Restricted magazines in open areas where children may be able to see the publications. ACCM called for a 'national review of the conditions for the display of [Restricted Category 1] magazines and a development of effective local systems of content checks and enforcement'.[36] ACCM also suggested that 'parents need to be better supported with information about complaints mechanisms, when children are confronted by such material'.[37]

4.36 Submissions referred to the principles set out at the beginning of the National Classification Code as supporting more controlled access to Category 1 Restricted publications. For example, ACL contended:

> Restricted publications and films are produced for an adult audience and considered inappropriate for children. In accordance with an important

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31 FamilyVoice Australia, *Submission 15*, p. 3.

32 FamilyVoice Australia, *Submission 15*, p. 3.

33 Australian Christian Lobby, *Submission 25*, p. 3. See also Media Standards Australia, *Submission 21*, p. 9; Salt Shakers, *Submission 23*, p. 10.

34 Collective Shout, *Submission 65*, p. 3.

35 Collective Shout, *Submission 65*, p. 4.

36 Australian Council on Children and the Media, *Submission 44*, p. 3.

37 Australian Council on Children and the Media, *Submission 44*, p. 3.

> principle articulated in the National Classification Code, that 'minors should be protected from material likely to harm or disturb them', the display of such items should be restricted to areas where children are unlikely to be exposed.[38]

4.37 Kids Free 2B Kids also noted the principle in the National Classification Code that everyone should be protected from exposure to unsolicited material that they find offensive, and stated that 'the word 'unsolicited', means 'Not looked for or requested; unsought'.[39] Specifically:

> Children and young teens are not looking for or requesting pornographic magazines which are unsolicited and sold at their eye level and within easy access, in the public arena.[40]

4.38 On the other hand, some submissions noted the principle in the National Classification Code that 'adults should be able to read, hear and see what they want'. For example, Mr Matthew Whitely argued that 'adults [should] have the right to choose what they wish to read and view in the privacy of their home and have the right to buy these products from retailers without absurd restrictions'.[41]

4.39 Similarly, Civil Liberties Australia did not think there was necessarily any need for such restrictions as retailers do not purposely set out to offend their customers:

> As to [R]estricted publications, their display is only of concern if they have cover designs that are sexually explicit (nudity, by itself, should not be considered sexually explicit), and are then displayed to draw attention in a store that caters to a large and diverse audience. There is little evidence to suggest that businesses go out of their way to offend their customers.[42]

4.40 However, as Ms Julie Gale of Kids Free 2B Kids told the committee, this is not necessarily the case. Ms Gale acknowledged a number of retailers who have taken proactive steps to remove Category 1 Restricted publications from their stores, but noted that some retailers continue to sell these items:

> ...BP, Shell Coles Express and Mobil...took swift and responsible action by removing all category 1 pornographic magazines nationwide from their company owned stores. This followed contact from Kids Free 2B Kids, which included providing examples of the content of the category 1 magazines they were selling. The same cannot be said for 7-Eleven,

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38 Australian Christian Lobby, *Submission 25*, p. 3.

39 Kids Free 2B Kids, *Submission 63*, p. 3.

40 Kids Free 2B Kids, *Submission 63*, p. 3.

41 Mr Matthew Whiteley, *Submission 19*, pp 2-3. See also Ms Irene Graham who, while opposing national standards for the display of Restricted publications, argued that if there is to be a national standard, it should be a standard that has no restrictions other than restrictions applicable to the content of covers: *Submission 20*, p. 3.

42 Civil Liberties Australia, *Submission 34*, p. 36.

> McDonald's Fuel Zone, Safeway, Caltex, United Petroleum and others who...refused to take responsible action, many stating they could not dictate what their co branded stores or franchisees sold.[43]

4.41 The Eros Association also argued for less stringent restrictions surrounding the display of Restricted publications, outlining the example of Category 1 Restricted publications. The Eros Association emphasised that, under the *Guidelines for the Classification of Publications 2005*, covers of Category 1 Restricted publications must be suitable for public display, and covers which are considered not suitable for public display will not be permitted in this classification category unless sealed in plain opaque wrapping.[44] Given this explicit requirement, the Eros Association questioned the additional stipulation existing in a number of states and the Northern Territory that all Category 1 Restricted publications must have opaque wrapping.[45]

4.42 Against this view that the requirements in the *Guidelines for the Classification of Publications 2005* provide for the display of Restricted Category 1 publications in a manner which is suitable for public display, the committee received evidence demonstrating that retailers are currently displaying Restricted publications in ways which do not accord with those requirements. The submission of Kids Free 2B Kids contained a photograph with an example of a magazine display in a milk bar where the comic 'Scooby-Doo' and *Who* magazine were displayed alongside Category 1 Restricted magazines. According to Kids Free 2B Kids:

> Category 1 [Restricted] magazines are also frequently displayed next to the daily newspapers, young girl's magazines such as *Dolly* and *Girlfriend*, and magazines such as *The Woman's Weekly*, *New Idea* and *Who*. This creates normalisation and desensitisation about pornography for children and young teens.[46]

4.43 The Kids Free 2B Kids submission contained further persuasive evidence for national standards for the display of Restricted publications in prescribed areas which cannot be accessed by children. In discussing the outcomes of audits by the Classification Board, Kids Free 2B Kids noted that 'distributors are flouting the law by sealing illegal magazines with official Category 1 labels and selling them to retailers'.[47] These magazines would then be available for display next to Unrestricted

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43 *Committee Hansard*, 27 April 2011, p. 21. See also Collective Shout, *Submission 65*, p. 3.

44 See *Guidelines for the Classification of Publications 2005*, p. 11.

45 *Submission 60*, p. 11. See also Mr Robert Harvey, who submitted that, in his experience, the covers of Restricted material are 'intentionally mild': *Submission 9*, p. 1.

46 Kids Free 2B Kids, *Submission 63*, p. 17.

47 Kids Free 2B Kids, *Submission 63*, p. 1. The Kids Free 2B Kids submission went on to note at p. 16 that 'illegal' Category 1 magazines will continue to be sold in the public arena because of: a lack of compliance by distributors; the fact that there are not enough resources to enforce the *Guidelines for the Classification of Publications 2005*; and due to a general lack of awareness by retailers. These issues are considered further in Chapter 6 in relation to enforcement issues.

and non-submittable publications, albeit in sealed, and in some cases opaque, wrapping.

4.44 In this context and due to the graphic nature of the photos and extracted text in the section of the submission from Kids Free 2B Kids dealing specifically with publications, the committee made a decision not to publish that part of the submission on the Parliament of Australia's website. Even though that aspect of the submission was not made available on the website, the committee accepted it as a public document (since its content was taken from magazines freely available from certain retail outlets). Copies of the relevant part of the submission are available in hard copy on request from the secretariat.

4.45 In terms of progress being made towards national standards for the display of Restricted publications, the Attorney-General's Department noted that in 2010 the Commonwealth explored issues around the harmonisation of jurisdictional requirements for the display of restricted material through the Standing Committee of Attorneys-General Compliance and Enforcement Working Party.[48]

48 Attorney-General's Department, *Submission 46*, p. 4.

CHAPTER 5

Restricted films

Introduction

5.1 Terms of reference (b), (f) and (g) refer to certain aspects of the classification, display and impact of Restricted films.

5.2 This chapter discusses the classification of Restricted films, focussing particularly on:

- the distinction between R18+ and X18+ films;
- films that are Refused Classification (RC);
- the availability and display of R18+ films in Australia; and
- the impact of X18+ films and their role in the sexual abuse of children.

5.3 In addition, this chapter considers the availability of X18+ films throughout Australia, particularly in the Northern Territory.

Classification of Restricted films

5.4 The National Classification Code provides details on the type of content that will place a film into a particular classification category specified in the *Classification Act 1995*. As noted in Chapter 3, a film (except a film that is Refused Classification) will be classified X18+ if it:

> a) contains real depictions of actual sexual activity between consenting adults in which there is no violence, sexual violence, sexualised violence, coercion, sexually assaultive language, or fetishes or depictions which purposefully demean anyone involved in that activity for the enjoyment of viewers, in a way that is likely to cause offence to a reasonable adult; and
>
> b) is unsuitable for a minor to see.[1]

5.5 A film (except a film that is Refused Classification or X18+) will be classified R18+ if it is unsuitable for a minor to see.

5.6 The *Guidelines for the Classification of Films and Computer Games* (referred to in this chapter as the Guidelines) set out the scope and limits of material in each of the classification categories.[2] In relation to X18+ films, the Guidelines note that such

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1 National Classification Code, cl. 3, item 2.

2 X18+ and R18+ classifications only apply to films and not to computer games.

films can contain consensual sexually explicit activity. However, the category has the following limitations:

> No depiction of violence, sexual violence, sexualised violence or coercion is allowed in the category. It does not allow sexually assaultive language. Nor does it allow consensual depictions which purposefully demean anyone involved in that activity for the enjoyment of viewers.
>
> Fetishes such as body piercing, application of substances such as candle wax, 'golden showers', bondage, spanking or fisting are not permitted.
>
> As the category is restricted to activity between consenting adults, it does not permit any depictions of non-adult persons, including those aged 16 or 17, nor of adult persons who look like they are under 18 years. Nor does it permit persons 18 years of age or over to be portrayed as minors.[3]

5.7 For R18+ films, the Guidelines state that the material 'should not exceed high' impact.[4] In relation to the classifiable elements of the film, the Guidelines provide as follows:

> THEMES
>
> There are virtually no restrictions on the treatment of themes.
>
> VIOLENCE
>
> Violence is permitted.
>
> Sexual violence may be implied, if justified by context.
>
> SEX
>
> Sexual activity may be realistically simulated. The general rule is "simulation, yes – the real thing, no".
>
> LANGUAGE
>
> There are virtually no restrictions on language.
>
> DRUG USE
>
> Drug use is permitted.
>
> NUDITY
>
> Nudity is permitted.[5]

Assessing 'impact' and 'context' for films

5.8 One issue raised by a number of witnesses was the change in the Guidelines in 2003 for classifying films and the effect that this has had on the classifications given to films. While the discussion did not relate specifically to the classification of Restricted films, some witnesses considered that the changes have resulted in a

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3 *Guidelines for the Classification of Films and Computer Games*, p. 12.

4 *Guidelines for the Classification of Films and Computer Games*, p. 11.

5 *Guidelines for the Classification of Films and Computer Games*, p. 11.

decline in the rigour of classification decisions, including decisions in relation to the classification of R18+ and X18+ films.

5.9 In its submission, the Australian Council on Children and the Media (ACCM) set out these concerns:

> The current Guidelines (2003, rev. 2005) place great emphasis on tests of context and impact. The criteria are much less detailed about the types of content allowable at each level.
>
> ...It was our view then, and still is, that by comparison with the 2000 guidelines the current ones allow a more subjective range of judgements to be made eg whether material has strong impact or high impact. Our prediction then was that standards would slip, and they have done so. Judgements based on contexts of fantasy and/ or horror genres as lessening impact have lowered the classification of some materials.
>
> Judgements based on whether the impact of violence was very mild, mild, moderate, strong or high can be less stringent than whether violence with high impact was frequent or infrequent, detailed or not (see Guidelines 2000: tests for M/ MA15+).[6]

5.10 Ms Barbara Biggins from ACCM told the committee that this change to the Guidelines has had a 'ripple effect throughout all classifications':

> It is resulting in material which perhaps would have belonged in MA15+ that has gone to M, or it would have been in R18+ and has gone to MA+, simply because the context has been interpreted as, well, it is a fantasy context or it is a horror genre or it is an action and adventure movie, and therefore put in that context, this very violent material is deemed to not have the same impact. The wording of the guidelines allows that interpretation.[7]

5.11 Similarly, Mrs Roslyn Phillips of FamilyVoice Australia expressed dissatisfaction with using 'impact' as a criteria for classifying films:

> ...since 2003 the film classification guidelines have talked about impact as being the differentiating factor between the different classifications of G, PG and so on...We are very unhappy about that because it is so vague and subjective. What is a high impact to one person might not be high to another. As a result, I think there have been some very inconsistent decisions by boards in recent times. We would like to see a return to more detail in the classification guidelines to indicate things like how frequent scenes of violence are and whether or not the sexual scene is discreet. Those sorts of terms have been removed, and the emphasis is on impact, as

6 Australian Council on Children and the Media, *Submission 44*, p. 5.

7 *Committee Hansard*, 25 March 2011, pp 66-67. See also Family Council of Victoria, *Submission 22*, p. 7, which noted the 'creep downwards' resulting in today's G and PG categories containing elements that only a few years ago were M or even MA15+.

> I said, which is not really a very satisfactory way of determining which category the film should be in.[8]

5.12 Collective Shout asserted that the use of impact has 'allowed the Classification Board and the Classification Review Board to make what often seem arbitrary decisions on classification'.[9] Accordingly, Collective Shout recommended:

> ...that the Guidelines for the classification of films and computer games [should] be revised to replace the subjective 'impact' scale with more detailed provisions for each of the classifiable elements, including strict limits on depictions of sexual violence and demeaning depictions of women.[10]

R18+ films

5.13 Term of reference (g) for the inquiry specifies the 'classification of films, including explicit sex or scenes of torture and degradation, sexual violence and nudity as R18+'.

Salo

5.14 Much of the evidence and submissions on the issue of classification of R18+ films centred on the 2010 decision by the Classification Board and the Classification Review Board to classify the film *Salo* as R18+. The Attorney-General's Department (Department) summarised the film as 'a 1975 Italian drama written and directed by Pier Paolo Pasolini based on the book *The 120 Days of Sodom* by the Marquis de Sade'.[11]

5.15 The Department's submission provided details in relation to the 'long and complex classification history' of *Salo*, going back to 1976.[12] Briefly, the film was Refused Classification in Australia until 1993. In 1993, the film was classified R18+ by the former Film and Literature Board of Review, and between 1993 and 1997 it was available in all jurisdictions, except in Western Australia and South Australia where restrictions applied. In June 1997, the film was reclassified R18+ by the Classification Board; and, in 1998, the film was classified Refused Classification by the Classification Review Board. In 2003, an application for reclassification was declined by the Classification Board and, in June 2008, an edited version of the film was classified Refused Classification by the Classification Board.[13]

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8 *Committee Hansard*, 25 March 2011, pp 77-78.

9 Collective Shout, *Submission 65*, p. 9.

10 Collective Shout, *Submission 65*, p. 10.

11 Attorney-General's Department, *Submission 46*, p. 10.

12 Attorney-General's Department, *Submission 46*, p. 10.

13 Attorney-General's Department, *Submission 46*, p. 10. The Attorney-General's Department's submission noted that the applications for classification relate to the same film with minor edits and changes to the running times.

5.16 The Department's submission described the events pertaining to the latest classification application for the film:

> On 13 April 2010 the Classification Board classified a modified 292 minute version of the film *Salo* R18+ with consumer advice for 'Scenes of torture and degradation, sexual violence and nudity'. This version included additional background information providing an historical context which, in the view of the [Classification] Board, mitigated the overall impact of the material submitted to no greater than high.
>
> On 15 April 2010, the Minister for Home Affairs applied for a review of the Classification Board's R18+ classification...because he considered it was in the public interest to do so, as there was likely to be sections of the community who would have different views on the content of this film...
>
> In a majority decision, the Review Board classified *Salo* R18+ with consumer advice for 'Scenes of torture and degradation, sexual violence and nudity'.[14]

5.17 The Department's submission noted that FamilyVoice Australia had taken legal action in the Federal Court of Australia under the *Administrative Decisions (Judicial Review) Act 1977*.[15] In their appearance before the committee, officers from the Department noted that the matter has now been heard in the Federal Court and that a decision has been reserved.[16]

5.18 As this matter is still before the courts, it would not be appropriate for the committee to engage in a deliberative analysis of the Classification Board's or the Classification Review Board's reasons for their decisions in relation to the *Salo* matter. For this reason, the discussion below is a general consideration of the issue of classification of R18+ films.

Distinction between R18+ films and X18+ films

5.19 A number of submissions referred to the classification of films with actual sexual activity in the R18+ category, despite the statement in the Guidelines that for R18+ films the 'general rule' is 'simulation, yes – the real thing, no'.

5.20 In its submission, FamilyVoice Australia discussed this point at length, noting that the classification of films with actual sex as R18+ breaches a 'clear dividing line' between R18+ and X18+.[17] FamilyVoice Australia outlined the history of decision-making on this issue:

> In January 2000 a decision [was made by] the Classification Review Board to classify the film *Romance* as R18+...The film contained several brief

14 Attorney-General's Department, *Submission 46*, p. 10.

15 Attorney-General's Department, *Submission 46*, p. 10.

16 *Committee Hansard*, 27 April 2011, p. 37.

17 FamilyVoice Australia, *Submission 15*, p. 10.

> depictions of an erect penis, of fellatio and of a woman masturbating a man. As the Classification Board observed in its initial decision to classify the film as RC 'the explicit depictions of sexual activity [had] not previously been permitted (other than in an educational context) in the 'R' classification'...The Board found that the sexually explicit depictions could have been accommodated in the X18+ classification but that other scenes of sexual violence prevented this.
>
> In classifying *Romance* as R18+ on appeal, the Classification Review Board opined that...'the "rule" ['simulation, yes – the real thing no'] is expressed to be a general rule, implying the possibility of exceptions in a limited number of instances. After careful consideration the majority of the [Review] Board decided that the limited discretion implicit in the application of the rule should be exercised in this film's favour.'...
>
> Since this decision a number of films with explicit depictions of sexual acts have been classified as R18+.[18]

5.21 Collective Shout also discussed films containing 'actual sex' being granted R18+ classification, describing the 2008 decisions to classify anime films containing explicit sexual acts as a 'new low in film classification':

> In 2008...the Classification Review Board [gave an] R18+ classification to three graphically animated anime films – *Classes in Seduction*, *T & A Teacher*, and *Bondage Mansion*, each of which featured explicit sexual acts...
>
> Both *T & A Teacher* and *Classes in Seduction* feature sexual acts between a teacher and his or her students, which the Classification Review Board found acceptable.[19]

5.22 The Collective Shout submission then quoted from an article by founder Ms Melinda Tankard Reist in which she argued that these films 'slipped into the "R" rating because the anime was said to reduce the impact of the [sex] scenes'.[20]

5.23 Collective Shout advocated that the Guidelines should be revised so that actual sex and animated scenes depicting explicit sexual acts should not be permitted in the R18+ classification.[21]

5.24 In putting a contrary point of view, Mr Johann Trevaskis stated that it is 'ironic' that non-simulated sex is classified higher than simulated sex:

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18 FamilyVoice Australia, *Submission 15*, p. 11.

19 Collective Shout, *Submission 65*, p. 9.

20 Collective Shout, *Submission 65*, p. 10, quoting from Melinda Tankard Reist, Crikey, 23 February 2009, http://www.crikey.com.au/2009/02/23/comments-corrections-clarifications-and-cckups/, (accessed 23 May 2011).

21 Collective Shout, *Submission 65*, p. 10. See also FamilyVoice Australia, *Submission 15*, p. 12.

> I find it ironic that non-simulated sex, which might be more realistic than simulated sex, is classified higher than simulated sex...I find it disturbing that anyone has a problem with real sex, a natural activity both for recreation and procreation. Each adult should be free to decide whether to access sexual content. That is, I do not support the enforcement role that classifying a film as X or RC implies.[22]

Films that are Refused Classification

5.25 By way of contrast to the material in R18+ films, the Department provided an example of a film that contains material that is Refused Classification. *Srpski Film* (also known as *A Serbian Film*) contains graphic depictions of rape, necrophilia and incest. The Department's submission outlined the reasoning behind the Classification Board's decision to categorise the film as Refused Classification:

> While the [Classification] Board's decision acknowledged that a degree of artistic merit and dramatic intent is evident in this fictional film, it is of the opinion that the film is very high in viewing impact and includes an explicit depiction of sexual violence. The film therefore exceeds what can be accommodated within the R18+ classification and was classified RC.[23]

5.26 The Department's submission noted that a modified version of the film received an '18 certificate' classification in the UK.[24] In February 2011, the Classification Board classified as Refused Classification a modified DVD version of the film.[25]

Should R18+ films be available in Australia?

5.27 A number of submissions questioned the need for R18+ films to be available in Australia. For example, the Life, Marriage and Family Centre, Catholic Archdiocese of Sydney called for a 'broad community review' of the availability of R18+ films:

> Given that there is no evidence that explicit, dehumanising sex scenes or scenes of torture, degradation, sexual violence and nudity that attract the R18+ classification contribute to or enhance social wellbeing, and given the growing evidence that, on the contrary, such explicit and dehumanising films do damage to the individual and the community, their legal availability should be subject to a broad community review.[26]

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22 Mr Johann Trevaskis, *Submission 32*, p. 3.

23 Attorney-General's Department, *Submission 46*, p. 11.

24 An '18 certificate' classification means no one younger than 18 may see the film in a cinema or rent or buy the video: see British Board of Film Classification website, at: http://www.bbfc.co.uk/classification/guidelines/18-2/, (accessed 8 June 2011).

25 Attorney-General's Department, *Submission 46*, p. 11.

26 Life, Marriage and Family Centre, Catholic Archdiocese of Sydney, *Submission 8*, p. 3.

5.28 The Catholic Women's League Australia argued, in relation to R18+ films, that 'we simply don't need these at all' and questioned why people would want to view them.[27]

5.29 Similarly, and in the context of the film *Salo*, Mr Lyle Shelton of the Australian Christian Lobby made the following point:

> I do not agree with the proposition that adults should be able to watch and see whatever they like...[W]e have a category called 'Refused Classification'. There are just some things that we judge as a civil society that go beyond the realms of civil liberties, and I think that is appropriate particularly when it comes to the protection of children.[28]

5.30 On the other hand, the committee received submissions expressing the view that the R18+ category is too restrictive. For example, Ms Irene Graham contended that the R18+ classification should not be tightened any further:

> It is already so restrictive that some films available for purchase/viewing by adults in other 'western democratic' countries (e.g. Western European counties, Canada, USA, etc) are banned/Refused Classification in Australia.[29]

5.31 Mr Matthew Whiteley highlighted in his submission the full range of graphic content which is permitted in the R18+ category. In particular, Mr Whiteley referred to the film 'Cannibal Holocaust' which 'contains several scenes of actual animal killing and dismemberment filmed specifically for the film'. This film was released in its entire cut form in Australia with an R18+ rating from the Classification Board.[30] In noting the controversy with respect to *Salo*, Mr Whiteley observed:

> [While] much has been made of such sexually explicit films such as *Salo* which depict simulated sexual violence, it's rather strange that no one seems to get outraged at the release of a film which contains real animal cruelty leading to death.[31]

5.32 The committee believes that it is not just the sexual element of R18+ films that is problematic for the broader community, it is the full range of material that is permitted in the R18+ category that might be seen to be offensive. For example, Salt Shakers advocated for more restrictions to be placed on all the classifiable elements in relation to R18+ films:

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27 Catholic Women's League Australia, *Submission 11*, p. 7.

28 *Committee Hansard*, 25 March 2011, p. 7. See also Family Council of Victoria, *Submission 22*, pp 8–9.

29 Ms Irene Graham, *Submission 20*, p. 4. See also Mr Matthew Whiteley, *Submission 19*, p. 5.

30 Mr Matthew Whiteley, *Submission 19*, p. 5.

31 Mr Matthew Whiteley, *Submission 19*, p. 5.

> Restricted films in the R18+ category have virtually no restrictions. We believe it is in everyone's best interests if violence, sex, themes and language had some restrictions upon them.
>
> Relating to sex, the Guideline says "Sexual activity may be realistically simulated. The general rule is 'simulation, yes – the real thing, no'."
>
> We believe that this is too explicit for this category.
>
> Regarding sexual violence, the Guideline says "Sexual violence may be implied, if justified by context."
>
> We contend that sexual violence should not be permitted.
>
> Furthermore, drug use and nudity should still be required to be "justified by context".[32]

Display of R18+ films

5.33 Term of reference (b) for the inquiry refers to the desirability of national standards for the display of Restricted films.

5.34 The display of R18+ films was an area of concern raised in submissions. Media Standards Australia (MSA) provided the committee with a photograph from a 'typical video library' in Western Australia. Although the detail in the photograph is not clear, according to MSA the display shows the film *Irreversible*, classified R18+, placed on the top centre of a shelf, with *Cat in the Hat*, classified G, and *Scooby Doo*, classified PG, 'not far away'.[33]

5.35 Some submissions pointed to recent legislative amendments in South Australia which place restrictions on the display of R18+ films for sale or hire. Section 40A of the *Classification (Publications, Films and Computer Games) Act 1995* (SA) provides that premises (other than adult-only premises) must not display material for a film classified R18+ unless the material is displayed in a different area (for example, a different aisle or on a different stand or table) from other films. Further, the area where the R18+ material is displayed must be marked with a notice stating:

> R18+ FILMS AREA—THE PUBLIC ARE WARNED THAT MATERIAL DISPLAYED IN THIS AREA MAY CAUSE OFFENCE.[34]

5.36 Restrictions also apply to the surface area of the material which can be displayed: for example, the cover of the DVD.[35]

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32 Salt Shakers, *Submission 23*, p. 9.

33 Media Standards Australia, *Submission 21*, p. 10.

34 *Classification (Publications, Films and Computer Games) Act 1995* (SA), ss. 40A(2). The notice must be printed in legible type of at least 15 millimetres in height and of a colour that contrasts with the background colour of the notice.

5.37 A number of submissions expressed support for this type of restriction to be put in place nationally.[36] MSA also suggested that a National Heart Foundation-style 'tick system' for family-friendly video stores should be rewarded and encouraged.[37] In evidence to the committee, Mr Paul Hotchkin from MSA provided more detail on what he envisages:

> ...it would go to promoting the G-rating type videos or PG-type videos. The video companies would have to meet specific rulings or guidelines to be able to get that tick. That way families would know that it is a family-friendly store.[38]

5.38 Ms Irene Graham noted the lack of restrictions in relation to the display of R18+ films:

> [W]hile there does not appear to be a specific restriction on the content of covers of boxes containing R18+ film DVDs, the general matters required to be taken into account by the Classification Boards, and the significantly smaller size of DVD covers (as compared to magazines) seems to make it unlikely that there is any problem with the covers of DVDs. If the Committee is made aware of any R18+ DVD covers that are allegedly unsuitable for public display, and if the Classification Board advises the Committee that that particular DVD cover would be required to be sealed in plain opaque wrapping if it was the cover of publication/magazine, then – and only then – there may be merit in restricting the content of covers of film DVDs in the same way as the covers of publications.[39]

X18+ Films

X18+ and sexual abuse

5.39 Term of reference (f) relates to the impact of X18+ films, including their role in the sexual abuse of children. A number of submissions referred the committee to the *Little children are sacred* report and the evidence received in the course of that inquiry about the impact of pornography on indigenous communities.[40] For example, FamilyVoice Australia noted the following evidence from that inquiry:

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35 *Classification (Publications, Films and Computer Games) Act 1995* (SA), paras. 40A(1)(a) and (b).

36 See FamilyVoice Australia, *Submission 15*, p. 5; Australian Christian Lobby, *Submission 25*, p. 3; Media Standards Australia, *Submission 21*, p. 10. See also Collective Shout, *Submission 65*, p. 4, which recommended that R18+ films should only be available for sale and distribution from a 'secure, physically separated area to ensure no children can enter the area'.

37 Media Standards Australia, *Submission 21*, p. 11.

38 *Committee Hansard*, 7 April 2011, p. 38.

39 Ms Irene Graham, *Submission 20*, pp 2–3.

40 Northern Territory Government, *Little Children are Sacred*, Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, 2007.

> The Inquiry was...told a story of a 17-year-old boy who would regularly show pornographic DVDs at a certain house then get young children to act out the scenes from the films.[41]

5.40 The *Little children are sacred* report resulted in the Northern Territory National Emergency Response, part of which entailed restrictions being placed on the possession and supply of prohibited materials, including films classified X18+, in prescribed areas.

5.41 Submissions also referred to the findings of an earlier inquiry into violence against women in Indigenous communities in Queensland which emphasised the impact of X18+ films in those communities:

> The incidence of sexual violence is rising and is [in] a direct relationship to negative and deformed male socialisation associated with alcohol and other drug misuse, and the prevalence of pornographic videos in some Communities.[42]

5.42 Submissions also noted evidence to the Queensland inquiry that $4,000–$5,000 worth of X18+ films were being purchased by mail order each week from Canberra by men in the Cape Communities.[43]

5.43 The committee was referred to a number of other research papers demonstrating a link between exposure to X18+ films and sexual abuse of children.[44] For example, FamilyVoice Australia noted the findings in a paper presented at the Ninth Australasian Conference on Child Abuse and Neglect in 2003 by staff from the Child at Risk Assessment Unit, Canberra Hospital. Those findings showed that exposure to X-rated pornography is one significant factor in children younger than 10 years old sexually abusing other children.[45]

5.44 The Australian Christian Lobby also referred to a 2003 study by The Australia Institute:

> An important 2003 research report from The Australia Institute found that almost three quarters of 16-17 year-old boys (73 per cent) report having watched an X-rated video. "One in twenty watch them on a weekly basis while more than a fifth watch an X-rated video at least once a month."

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41 FamilyVoice Australia, *Submission 15*, p. 8. See also Media Standards Australia, *Submission 21*, p. 14; Australian Christian Lobby, *Submission 25*, p. 6; Collective Shout, *Submission 65*, p. 7.

42 Collective Shout, *Submission 65*, p. 7. See also FamilyVoice Australia, *Submission 15*, p. 8.

43 Collective Shout, *Submission 65*, p. 7; FamilyVoice Australia, *Submission 15*, p. 8.

44 See, for example, the Hon. Nick Goiran MLC, Member of the Western Australian Legislative Council, and Mr Peter Abetz MLA, Member of the Western Australian Legislative Assembly, *Submission 36*, pp 5-6. See also Media Standards Australia, *Submission 21*, pp 13-14.

45 FamilyVoice Australia, *Submission 15*, pp 8-9. The committee notes that the paper referred to does not claim that pornography is the only factor in children becoming sexually abusive.

> One of the effects of this exposure, the authors postulate, is "young people exposed to images of non-mainstream sexual behaviours may be more likely to accept and adopt them".[46]

5.45 However, the committee also received evidence disputing a link between X18+ films and the sexual abuse of children. For example, Ms Irene Graham argued:

> The X18+ classification specifically excludes depictions of children (i.e. persons under 18 years). It is legislatively limited to depictions of non-violent sexual activity between consenting adults.
>
> Accordingly, the X18+ classification has **no** role at all in the sexual abuse of children.[47]

5.46 Submitters also referred to a paper authored by Milton Diamond of the University of Hawaii in 2009:

> This extensive research paper concluded that..."It has been found everywhere scientifically investigated that as pornography has increased in availability, sex crimes have either decreased or not increased."[48]

Availability of X18+ films

5.47 The inconsistency of restrictions applying to the availability of X18+ films in the different Australian jurisdictions is, in the committee's view, an area which highlights the complexity of the enforcement of classification decisions by state and territory governments.

5.48 In the ACT, for example, X18+ films may be exhibited in a restricted publications area, in premises located in a prescribed area.[49] X18+ films are available for sale in the ACT; however, the ACT legislation sets out certain requirements in relation to the sale of those films. For instance, the person purchasing the film must make a direct request for the film and the film must be contained in an opaque package.[50]

5.49 Similar provisions are in place in the Northern Territory, with respect to the exhibition and sale of X18+ films.[51] However, as part of the Northern Territory

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46 Australian Christian Lobby, *Submission 25*, p. 7.

47 Ms Irene Graham, *Submission 20*, pp 3-4. Emphasis in original.

48 Eros Association, *Submission 60*, p. 15. See also Mr Robert Harvey, *Submission 9*, p. 2.

49 *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* (ACT), ss. 9(2). For the purposes of the ACT legislation, the 'prescribed areas' are set out in the *Classification (Publications, Films and Computer Games) (Enforcement) Regulation 1995* (ACT), s. 2.

50 *Classification (Publications, Films and Computer Games)(Enforcement) Act 1995* (ACT), s. 22.

51 *Classification of Publications, Films and Computer Games Act* (NT), s. 49.

National Emergency Response, the federal *Classification Act 1995* was amended to prohibit the possession and supply of prohibited material, including X18+ films, in prescribed areas.[52]

5.50 The sale and public exhibition of X18+ films is prohibited in all states.[53] As the Eros Association noted in its submission, it is illegal to sell X18+ films in all states, but it is not illegal for a person to possess such films.[54]

5.51 Submissions highlighted this anomaly, particularly in relation to the situation in the Northern Territory. For example, FamilyVoice Australia noted:

> Videos and DVDs are very portable items. Unless their sale is prohibited not just within the boundaries of the prescribed areas but throughout the Northern Territory then X18+ films will most likely continue to play a role in the premature sexualisation and sexual abuse of indigenous children.[55]

5.52 ACL recommended in its submission that, among other things:

- the possession or supply of X18+ films should be prohibited in the Northern Territory;
- there should be a prohibition on the use of a carrier service to send or receive an X18+ film; and
- the sale of X18+ films in the ACT should be prohibited.[56]

5.53 In evidence at one of the public hearings, ACL indicated its intention to approach the Northern Territory Government to discuss this matter.[57]

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52 See *Classification (Publications, Films and Computer Games) Act 1995* (Cth), Part 10. For the purposes of the Northern Territory National Emergency Response, the 'prescribed areas' are defined in section 4 of the *Northern Territory National Emergency Response Act 2007*.

53 See: *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (NSW), s. 6; *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* (Vic), s. 8 and s. 15; *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (Tas), s. 22 and s. 36; *Classification (Publications, Films and Computer Games) Enforcement Act 1996* (WA), s. 69 and s. 73; *Classification of Films Act 1991* (Qld), s. 37 and s. 39; *Classification (Publications, Films and Computer Games) Act 1995* (SA), s. 30 and s. 38.

54 Eros Association, *Submission 60*, p. 4. The exception to this is that the possession of X18+ material is prohibited in prescribed areas of the Northern Territory.

55 FamilyVoice Australia, *Submission 15*, p. 8.

56 Australian Christian Lobby, *Submission 25*, p. 7.

57 Mr Lyle Shelton, Australian Christian Lobby, *Committee Hansard*, 25 March 2011, p. 12. See also Mrs Roslyn Phillips, FamilyVoice Australia, *Committee Hansard*, 25 March 2011, pp 76-77, who indicated that FamilyVoice Australia has made many submissions to the Australian Government and various state government inquiries, but has not directly approached the Northern Territory Government on this issue.

5.54 The committee sought advice from the Department as to what steps the Australian Government is taking to address the situation in the Northern Territory. Officers of the Department stated that they were not aware of any specific discussions in which the Australian Government has insisted on the Northern Territory banning the sale of X18+ films in the Northern Territory.[58] Further, departmental officers indicated that it is:

> ...really a matter for the Northern Territory government...[I]n terms of the enforcement of areas where certain types of product can be properly supplied, that is a matter for the jurisdictional enforcement legislation and law enforcement agencies to do that.[59]

5.55 In answers to questions on notice, the Department reiterated that the availability of X18+ material is normally a matter for state and territory governments, but also noted the measures in the *Classification Act 1995* regarding the possession and supply of pornography in prescribed areas of the Northern Territory:

> To support these measures, in 2008 officers from the Classification Branch of the Department provided classification training in relation to the [Emergency Response] to officers from the Northern Territory Police, the Australian Crime Commission, the Australian Federal Police and the Commonwealth Department of Families, Housing, Community Services and Indigenous Affairs...in Darwin and Alice Springs. The Department continues to work with the Northern Territory Department of Justice on [Emergency Response] classification matters.[60]

58 *Committee Hansard*, 27 April 2011, p. 30.

59 *Committee Hansard*, 27 April 2011, p. 30.

60 Attorney-General's Department, answers to questions on notice, received 18 May 2011.

CHAPTER 6

Enforcement of the classification system and interaction of the National Classification Scheme with Customs regulations

6.1 Term of reference (c) refers to 'the enforcement system, including call-in notices, referrals to state and territory law enforcement agencies and follow-up of such referrals'.

6.2 In its submission, the Attorney-General's Department (Department) noted that, pursuant to the National Classification Scheme, the states and territories are chiefly responsible for enforcing the laws under the National Classification Scheme, and that neither the Department nor the Classification Board has powers of enforcement.[1] The agencies responsible for enforcement of classification laws in each state and territory jurisdiction are as follows:

> The ACT Office of Regulatory Services and ACT Policing (part of the Australian Federal Police) enforce classification laws in the ACT. The Department of Employment, Economic Development and Innovation enforces classification laws in Queensland, on behalf of the Queensland Department of Justice and Attorney-General. State and Territory police are responsible for enforcing classification laws in other jurisdictions.[2]

6.3 This chapter considers the effectiveness of the 'call-in' notice regime along with the adequacy of information-sharing between Commonwealth and state and territory agencies in relation to the referral of classification matters. The chapter also examines the enforcement of classification laws by states and territories, and discusses the role of the Classification Liaison Scheme.

6.4 There is also discussion in this chapter of term of reference (d), the interaction between the National Classification Scheme and relevant Customs regulations. As the Australian Customs and Border Protection Service (Customs) noted in its submission, an important part of its enforcement role is 'to prevent, deter and detect prohibited, harmful and prohibited goods from entering Australia'.[3] It is therefore appropriate to consider the interaction of the National Classification Scheme with Customs regulations in the broader context of the classification enforcement regime.

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1 Attorney-General's Department, *Submission 46*, p. 4.

2 Attorney-General's Department, *Submission 46*, p. 4.

3 Australian Customs and Border Protection Service, *Submission 10*, p. 4.

'Call-in' notices

6.5 The powers of the Director of the Classification Board to 'call-in' publications were explained in the Department's submission:

> If a publication is unclassified, the Director has powers under the Commonwealth Classification Act and the State and Territory enforcement Acts to require publishers to submit an application for classification of a publication within three days, when the Director has reasonable grounds to believe the publication is submittable and is or will be published in Australia (the 'call-in' power).[4]

6.6 Section 23A of the *Classification Act 1995* makes provision for the Director of the Classification Board to call-in films if:

(a) there are reasonable grounds to believe that an unclassified film is not an exempt film; and

(b) the film is being published in the ACT, or there are reasonable grounds to believe it will be published in the ACT.[5]

6.7 A person who receives a call-in notice under section 23A of the *Classification Act 1995* has three days to comply with the notice.[6]

6.8 The Department's submission set out the numbers of call-in notices issued by the Director of the Classification Board in recent years, and the corresponding response to these call–in notices:

> In 2009-10, the Director called in 49 adult publications and 444 adult films.
>
> In the 2010-11 period to 31 December 2010, the Director called in 8 adult publications and 32 adult films.
>
> Only one of the publishers of adult magazines has complied with a call-in notice issued by the [Classification] Board. While some distributors indicated they no longer have copies of the called in product to submit, it is an offence not to comply with a call-in notice. Where call-in notices are not complied with the Department refers these matters to State and Territory enforcement agencies.

6.9 The Director of the Classification Board gave evidence to the Senate Legal and Constitutional Affairs Legislation Committee during the hearings for Budget Estimates 2011-12 that, in the current financial year to 30 April 2011, he had called in

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4 Attorney-General's Department, *Submission 46*, pp 5-6. See *Classification Act 1995*, s. 23.

5 'Publish' is defined in section 5 the *Classification Act 1995* to include sale, offer for sale, let on hire, exhibit, display, distribute and demonstrate.

6 *Classification Act 1995*, ss. 23A(3). Similar provisions exist in state and territory enforcement legislation: see, for example, *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* (Vic) s. 60A. There are also provisions for call-in notices to be issued in respect of computer games: see, for example, Classification Act, s. 24.

seven publications and 158 adult films. Only one of those call-in notices for publications has been complied with and none of the film call-in notices have been complied with.[7]

6.10 The lack of compliance with call-in notices has been an issue that has been discussed by the Senate Legal and Constitutional Affairs Legislation Committee for a number of years in the context of the estimates process.[8] At the hearings for Additional Budget Estimates 2010-11, the Director of the Classification Board reiterated his long-held view that the failure of publishers and distributors to respond to call-in notices does not mean that the system is a failure:

> To date, only one call-in notice for adult publications has been complied with, and the majority of films called in have not been complied with either. ...I do not believe this constitutes a systems failure, but in fact establishes that a breach of classification legislation has occurred. In each and every instance the Attorney-General's Department notifies the relevant law enforcement agency of the failure to comply. I will continue to use my call-in powers in circumstances where I believe it is warranted.[9]

6.11 The committee notes that when questioned about the lack of responses in relation to call-in notices at a hearing for Additional Estimates 2010-11, the Director of the Classification Board responded that he is 'pleased that progress is being made with enforcement'.[10]

6.12 Evidence to this inquiry suggested, however, that the high level of non-compliance of publishers and distributors with call-in notices is indicative of a failure of the system. For example, FamilyVoice Australia referred to the 'abysmal' response rate to call-in notices:

> It would be helpful to try to improve the abysmal response rate to call-in notices by introducing penalties for failure to comply with a notice, including suspension from using any services of the Classification Board for a fixed period, say twelve months, and until all call-in notices are complied with.[11]

6.13 Similarly, Ms Melinda Tankard Reist of Collective Shout told the committee:

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7 Senate Legal and Constitutional Affairs Legislation Committee, Budget Estimates 2011-2012, *Estimates Hansard*, 25 May 2011, p. 33.

8 See, for example, Senate Legal and Constitutional Affairs Legislation Committee, Budget Estimates 2009-2010, *Estimates Hansard*, 25 May 2009, p. 84; Supplementary Budget Estimates 2010-2011, *Estimates Hansard*, 18 October 2010, p. 14; Budget Estimates 2011-2012, *Estimates Hansard*, 25 May 2011, pp 34-35.

9 Senate Legal and Constitutional Affairs Legislation Committee, Additional Budget Estimates 2010-2011, *Estimates Hansard*, 22 February 2011, p. 32.

10 Senate Legal and Constitutional Affairs Legislation Committee, Budget Estimates 2010-2011, *Estimates Hansard*, 24 May 2010, p. 78.

11 FamilyVoice Australia, *Submission 15*, p. 5.

> The Classification Board has shown that it is ineffective to deal with recalcitrant distributors...They have ignored hundreds and hundreds of call-in notices. There are no penalties for non-compliance, and yet they want even more self regulation than they already have, when they cannot even comply with the basic standards right now....
>
> We recommend a major overhaul of the enforcement system, including introducing penalties for failure to respond to call-in notices, removing distributors who breach the scheme from access to further classification services...[12]

6.14 The Eros Association described the call-in system for adult publications as 'entirely ineffective':

> While available for all classifiable material it is only ever used on publications. It is unclear as to what the point actually is in 'calling in' a publication and [the] purpose it serves. As stated earlier, numerous companies sell the same publication. The end result of a call-in, is that the classification of the modified version is revoked even though that was not the version found in the market place.[13]

6.15 Ms Julie Gale from Kids Free 2B Kids told the committee of her frustration with the call-in system, and explained why she had stopped submitting material to the Classification Board for auditing:

> I could be out there buying porn magazines and submitting them to be audited every week. I see examples, because I know the [guidelines] very well now, of magazines that are clearly not meant to be on the public shelves but, in terms of spending dollars consistently on the porn industry, I just stopped.
>
> As to the numbers that the Classification Board could be sending out, the call-in notices could be so much greater than the numbers that they are because they are relying on people like Melinda [Tankard Reist] and I and others to bring to their attention the magazines that are not complying. Some time ago I stopped even bothering, because we just saw that it was futile and that most of them do not comply. I certainly did not want to keep spending money on proving the point.[14]

6.16 The Australian Christian Lobby (ACL) referred to the 'systemic failure of the call-in system':

> Despite the Classification Board having the capacity to 'call-in' for classification any submittable publication, or any film or computer game, this power has proven extremely ineffective in preventing unclassified pornographic content from becoming available on the Australian market.

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12 *Committee Hansard*, 27 April 2011, p. 24.

13 Eros Association, *Submission 60*, p. 12.

14 *Committee Hansard*, 27 April 2011, p. 24.

> According to answers to questions taken on notice in a recent round of Senate Estimates hearings, 'Since 1 January 2008, 858 items mainly concerned with sex or sexualised nudity ("adult material") have been called in'. The result: 'In this period, no distributors of adult material have submitted films or publications for classification as a result of the call-ins'.[15]

6.17 ACL also called for 'heavy financial penalties' where call-in notices are not complied with, and for an increase in penalties where there are repeated failures of compliance.[16]

Referrals to state/territory agencies and follow-up of referrals

6.18 The Department's submission noted the issues which are the main subject of referrals to law enforcement agencies:

- displaying for sale unclassified adult films or submittable publications;
- displaying for sale adult films and/or publications with incorrect markings, suggesting a film or publication is classified or has a different classification;
- non-compliance with a call-in notice issued by the Director of the Classification Board to submit a film or publication for classification; and
- advertising for sale unclassified adult films.[17]

6.19 In terms of the follow-up of referrals, the Department explained that '[l]aw enforcement agencies are asked, but are not required, to advise the Department when they investigate a referral from the Department'.[18]

6.20 This apparent gap in the enforcement system, where matters are referred to state and territory law enforcement agencies and there is no requirement for the agency to inform the Department of the outcome of the referral, has also been the subject of consideration by the Senate Legal and Constitutional Affairs Legislation Committee in the estimates process. The Secretary of the Department advised in 2010 that there is 'some level of awareness' about referrals.[19] It was also noted that, while state and territory agencies may contact the Department for advice or assistance, the

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15 Australian Christian Lobby, *Submission 25*, p. 4. See also Media Standards Australia, *Submission 21*, pp 10-11.

16 Australian Christian Lobby, *Submission 25*, p. 4.

17 Attorney-General's Department, *Submission 46*, pp 4-5.

18 Attorney-General's Department, *Submission 46*, p. 5.

19 Senate Legal and Constitutional Affairs Legislation Committee, Budget Supplementary Estimates 2010-2011, *Estimates Hansard*, 18 October 2010, p. 15.

Commonwealth 'does not have a repository of data about state and territory law enforcement'.[20]

6.21 During the current inquiry, the Department was able to provide the committee with some details in relation to enforcement actions:

> The Department is aware that state and territory police have undertaken a number of enforcement actions over the past eighteen months. For example in December 2010 Classification Liaison Scheme (CLS) officers were advised by NSW Police of action against two adult retailers in the Lake Illawarra area. 5,000 DVDs were seized from one store and 2,000 from another. CLS has referred these premises to the NSW Police in 2009.[21]

6.22 Further:

> CLS have been advised that on 4 May 2011, the owner of one store pleaded guilty and was fined $1500 plus court costs and an order was made for the 5,000 DVDs seized to be destroyed. On 4 May 2011 the owner of the store where 2,000 DVDs were seized pleaded not guilty...[22]

6.23 The Department also informed the committee that, from July 2010 to April 2011, the Department was notified of police investigations into seven Classification Liaison Scheme referrals. The outcomes of those referrals included, for example, warnings being issued with no charges being laid; a fine of $9,000 and an 18-month good behaviour bond; and a total of over 23,000 films seized and destroyed.[23]

Need for enhanced information-sharing

6.24 The lack of follow-up of referrals was highlighted by witnesses as a key flaw in the cooperative National Classification Scheme. For example, Ms Melinda Tankard Reist of Collective Shout noted:

> ...the absence of a centralised information system about follow up by any state or territory law enforcement officers for continual breaches of the scheme.[24]

6.25 ACL referred to a 'reckless lack of coordination between the [Classification] Board, the Commonwealth Attorney-General's Department and state and territory law enforcement agencies to have notices complied with'.[25]

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20 Senate Legal and Constitutional Affairs Legislation Committee, Budget Supplementary Estimates 2010-2011, *Estimates Hansard*, 18 October 2010, p. 15.

21 Attorney-General's Department, *Submission 46*, p. 5.

22 Attorney-General's Department, answers to questions on notice, received 18 May 2011.

23 Attorney-General's Department, answers to questions on notice, received 18 May 2011.

24 *Committee Hansard*, 27 April 2011, p. 21. See also Australian Christian Lobby, *Submission 25*, p. 4.

6.26 FamilyVoice Australia also emphasised the need for the coordinated sharing of information in relation to law enforcement:

> While it is appropriate that law enforcement of the classification system remains a matter for the states it would be very useful for the Commonwealth to play a role in coordinating information on the results of law enforcement efforts. Publications and films that are found to be in breach of the classification system are likely to be offered for sale in more than one state, not just in the state in which a copy of the offending publication or film has been found.[26]

6.27 It appears that the idea of a centralised database for sharing information on referrals has had some consideration by the relevant Commonwealth, and state and territory bodies. As the Department's submission noted:

> At the first Classification Enforcement Forum held in Sydney in 2010, representatives [of the Working Party] indicated an interest in increasing coordination and information sharing to enhance enforcement of classification offences.
>
> ...While there is no obligation for enforcement agencies to advise of the outcomes of investigations the Minister wrote to police Ministers on 10 February 2011 asking for this information as part of a wider strategy of increasing information sharing to improve compliance with classification laws. This will be progressed through the Classification Enforcement Forum.[27]

6.28 In evidence to the committee, officers of the Department indicated that they 'support the general merit of the idea' of a centralised database.[28] The Department was asked to indicate any barriers to the establishment of a centralised database for tracking referrals of classification matters:

> A centralised platform for intelligence sharing would require the commitment and participation of all relevant state and territory government agencies. Policy discussions on the feasibility and any impediments are ongoing and will be further considered...[T]he need for a centralised database would also need to be fully assessed, including whether the objective could be achieved in other ways.[29]

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25 Australian Christian Lobby, *Submission 25*, p. 4.

26 FamilyVoice Australia, *Submission 15*, p. 5.

27 Attorney-General's Department, *Submission 46*, pp 4 and 6. The Classification Enforcement Forum is a Commonwealth initiative attended by law enforcement and policy representatives from the Commonwealth, the states and territories, the Australian Communications and Media Authority and the Australian Customs and Border Protection Service. Participants exchange information on classification enforcement issues affecting each jurisdiction and explore ways in which shared intelligence could assist enforcement outcomes.

28 *Committee Hansard*, 27 April 2011, p. 36.

29 Attorney-General's Department, answers to questions on notice, received 18 May 2011.

Effectiveness of the enforcement system

6.29 There appeared to be a range of views on the effectiveness of the enforcement of classification. For example, Ms Irene Graham referred to the states and territories giving such work a 'low priority'. Ms Graham attributed that to an 'ever increasing censorship criteria'; and, further, 'in the absence of evidence of widespread community support for more censorship...both governments and their police services are likely aware that censorship enforcement may be a pretty much thankless activity...'.[30]

6.30 Mr Robert Harvey described the enforcement system as 'more than adequate', stating that, if anything, state and territory agencies were 'overzealous in ensuring that action is taken against anything that might be an offence'.[31] In contrast, the Australian Council on Children and the Media (ACCM) described the application of the enforcement provisions as 'very lax'.[32] In evidence to the committee, Ms Barbara Biggins of the ACCM set out her concerns in more detail:

> ...enforcement at the level of publications: where they are displayed; whether in fact they are displayed in conformity with the requirements for how they could be displayed; and whether in fact publications are actually being displayed with appropriate classifications. There seems to be quite some evidence that there are issues there. Because there is very little monitoring or a great variability in the monitoring of publications from state to state, that is an area of enforcement that really does need to be looked at.
>
> The other area of enforcement that would concern us is whether enforcement in fact can occur. When you are looking at the legally classified categories of MA15+ and R18+, there is certainly very good evidence that it is almost impossible to enforce the age restrictions on portable items such as DVDs and computer games. It is almost impossible to protect children despite what the law says because once those portable items are out of the retail outlet then there are very few controls.[33]

6.31 Salt Shakers called for better education in relation to the enforcement system for classification:

> There needs to be a better system that would allow citizens to work with law-enforcement agencies on this matter. Very few individuals know the difference between Category 1, Category 2 and nonrestricted and 'Refused classification' pornographic material. Often they don't know that it is illegal to sell or display X18+ material in stores (even adult stores) around the states. Even if they do, and they notice breaches of the *Guidelines* the person does not know who to contact. If a person does not know what the

30 Ms Irene Graham, *Submission 20*, p. 3.

31 Mr Robert Harvey, *Submission 9*, p. 2.

32 Australian Council on Children and the Media, *Submission 44*, p. 3.

33 *Committee Hansard*, 25 March 2011, p. 64.

> classification system entails or how it is enforced, then often the classifying of publications is, at best, a token effort.[34]

6.32 The Arts Law Centre of Australia called for 'standardisation in classification enforcement laws' because they vary in detail across the states and territories.[35]

6.33 The Office of Public Prosecutions Victoria (OPP) advised that it has prosecuted very few cases in the higher courts in recent years:

> ...figures [reveal] that during the period 2000 to 2010...there were only 11 offences of Possessing an unclassified or RC film with intent to sell in a commercial quantity and 1 offence of Copying an unclassified film with intent to sell in a commercial quantity recorded. The state Act contains very few indictable offences. With respect to both of the above offences none have been recorded in the last five years.
>
> During the same time period 30 offences of Possessing an X rated film with intent to sell or exhibit, 18 offences of Possessing an unclassified film, 45 offences of Selling an unclassified film, 6 offences of Selling a Refused Classification film and 29 offences of Selling a film classified X are recorded. Many of the less serious offences under the state Act are recorded as also having very few or no offences recorded.[36]

6.34 The OPP also noted that 'the statistics do appear to reveal an emphasis or concentration of effort on the offences...relating to on-line information services'.[37] Further:

> As to the reasons for the small number of reported offences it is unclear whether this is due to factors such as the complexity of the state Act, the lack of a specialised unit within Victoria Police specifically to deal with such matters or a change in resourcing priorities by Victoria Police.[38]

6.35 The committee also notes the views of the Director of the Classification Board, when questioned about an apparent lack of action by state and territory law enforcement agencies:

> My impression is that it really comes down to the priorities that the states and territories place on this. They wish to have these rules and regulations in place, they are parties to the scheme but in pursuing these matters presumably their police forces...have to make decisions about what resources they put to it. The effort that goes into it varies from state to state.

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34 Salt Shakers, *Submission 23*, p. 11.

35 Arts Law Centre of Australia, *Submission 33*, p. 9.

36 Office of Public Prosecutions Victoria, *Submission 14*, p. 2.

37 Office of Public Prosecutions Victoria, *Submission 14*, p. 2.

38 Office of Public Prosecutions Victoria, *Submission 14*, p. 3.

> There is possibly, if I could say, an issue of how fair dinkum the states are about this.[39]

6.36 Finally, Mr Bruce Arnold and Dr Sarah Ailwood highlighted the need for the collection of empirical evidence as a basis for policy development in this area:

> As a basis for informed policy development and coherent enforcement the Committee may wish to encourage the collection, critical analysis and publication of data...[Such] activity might be undertaken by the Australian Institute of Criminology or the Australian Law Reform Commission (ALRC).[40]

Classification Liaison Scheme

6.37 The Department's submission set out the role of the Classification Liaison Scheme (CLS):

> CLS is a joint Australian Government, State and Territory initiative established in 1997 with the primary functions of educating industry about classification and checking compliance with classification laws.
>
> CLS officers visit a wide range of premises throughout Australia, including cinemas, DVD and computer game stores, newsagencies, petrol stations, adult premises, games arcades and convenience stores. CLS officers actively check whether classifiable material complies with classification laws and refer breaches to law enforcement agencies.[41]

6.38 The Classification Liaison Scheme has four officers.[42] The Department's submission noted that, for the first half of the 2010-11 financial year (to 31 December 2010), the Classification Liaison Scheme has:

- conducted 490 site visits across all states and territories, including regional centres;
- contacted 124 companies about breaches of classification laws; and
- referred 49 restricted premises and three websites to enforcement agencies.[43]

6.39 The Department provided further information on these statistics in answers to questions on notice. For example, in relation to the 124 companies contacted about breaches of classification law noted above, adult premises are not included in this category, and the breaches identified were relatively minor. The Department stated that, in general, 'companies are very cooperative and responsive to the Classification

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39 *Committee Hansard*, 7 April 2011, p. 62.

40 Mr Bruce Arnold and Dr Sarah Ailwood, *Submission 37*, p. 4.

41 Attorney-General's Department, *Submission 46*, p. 5.

42 *Committee Hansard*, 27 April 2011, p. 39.

43 Attorney-General's Department, *Submission 46*, p. 5.

Liaison Scheme advice and incorrect practices are often corrected immediately'.[44] The Department also outlined some of the responses received where companies were contacted about breaches:

- a website was corrected after films were advertised with incorrect classification;
- the catalogue for a major retailer was withdrawn for advertising unclassified computer games and the distributor submitted the games for classification;
- a film was submitted for classification after being incorrectly assessed by the distributor as exempt from classification.[45]

6.40 The committee notes that witnesses expressed a range of views on the Classification Liaison Scheme's work. The Eros Association highlighted concerns that it has about the role of the Classification Liaison Scheme apparently evolving from one of education to one of enforcement.[46] Alternatively, Ms Melinda Tankard Reist of Collective Shout was of the view that the Classification Liaison Scheme does little to assist in the follow-up of breaches of the *Classification Act 1995*.[47]

Interaction between the National Classification Scheme and Customs regulations

6.41 Customs describes its responsibility in relation to classification as:

> [P]reventing imports of objectionable material. The standard for determining what is objectionable mirrors the 'refused classification' standard under the national classification guidelines and includes, materials depicting child pornography, sexualised violence or materials that incite terrorism.[48]

6.42 In its submission, Customs emphasised that it does not have a role in classifying goods or determining whether goods are packaged to meet certain requirements for display, and described the limitations of its role:

> Determinations by officers are intentionally limited to assessing whether the goods would be considered objectionable under customs legislation at the time they are imported. If they are not considered to be objectionable, no further assessments are made as to their classification...This is appropriate as many goods assessed are intended only for private consumption.[49]

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44 Attorney-General's Department, answers to questions on notice, received 18 May 2011.

45 Attorney-General's Department, answers to questions on notice, received 18 May 2011.

46 Eros Association, *Submission 60*, pp 13-14.

47 *Committee Hansard*, 27 April 2011, p. 24.

48 Australian Customs and Border Protection Service *Annual Report 2009-10*, p. 65.

49 Australian Customs and Border Protection Service, *Submission 10*, p. 3.

Defining 'objectionable' material

6.43 Regulation 4A of the Customs (Prohibited Imports) Regulations 1956 (Customs PI Regulations) prohibits the importation of 'objectionable goods' unless permission is received from the Attorney-General. Objectionable goods are defined as publications and any other goods that:

- describe, depict, express or otherwise deal with matters of sex, drug misuse or addiction, crime, cruelty, violence or revolting or abhorrent phenomena in such a way that they offend against the standards of morality, decency and propriety generally accepted by reasonable adults to the extent that they should not be imported; or
- describe or depict in a way that is likely to cause offence to a reasonable adult, a person who is, or appears to be, a child under 18 (whether the person is engaged in sexual activity or not); or
- are computer games that are unsuitable for under-18s; or
- promote, incite or instruct in matters of crime or violence; or
- promote or incite the misuse of a prohibited drug; or
- advocate the doing of a terrorist act.[50]

6.44 Border control measures are linked to the National Classification Scheme through a definition of objectionable material that mirrors the Refused Classification category in the National Classification Scheme. While the Customs PI Regulations are intended to mirror the *Classification Act 1995*, they are not identical.[51]

6.45 The penalty for importing objectionable material differs depending on the nature of the offence. Personal importations can include fines of up to three times the value of the goods or $110,000 (whichever is greater), while commercial importations can also lead to five years imprisonment.[52] Importation of child pornography, whether personal or commercial, can result in penalties of up to $275,000 in fines and ten years' imprisonment.[53]

6.46 Due to the heavy criminal penalty imposed on an individual that imports child pornography, the *Customs Act 1901* includes a detailed definition of items of child pornography or child abuse material that is independent from the definition provided in the Customs PI Regulations.[54]

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50 Australian Customs and Border Protection Service, *Submission 10*, pp 1-2.

51 Australian Customs and Border Protection Service, *Submission 10*, p. 2.

52 Australian Customs and Border Protection Service, *Submission 10*, p. 2.

53 Australian Customs and Border Protection Service, *Submission 10*, p. 2.

54 Australian Customs and Border Protection Service, *Submission 10*, p. 2.

Determining objectionable material

6.47 While the Department has policy responsibility for the National Classification Scheme, Customs administers import (and export) controls on objectionable material at the borders, on behalf of the Department.[55]

6.48 The Department provides training to Customs officers to assist them in their ability to make determinations. In addition, the Department advises Customs about classification decisions, including reclassifications and lists of items that have been refused classification.[56]

6.49 Customs will also consult the Australian Federal Police or state and territory police, and potentially child welfare authorities, on any detections of child pornography.[57]

Enforcement action by Customs

6.50 Customs detects and assesses a substantial quantity of objectionable material each year. Its general practice is to refer serious offences, such as child pornography, for prosecution, whereas in less serious cases offending items are seized and destroyed.[58]

6.51 Customs provided the committee with detailed information relating to the detection of objectionable material:

55 Australian Customs and Border Protection Service, *Submission 10*, p. 2.

56 Australian Customs and Border Protection Service, *Submission 10*, p. 2.

57 Australian Customs and Border Protection Service, *Submission 10*, p. 2.

58 Australian Customs and Border Protection Service, *Annual Report 2008-09*, p. 81.

Table 6.1: Detection of objectionable material (2009–10)[59]

	Mode of entry					
Media Type	Passengers	Post	Small Craft	Cargo (Air)	Cargo (Sea)	**Totals**
Computer	82		2	1		**85**
DVD	346	355	16	132	21	**870**
Electronic Storage*	206	6	9	6		**227**
Game	1	105		4		**110**
Mobile Phone	35		1	1		**37**
Publication	15	11	2	5	2	**35**
Unknown**	7	2				**9**
Totals	**692**	**479**	**30**	**149**	**23**	**1373**

6.52 As described in Table 6.1, Customs made 1,373 detections of objectionable material in the 2009-10 financial year. Customs informed the committee that, of these, 54 cases were prosecuted: 47 cases involved child pornography; seven cases involved abhorrent material (for example, harmful or disgusting fetishes); and two cases involved violence. None of these cases related to terrorism material. The majority of these prosecutions arose from detections relating to passengers. All but four of the child pornography cases were successfully prosecuted.[60]

6.53 For the 2009-10 financial year, sentences handed down included thirty custodial sentences ranging from one month to three years, two suspended sentences over 12 months, 11 good behaviour bonds ranging from 12 months to three years and one community service sentence. For the same period, court–imposed payments totalled $211,754.[61]

59 Australian Customs and Border Protection Service, answer to question on notice, received 25 May 2011. Figures represent detections rather than items; *electronic storage includes computer hard drives, USB devices, video and digital camera memory cards and similar goods; **unknown relates to records where the title of the goods is recorded but the media type was not recorded.

60 Australian Customs and Border Protection Service, answer to question on notice, received 25 May 2011.

61 Australian Customs and Border Protection Service, answer to question on notice, received 25 May 2011.

6.54 Customs also provided information for the current financial year, to 30 April 2011. In that period, Customs made 1,072 detections. Customs noted that it has experienced a reduction in the number of objectionable material matters being referred for investigation compared to 2009-10. In particular, fewer child pornography related matters have been referred.[62]

6.55 Customs informed the committee that, while the detection rate of objectionable material has remained consistent, the reduction of serious offences may indicate that an information campaign undertaken by Customs is having an effect on the number of importations of this nature.[63]

Issues

6.56 Customs submitted that any revision of the criteria by which material is Refused Classification under the National Classification Scheme would require similar amendments to be made to the Customs PI Regulations. This would be necessary to ensure that the classification and border control regimes continue to complement one another.[64]

6.57 As noted above, Customs officers determine whether material is objectionable, based on criteria in the Customs PI Regulations that mirror the National Classification Scheme guidelines for a refusal of classification. During the inquiry, Ms Irene Graham submitted that the determination that material is 'objectionable', and therefore prohibited, should be made by the Classification Board as the appropriate authority on classifications in Australia:

> Members of the Australian public are constantly told that they should "trust" the National Classification Scheme because classification decisions are made by a so-called "independent" Classification Board whose names are made publicly available. However, the customs import regulations basically import the definition of "Refused Classification" from the Classification Code and allow (unknown/unidentified) customs officers to guess whether or not the Classification Board would "refuse classification" to particular material.[65]

6.58 For this reason, Ms Graham recommended that relevant legislation and regulations should be amended to ensure that Customs officers refer material to the Classification Board for classification.[66]

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62 Australian Customs and Border Protection Service, answer to question on notice, received 25 May 2011.

63 Australian Customs and Border Protection Service, answer to question on notice, received 25 May 2011.

64 Australian Customs and Border Protection Service, *Submission 10*, p. 3.

65 Ms Irene Graham, *Submission 20*, p. 3.

66 Ms Irene Graham, *Submission 20*, p. 3.

6.59 The Eros Association alleged that new operating rules adopted by Customs in 2011 have changed the way in which films are treated:

> Customs now maintain that the industry cannot import a film or publication that 'may' be Refused Classification...[M]ost publications and almost all films need to be modified to meet the stringent Australian classification guidelines. For the past 30 years this has meant that bona fide operators have had to bring in a master tape or disk from overseas which is modified, then submitted and classified and then duplicated from. Now Customs are saying that even a master disk has to be classified to bring it in but you cannot classify the film if you do not have a copy of it in the country.[67]

6.60 The Eros Association described this as a 'Catch-22' situation that was significantly affecting legitimate importers of X18+ rated films.[68] Expanding upon the effects of this apparent change in policy, Mr Robert Swan, Coordinator of the Eros Foundation, stated:

> My members [want] to put...the position that the Australian classification scheme, as a national scheme, is completely broken and for them it does not work. I think this year we will see zero classifications for all adult publications in Australia and we will now see, as a result of a Customs decision taken two weeks ago, zero classifications for X-rated films in Australia. If you look back around about the mid-1990s, there were 6,000 classifications a year for X-rated films in Australia. As I say, if nothing happens with the change at Customs in which they are now forbidding adult importers to bring in masters from which they can edit and make X-rated films that fit the Australian scheme, then there will be no classifications.[69]

6.61 Salt Shakers submitted that the ability of Customs to screen imports needs to be improved to ensure that all objectionable material is captured.[70]

6.62 Two other submitters noted that the ability to source material that has been Refused Classification through the internet impacts on the ability of Customs to prevent physical importations.[71]

6.63 FamilyVoice Australia noted that the definition of objectionable material seeks to mirror the Refused Classification category, including any computer game rated above MA15+. FamilyVoice Australia drew the committee's attention to the fact that the sale of X18+ films is prohibited in all Australian jurisdictions except for the ACT and parts of the Northern Territory (NT) (possession of such material is prohibited in certain areas of the NT). FamilyVoice Australia therefore recommended

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67 Eros Association, *Submission 60*, p. 13.

68 Eros Association, *Submission 60*, p. 13.

69 *Committee Hansard*, 25 March 2011, p. 52.

70 Salt Shakers, *Submission 23*, p. 11. See also Family Council of Victoria, *Submission 22*, p. 10.

71 See Civil Liberties Australia, *Submission 34*, p. 37; Mr Bruce Arnold and Dr Sarah Ailwood, *Submission 37*, p. 4.

that the Customs PI Regulations should be amended to prohibit the importation of X18+ films so as to reflect the position of the majority of jurisdictions in Australia.[72]

72 FamilyVoice Australia, *Submission 15*, p. 6.

CHAPTER 7

Artworks, film festivals and 'advocating terrorism'

7.1 This chapter deals with a range of issues raised in the course of the inquiry with respect to the National Classification Scheme, including:

- application of the National Classification Scheme to artworks, and particularly the role of artistic merit in classification decisions (term of reference (e));
- film festival classification exemptions (term of reference (o)); and
- section 9A of the *Classification Act 1995*, relating to the advocacy of terrorism (term of reference (o)).

Classification of artworks

7.2 Term of reference (e) relates to the application of the National Classification Scheme to works of art and the role of artistic merit in classification decisions. The committee received a substantial amount of evidence on this issue.

7.3 The Arts Law Centre of Australia's (Arts Law Centre) submission noted that the requirement to classify a work prior to public exhibition under the federal *Classification Act 1995* does not traditionally extend to works of art that are exhibited in gallery spaces.[1] The *Classification Act 1995* may apply, however, by virtue of the nature of the media included in the artwork.

7.4 This section of the report considers the circumstances in which the National Classification Scheme does apply to works of art, and outlines issues raised during the inquiry in relation to the application of the National Classification Scheme to works of art. The discussion centres around two aspects of 'artistic merit', namely:

- the role of artistic merit in classifying works of art; and
- the role of a defence of artistic merit with respect to child pornography, child exploitation and the production of child abuse material offences under Commonwealth, state and territory legislation.

Application of the National Classification Scheme to artworks

7.5 In its submission, the Arts Law Centre noted that the *Classification Act 1995* may apply to artwork where it contains classifiable material such as film or video:

> This would include multimedia works such as installation art which frequently incorporates a video element, and are exhibited in gallery spaces.

1 Arts Law Centre of Australia, *Submission 33*, p. 6.

> Such pieces have been increasing in popularity with the rise of digital technology as contemporary art...[2]

7.6 While noting the exemptions for classification of films listed in section 5B of the *Classification Act 1995*, the Arts Law Centre argued:

> It is unlikely that films such as those used in multimedia works of art are exempt from the classification requirement…Some multimedia art films may be exempt as a musical presentation or record of a hobby or live performance, however these would be required to wholly be a documentary record of that hobby or live performance. A film used in a work of art that exists as a piece of art, not a documentary record, would not be automatically exempt from the classification requirement. More importantly, for many artists their artistic activities are a professional activity, not a hobby activity.[3]

7.7 The Arts Law Centre noted that the fee for classification of a film for public exhibition, currently $990 for a 0-60 minute film, may be beyond the means of many artists using films in their works of art.[4]

7.8 The Arts Law Centre set out the circumstances when the *Classification Act 1995* would apply to photography or visual artworks:

> Under the *Guidelines for the Classification of Publications* bona fide artworks are not usually required to be submitted [for] classification as they are not generally considered to be 'submittable publications'.
>
> ...
>
> 'Publication' is defined in the Act to include any 'pictorial matter', not including a film, computer game or advertisement for a film or computer game. As such, visual artworks such as photographs are publications under the Act, and if they contain certain depictions or descriptions, may be considered submittable for classification.[5]

7.9 The submission from the Attorney-General's Department (Department) highlighted that the Director of the Classification Board may also play a role in judging material to be submittable in the context of calling-in publications for classification as authorised under state and territory enforcement legislation.[6] The Department gave the example of the issuing of a call-in notice for the July 2008

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2 Arts Law Centre of Australia, *Submission 33*, p. 6.

3 Arts Law Centre of Australia, *Submission 33*, p. 6.

4 Arts Law Centre of Australia, *Submission 33*, pp 6-7. The Arts Law Centre also noted that an additional fee of $400 applies where priority processing is required. See also the Australian Government Classification website, *Fees for classification – Public exhibition films* at: http://www.classification.gov.au/www/cob/classification.nsf/Page/Industry_FeesforClassification_FeesforClassification-PublicExhibitionFilms, (accessed 27 May 2011).

5 Arts Law Centre of Australia, *Submission 33*, pp 7-8.

6 Attorney-General's Department, *Submission 46*, p. 8.

edition of the magazine *Art Monthly*, which contained reproductions of Bill Henson photographs, as demonstrating that arts publications and reproductions of artworks may be submittable publications requiring classification under the National Classification Scheme.[7]

7.10 The fee for the classification of a 0-76 page publication is $520.[8]

7.11 While there are limited circumstances in which the *Classification Act 1995* may apply to artworks, a number of submissions noted that an artist whose work contains contentious material may seek to have their work classified as a 'preventative measure' to 'ensure against any controversy'.[9]

7.12 The National Association for the Visual Arts (NAVA) noted that decisions about whether to have works classified is a dilemma for artists:

> For artists who explore sensitive or controversial material it presents a real and tangible dilemma. Do they pay the extensive costs of having their work classified, even when it is not likely to need classification, or do they defend their right to freedom of expression and risk prosecution or censorship?[10]

Role of 'artistic merit' in classification decisions

7.13 Section 11 of the *Classification Act 1995* provides that, in making a decision on the classification of a publication, film or a computer game, one of the matters to be taken into account is the 'literary, artistic or educational merit (if any) of the publication, film or computer game'.[11] The Arts Law Centre noted that 'artistic merit' is not defined in either the *Classification Act 1995*, the *Guidelines for the Classification of Publications 2005* or the *Guidelines for the Classification of Films and Computer Games*:

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7 Attorney-General's Department, *Submission 46*, p. 9. This issue of *Art Monthly* was ultimately classified Unrestricted with the inclusion of consumer advice recommending that the publication was unsuitable for readers under 15 years of age. The works of Bill Henson, and the issues surrounding his works, are considered later in this chapter.

8 See the Australian Government Classification website, *Fees for classification – Publications and Serial Declarations* at: http://www.classification.gov.au/www/cob/classification.nsf/Page/Industry_FeesforClassification_FeesforClassification-PublicationsandSerialDeclarations, (accessed 27 May 2011).

9 Arts Law Centre, *Submission 33*, p. 8. See also Associate Professor Robert Nelson, *Submission 68*, p. 16; National Association of Visual Artists, *Submission 64*, p. 10.

10 National Association of Visual Artists, *Submission 64*, p. 10.

11 Other matters to be taken into account under section 11 are: the standards of morality, decency and propriety generally accepted by reasonable adults; the general character of the publication, film or computer game, including whether it is of a medical, legal or scientific character; and the persons or class of persons to or among whom it is published, or is intended or likely to be published.

> It may be impliedly taken into context, which is emphasised in the Guidelines as being crucial in determining whether a 'classifiable element' is justified by the storyline or themes, however this is unclear...[12]

7.14 The Arts Law Centre's submission provided a detailed analysis of certain Classification Review Board decisions it has undertaken by it since 'the amount of weight artistic merit has in classification decisions is only known in [Review Board] decisions'.[13] The Arts Law Centre provided the following conclusive view based on its analysis:

> ...'[A]rtistic merit' was crucial in the Review Board's decision to ultimately grant a rating to works...that but for artistic merit, could have been refused classification...
>
> However, artistic merit alone is insufficient to ensure classification, with some works (again, usually film) [having] been refused classification and therefore banned in Australia despite acknowledgments of artistic merit...[14]

7.15 Submissions and witnesses commented that the term 'artistic merit' involves a subjective element. For example, Mr Bruce Arnold and Dr Sarah Ailwood submitted:

> Classification decisions should be based on content (eg the intensity and gratuitousness of violence) rather than on measures of artistic merit such as the deftness of the screenwriter or the brilliance of the cinematographer. It should not be the function of the [Classification Board] to articulate and implicitly enforce a particular aesthetic.[15]

7.16 Mr Paul Hotchkin from Media Standards Australia criticised the term as too broad and vague, arguing that '[a]nyone can justify artistic merit'.[16] Salt Shakers expressed the view that artistic merit should play a limited or non-existent role in relation to the classification of artworks.[17]

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12 Arts Law Centre of Australia, *Submission 33*, p. 11.

13 Arts Law Centre of Australia, *Submission 33*, p. 11. The Arts Law Centre noted that its analysis is based on decisions of the Classification Review Board in relation to films but also some publications. Classification Review Board decisions are published on the government's classification website at http://www.classification.gov.au/www/cob/classification.nsf/Page/Classification_in_AustraliaWho_we_areClassification_Review_Board_Decisions, (accessed 11 June 2011).

14 Arts Law Centre of Australia, *Submission 33*, pp 11-12.

15 Mr Bruce Arnold and Dr Sarah Ailwood, *Submission 37*, pp 4-5. See also Australian Council on Children and the Media, *Submission 44*, p. 4; Associate Professor Robert Nelson, *Submission 68*, p. 5.

16 *Committee Hansard*, 7 April 2011, p. 41.

17 Salt Shakers, *Submission 23*, p. 11.

7.17 The Office of Public Prosecutions Victoria (OPP) submitted that there needs to be a 'balancing' of the matters set out in section 11 of the *Classification Act 1995*:

> ...[A]rtistic merit should remain a factor to be taken into account by the Classification Board pursuant to s11 of the Commonwealth Act although it should not be elevated above the other factors that...are required by that section to take into account.[18]

7.18 One proposal put forward to address the concern in relation to artistic merit was for any assessment of the literary or artistic merit of a work to take into account the views of highly regarded arts professionals who are specialists in the medium being assessed.[19] Associate Professor Robert Nelson suggested that artistic intentions should be the key criterion in all matters of classification:

> [I]n the law, intention is always a critical factor; and however difficult it may be to establish artistic intention, it is much safer and more reliable than merit. In all other circumstances, the law makes decisions about the intentions of a suspected felon; and no one is found guilty unless he or she [possesses] an evil mind (*mens rea*) over the evil deed. I cannot see how art and its legal or classificatory evaluation operate differently and see no basis for appealing to artistic merit as some kind of moral disclaimer.[20]

Works featuring children

7.19 The issue of works featuring children and, in particular, naked children has been the subject of considerable attention, and concern, in recent years. Whether such works constitute 'art' or 'child pornography' is the subject of heated debate between various groups in the community.

Bill Henson case

7.20 One specific issue considered in the course of this inquiry was the differing treatment of the defence of 'artistic merit' in relation to child abuse or child pornography offences contained in Commonwealth and state and territory criminal law.

7.21 The most well known case in relation to this issue is the work of Mr Bill Henson, and the debate which surrounded an exhibition of his work in a Sydney gallery in 2008. In May 2008, an exhibition of Mr Henson's photographs was due to open at the Roslyn Oxley9 Gallery in Sydney, featuring images of naked

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18 Office of Public Prosecutions Victoria, *Submission 14*, p. 4.

19 Government of Western Australia, *Submission 39*, p. 1. See also National Association of Visual Artists, *Submission 64*, pp 12-13, which suggested that experts could be drawn from senior curators at major art institutions, art academics, well-established artists and reputable gallery owners.

20 Associate Professor Robert Nelson, *Submission 68*, p. 5.

children, aged 12 and 13.[21] The National Association of Visual Artists' submission summarised what ultimately occurred:

> The exhibition...was raided by police on the day it was to open, the works were confiscated by police and the artist and gallery were threatened with legal proceedings. On request, the police received advice from the Public Prosecutor...[22]

7.22 At the time, the *Crimes Act 1900* (NSW) (NSW Crimes Act) defined 'child pornography' as material that depicts or describes in a manner that would cause offence to a reasonable person, a person under (or apparently under) the age of 16 years:

(a) engaged in sexual activity; or

(b) in a sexual context; or

(c) as the victim of torture, cruelty or physical abuse.[23]

7.23 The NSW Crimes Act, at the time, set out three relevant offences in relation to child pornography:

(a) producing or disseminating child pornography, with a maximum sentence of 10 years imprisonment;[24]

(b) possessing child pornography, with a maximum sentence of five years imprisonment;[25] and

(c) using or causing or procuring a child, or consenting or allowing a child under the care of the off ender, to be used for pornographic purposes, with a maximum sentence of 14 years imprisonment where the child is under the age of 14 years and 10 years imprisonment where the child is of or above that age.[26]

7.24 The NSW Crimes Act also provided for the following specific defences to these child pornography offences, including:

> ...that, having regard to the circumstances in which the material concerned was produced, used or intended to be used, the defendant was acting for a genuine child protection, scientific, medical, legal, artistic or other public

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21 Paul Bibby, 'Henson exhibition shut down', *Sydney Morning Herald*, 23 May 2008, p. 3.

22 National Association of Visual Artists, *Submission 64*, p. 25.

23 See NSW Sentencing Council, *Penalties relating to sexual assault offences in New South Wales*, Volume 1, August 2008, p. 78.

24 *Crimes Act 1900* (NSW), ss. 91H(2). See NSW Sentencing Council Report, p. 78.

25 *Crimes Act 1900* (NSW), ss. 91H(3). See NSW Sentencing Council Report, p. 78.

26 *Crimes Act 1900* (NSW), ss. 91G(1) and ss. 91G(2). See NSW Sentencing Council Report, p. 78.

> benefit purpose and the defendant's conduct was reasonable for that purpose...[27]

7.25 The NSW Police sought advice from the NSW Director of Public Prosecutions (DPP) in relation to whether Mr Henson should be charged with child pornography offences. The DPP determined that the Henson photographs in question would not cause offence to the reasonable person. The DPP's advice noted that the models in the pictures were naked, but that in and of itself was not sufficient to cause offence to reasonable persons. Further, the DPP concluded that the models in the pictures were not depicted in a 'sexual context'. Again, the DPP's advice noted that the models were nude, but stated that '[m]ere nudity is not sufficient to create a "sexual context"'. On this basis, the DPP concluded that the offence was not made out and that the case should not be prosecuted.[28]

7.26 Despite being of the view that the offences were not made out in the Henson case, the DPP also considered whether the defence of 'artistic merit' would be successful. The DPP concluded that such a defence 'could well be established on the balance of probabilities'.[29]

7.27 On the day of the exhibition opening, photographs from the exhibition were posted on the Roslyn Oxley9 Gallery's website, but removed a few hours later. The removal of the images occurred before any complaint was made to the Australian Media and Communications Authority (ACMA) for investigation.[30] The ACMA received a complaint, however, in relation to one of the Henson images posted on another website.[31] The ACMA referred the complaint to the Classification Board and the image was later classified PG.

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27 *Crimes Act 1900* (NSW), ss. 91H(4). See NSW Sentencing Council Report, p. 79.

28 D. Marr, *The Henson Case*, The Text Publishing Company, Melbourne, 2008, pp 122-123.

29 D. Marr, *The Henson Case*, p. 123. The committee also notes that, following the decision by the NSW Police to close the Henson exhibition in Sydney, the Australian Federal Police (AFP) also examined Henson images in the National Gallery of Australia in Canberra. The AFP concluded that no breaches of ACT law relating to child pornography could be established: see N. Towell and L. Minion, 'Our turn: police inspect NGA's Henson works', *Canberra Times*, 30 May 2008, p. 1; D. Marr, *The Henson Case*, p. 120.

30 D. Marr, *The Henson Case*, pp 7 and 18-20. The ACMA investigates complaints in relation to online content and determines whether content is 'prohibited content'. This is discussed further in Chapter 8.

31 D. Marr, *The Henson Case*, pp 117-118. The image was hosted on a blog discussion. The AMCA also received a number of complaints about the Henson photographs which appeared on media websites with black bars covering the child's breasts and genitals. The ACMA referred the images in these complaints to the Classification Board, which determined that all the images should be classified G: see D. Marr, *The Henson Case*, pp 116-117.

Retaining 'artistic merit' as a defence

7.28 Following the Henson case, the NSW Crimes Act was amended in 2010 to remove 'genuine artistic purpose' as a defence to the offences of production, dissemination and possession of child abuse material.[32] The amendment was introduced because:

> ...the inclusion of the defence of artistic merit amongst the child pornography offences may, somewhat unhelpfully, lead to the impression that material that would otherwise constitute child pornography is acceptable if the material was produced, used, or intended to be used whilst acting for a genuine artistic purpose...[M]aterial that is otherwise offensive because of the way in which it depicts children should not be protected because its creator claims an overriding artistic purpose for it.[33]

7.29 As part of the amendments, references to 'child pornography' were also changed to 'child abuse material'.[34] In determining whether material is 'child abuse material', the test is whether the material depicts or describes a child, or the private parts of a child, in a way that a reasonable person would regard as being offensive.[35] Subsection 91FB(2) of the NSW Crimes Act provides that the 'literary, artistic or educational merit (if any) of the material' must be taken into account in determining whether a reasonable person would regard the particular material as being offensive.

7.30 The NSW Crimes Act still provides that classification of material under the *Classification Act 1995* (other than material that has been Refused Classification) is a defence to an offence of production, dissemination and possession of child abuse material.[36] This defence is not available, however, for offences relating to the use of a child for the production of child abuse material.[37]

7.31 The *Criminal Code Act 1995* (Cth) provides for offences in relation to the use of a carriage service for child pornography material or child abuse material.[38] The *Criminal Code Act 1995* (Cth) does not provide for a defence of 'artistic merit' in relation to these offences.[39] Considerations of artistic merit, however, form part of the

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32 *Crimes Amendment (Child Pornography and Abuse Material) Act 2010*, Schedule 1, item 9.

33 The Hon. Michael Veitch MLC, Parliamentary Secretary, Second Reading Speech, Crimes Amendment (Child Pornography and Abuse Material) Bill 2010, 20 April 2010. The initial recommendation for the removal of the defence of artistic merit was made by the NSW Sentencing Council: see NSW Sentencing Council Report, p. 111. See also NSW Department of Justice and Attorney-General, *Report of the Child Pornography Working Party*, January 2010, p. 25.

34 *Crimes Amendment (Child Pornography and Abuse Material) Act 2010*, Schedule 1, item 6.

35 *Crimes Act 1900* (NSW), ss. 91FB(1).

36 *Crimes Act 1900* (NSW), ss. 91HA(7).

37 *Crimes Act 1900* (NSW), s. 91G.

38 *Criminal Code Act 1995* (Cth), Schedule 1, Part 10.6, Division 474, Subdivision D.

39 *Criminal Code Act 1995* (Cth), s. 474.21 and s. 474.24.

decision-making process in determining whether a reasonable person would regard the relevant material as offensive. Section 473.4 of the *Criminal Code Act 1995* (Cth) provides:

> The matters to be taken into account in deciding for the purposes of this Part whether reasonable persons would regard particular material, or a particular use of a carriage service, as being, in all the circumstances, offensive, include:
>
> ...
>
> (b) the literary, artistic or educational merit (if any) of the material...

7.32 The amendments to the NSW Crimes Act in 2010 are intended to reflect the Commonwealth provisions.[40]

7.33 Despite the changes to the NSW legislation, a number of state jurisdictions still retain the defence of 'artistic merit' in relation to the production and possession of child pornography. For example, subsection 70(2) of the *Crimes Act 1958* (Vic) provides that it is a defence to a prosecution for an offence of possession of child pornography if the relevant film, photography, publication or computer game possesses artistic merit or is for a genuine, medical, legal, scientific or educational purpose. However, as the Office of Public Prosecutions Victoria (OPP) advised in its submission this defence cannot be relied on in a case where the child depicted is actually under the age of 18 years.[41]

7.34 The National Association of Visual Artists noted that the NSW Attorney-General tried unsuccessfully to convince other state Attorneys-General to excise the

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40 The Hon. Michael Veitch MLC, Parliamentary Secretary, Second Reading Speech, Crimes Amendment (Child Pornography and Abuse Material) Bill 2010, 20 April 2010.

41 Office of Public Prosecutions Victoria, *Submission 14*, p. 4; *Crimes Act 1958* (Vic), ss. 70(3). See also: *Criminal Code Act 1899* (Qld), Schedule 1, Criminal Code, ss. 228E(2) which provides that conduct for a genuine artistic purpose where the person's conduct was, in the circumstances, reasonable for that purpose, is a defence to a prosecution for the offences of involving a child in the making of child exploitation material (s. 228A), making child exploitation material (s. 228B), distributing child exploitation material (s. 228C), and possessing child exploitation material (s. 228D); *Criminal Code Act 1924* (Tas), Schedule 1, Criminal Code, paragraph 130E(1)(b) which provides that if conduct is for a genuine artistic purpose it is a defence to the offences of involving a person under 18 years in production (s. 130), production (s. 130A), distribution (s. 130B), possession (s. 130C) or accessing (s. 130D) child exploitation material; *Criminal Code Act Compilation Act 1913* (WA), Appendix B, Criminal Code, paragraph 221A(1)(c) which provides that if the material is of recognised artistic merit it is a defence to the offences of involving a child in child exploitation (s. 217), the production (s. 218), distribution (s. 219), or possession (s. 220) of child exploitation material; and *Criminal Law Consolidation Act 1935* (SA), s. 63C which provides that where the production, dissemination or possession of material constitutes part of a work of artistic merit no offence is committed in relation to the production or dissemination of child pornography (s. 63), the possession of child pornography (s. 63A), and procuring a child to commit an indecent act (s. 63B). Relevant legislation in the Northern Territory and the ACT does not provide for artistic merit defences.

artistic defence from their respective legislation, and to tighten other laws about creating images of children and making them publicly available.[42]

7.35 As the National Association of Visual Artists explained in its submission, the artistic merit defence is:

> ...based on an understanding that art, science and education can be interrogative and serve special purposes that are intended for the public good, even though the material may at times go against what, in another context would be regarded as problematic.[43]

7.36 However, the committee received evidence which supported the sentiment behind the NSW amendments, and argued that artistic merit should not be used to justify the lower classification of material which would otherwise be Refused Classification:

> Commonwealth classification law could be further clarified to ensure that any offensive material of this nature that would normally be classified Refused Classification does not receive a lower classification rating on the basis of 'artistic merit'. The Classification Act, Code and Guidelines should state that any depiction or description of a minor under the age of 18, including the promotion or instruction in the creation of child abuse material, that is considered offensive and would receive a Refused Classification rating, cannot receive a different rating because of artistic merit. Artistic merit should never excuse content in breach of the Guidelines.[44]

7.37 Ms Melinda Tankard Reist of Collective Shout put her argument more bluntly:

> We need to get rid of this idea of artistic merit, because why is a pornographic image of a young girl okay just because you slap the word 'art' on it?[45]

7.38 The Family Council of Victoria asserted that 'artistic merit should not be allowed to be a scapegoat for pornography'.[46]

7.39 In their joint submission, the Hon. Nick Goiran MLC and Mr Peter Abetz MLA from the Western Australian Legislative Council and the Western Australian Legislative Assembly (respectively), argued that the NSW legislation at the time of

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42 National Association of Visual Artists, *Submission 64*, p. 26.

43 National Association of Visual Artists, *Submission 64*, pp 8-9.

44 Australian Christian Lobby, *Submission 25*, p. 5. See also Australian Council on Children and the Media, *Submission 44*, p. 4.

45 *Committee Hansard*, 27 April 2011, p. 27.

46 Family Council of Australia, *Submission 22*, p. 10.

the Henson case indicated that the law did not provide adequate powers for the police to prosecute Mr Henson:

> In this case it was clear that the community, as demonstrated by the outrage expressed, did not find it acceptable to use children in art in a way that could be used as pornography...[47]

Protocols for working with children in art

7.40 A number of submissions noted the introduction of the Australia Council's *Protocols for working with children in art* (Protocols).[48] The Protocols set out the requirements for recipients of Australia Council funding, specifically in relation to obtaining consent where an artist is working with a child under the age of 15. The Protocols note that state laws may prohibit working with a child under the age of 15 who is fully or partly naked.[49]

7.41 In its submission, Bravehearts noted the restrictions put in place by state employment laws:

> Each State and Territory in Australia places varying prohibitions or restrictions on the engagement of children in employment while the majority, NSW, Vic, Qld and WA specifically prohibit the use of naked or semi naked children in art.[50]

7.42 Bravehearts argued that state employment laws should prevail over classification decisions:

> Taking images of naked or semi naked children, manufactured and created for the purposes of 'art' is illegal in NSW–end of argument. As such, there is no place for any consideration of 'artistic merit'. There should be no further opportunity in law, either by the allowance of the introduction of 'expert evidence' or by a rating obtained from a 'Classification Board' or by any other means or individual–or group of individuals–that would weaken that position.[51]

7.43 Associate Professor Robert Nelson's submission noted that, until the introduction of the Protocols, many artists had not considered the impact of employment laws:

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47 Hon Nick Goiran MLC and Mr Peter Abetz MLA, *Submission 36*, p. 9.

48 The Australia Council's *Protocols for working with children in art* (Protocols) came into effect in January 2009 and were reviewed in 2010. See further: http://www.australiacouncil.gov.au/__data/assets/pdf_file/0016/44314/Working_with_children_in_art_protocols_May_2010.pdf, (accessed 28 May 2011). See also Associate Professor Robert Nelson, *Submission 68*, p. 3; National Association of Visual Artists, *Submission 64*, p. 26.

49 *Protocols for working with children in art*, p. 4.

50 Bravehearts, *Submission 66*, p. 4.

51 Bravehearts, *Submission 66*, p. 4.

> ...[V]isual artists (like photographers and painters who exhibit in galleries) did not believe that state child employment laws had application to art, because they had never thought of themselves employing the people in their pictures.[52]

7.44 The Protocols also state:

> If you have any concerns about the content of any images or artworks being exhibited, we strongly suggest you obtain a rating classification from the Classification Board and follow any requirements the Classification Board may impose.[53]

7.45 In this context, the committee notes the evidence it received from the Arts Law Centre in relation to Mr Henson applying for the classification of his works prior to exhibition.[54]

7.46 The Protocols also provide that an artist working with anyone under the age of 15 is required to obtain the consent of the child's parent or guardian prior to commencing their artwork.[55]

7.47 Professor Elizabeth Handsley set out for the committee the concerns she has in relation to the giving of parental consent in a situation such as the Henson case:

> My main concern with [the Henson] photos has been the question of how consent was gained for those children to appear in material that would be widely published, and published for the rest of their lives. There are many matters where we do not allow children under our legal system to give consent to certain kinds of activities and experiences, and there are some matters where we do not allow parents to give consent on behalf of children. One example that the committee might be aware of is the one that is based on Marion's case...where it was decided that parents cannot give consent on behalf of their intellectually disabled children to an irreversible sterilisation operation. I would liken the experience of having your naked body plastered all over websites for the rest of your life to be something akin to an irreversible sterilisation operation, perhaps not as bodily invasive, but certainly something that could affect your life quite profoundly.
>
> I think the main point is that it is irreversible. I would suggest that, on that sort of analysis, there would be a basis for saying that parents cannot give

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52 Associate Professor Robert Nelson, *Submission 68,* p. 3.

53 *Protocols for working with children in art*, p. 4. This statement is made specifically in respect of exhibition and performance funded by the Australia Council for contemporary images of fully or partly naked children.

54 Arts Law Centre of Australia, *Submission 33*, p. 8. See also Arts Law Centre of Australia, answer to question on notice, received 15 April 2011, which notes that the works exhibited in the Roslyn Oxley9 gallery in 2010 were classified 'Unrestricted – M, Not recommended for Readers under 15 years'.

55 *Protocols for working with children in art*, p. 3.

> consent on behalf of their children to having naked pictures taken, irrespective of the artistic merit. I am not terribly happy about the idea of leaving it the way that it appears to be at the moment, where as long as the artist or the photographer can get some sort of consent from someone, then what that person does with the photographs afterwards is completely out of their hands.[56]

No featuring of children in artworks

7.48 Some submissions argued that a consequence of the Henson case has been that children are no longer being featured in artworks. For example, NAVA noted:

> ...[C]ertainly artists and the public media are much more reluctant to get involved in any form of representation of children, whether clothed or unclothed. This fear being engendered around the representation of children is rendering them invisible.[57]

7.49 NAVA's submission also outlined some examples where images of children have attracted media attention. Sydney artist Del Kathryn Barton's photograph 'Eye Land of Kell' depicted her son wearing only jeans standing in front of a floral display with decorative elements superimposed on his face and torso. The photograph was part of a fundraising exhibition for the Sydney Children's Hospital. NAVA noted that, while the photograph was outside the scope of the Protocols, the Sydney Children's Hospital decided to withdraw from the event:

> ...[T]he hospital adopted the most cautious possible position and decided not to continue its partnership as charity recipient from the art exhibition stating that some members of the community might find the image inappropriate as part of a fundraiser for a children's hospital charity.[58]

7.50 Ms Susan Reid noted the historical use of children in art, such as in religious images, and referred to community fears about children in the media prompting 'knee-jerk calls for broader censorship laws and tighter restrictions on content providers, broadcasters and publishers'. Ms Reid also referred to certain comments by media academic Professor Catharine Lumby, who has warned that 'the trouble begins when we start looking at every image through the lens of a paedophile'.[59]

7.51 Bravehearts, however, drew a distinction between the use of naked children in art and other situations. Bravehearts argued that it is possible to remove the artistic

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56 *Committee Hansard*, 25 March 2011, pp 69-70. Professor Handsley is President of the Australian Council on Children and the Media; however, she prefaced these comments with the statement that her thoughts on this subject arise from her consideration of the issue in her capacity as a professor of law and also from her personal perspectives as a former child model.

57 National Association of Visual Artists, *Submission 64*, p. 17.

58 *Submission 64*, pp 16-17.

59 Ms Susan Reid, *Submission 4*, pp 1 and 3.

merit defence without infringing on the rights of journalists and artists to depict valid situations involving children:

> Images of naked or semi naked children that are designed, produced, manufactured, posed or created images should remain illegal. Images of children that may well hold artistic merit but that are real life depictions of un-orchestrated true events, fall into another category. The determination of the motivation for taking the photo and the context of the image is critical.[60]

Exempting artwork from classification

7.52 The committee received submissions that argued for exemptions for artworks from classification. NAVA argued that classification should not be mandatory for artworks, and that galleries and art spaces 'seem an obvious zone for exemption from classification, especially as it is the industry's standard to use signage and explanatory panels to alert the public to potentially challenging content'.[61]

7.53 Similarly, the Arts Law Centre recommended that there should be an explicit exemption to classification for works of art exhibited in a gallery space, and that the requirements for 'submittable publication' for classification should apply only if the work of art is to be communicated or distributed to the general public.[62]

7.54 NAVA also suggested that classification for artists be done either without charge if they bring the works to the Classification Board themselves, or with the cost being borne by the complainant if they are called-in as the result of a complaint.[63]

7.55 Conversely, the committee received submissions which strongly argued against the exemption of artworks from classification. The Catholic Women's League of Australia recommended that the National Classification Scheme apply to works of art.[64] Similarly, Salt Shakers recommended that all artworks should be classified.[65]

7.56 The Hon. Nick Goiran MLC and Mr Peter Abetz MLA recommended that the public display of artwork should be included in the National Classification Scheme, with all works to be displayed in galleries or exhibitions to be classified in order to inform viewers of the likely content, as well as any potentially offensive material. Further, the display of artwork that is suitable for adults only should be limited to restricted areas.[66]

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60 Bravehearts, *Submission 66*, p. 2.

61 National Association of Visual Artists, *Submission 64*, p. 10.

62 Arts Law Centre of Australia, *Submission 33*, p. 8.

63 National Association of Visual Artists, *Submission 64*, p. 11.

64 Catholic Women's League Australia, *Submission 11*, p. 7.

65 Salt Shakers, *Submission 23*, p. 6.

66 Hon Nick Goiran MLC and Mr Peter Abetz MLA, *Submission 36*, p. 9.

Exemptions for film classification

7.57 Under the National Classification Scheme, films are subject to compulsory classification before they can be exhibited, sold or hired out. Thirteen types of film, however, are exempt from the requirement for classification: business, accounting, professional, scientific, educational, current affairs, hobbyist, sporting, family, live performance, musical presentation, religious, and community and cultural films.[67]

7.58 In addition, films screened at film festivals may also be exempted from classification under provisions in state and territory enforcement legislation.[68]

7.59 The National Film and Sound Archive (NFSA) noted that all state and territory enforcement legislation allows for 'approved organisations' to seek exemptions allowing them to screen unclassified films:

> [Exemptions] can be granted by the Classification Board or, in Queensland and South Australia, by the relevant minister. An approved organisation is one authorised by the Classification Board to apply for exemptions, having regard to matters such as the extent to which it engages in medical, scientific, education, cultural or artistic activities, and its reputation for screening films.
>
> There are different types of exemptions, some of which are not available in all jurisdictions. The most common type—which is available in all jurisdictions—is a festival exemption. This allows approved organisations to screen particular unclassified titles at a specific event or festival. The exemption works as a temporary classification, although conditions may be set for screening particular titles (e.g. a requirement to show background material with a film to contextualise it).[69]

7.60 The NFSA informed the committee that a significant amount of material held within its collection is unclassified, meaning that the NFSA often relies on film festival exemptions to screen archived material. Ms Ann Landrigan from the NFSA described the nature of this material:

> As you can appreciate, with material in our collection that dates back to the earliest days of moving image production, we have a significant number of titles that have never been classified. They might be Indigenous titles, ethnographic material, home movies and filmed oral histories, for example;

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67 *Classification Act 1995*, ss. 5B(1).

68 See, for example, *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* (Vic), Part 8; *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* (NSW), s. 51.

69 National Film and Sound Archive, *Submission 27*, pp 2-3. For an example of this exemption see: *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* (Vic), s. 64, s. 66 and s. 66A. See also Arts Law Centre of Australia, *Submission 33*, p. 7, which refers to the Victorian legislation in relation to this exemption.

> and, as you are aware, we must apply for festival exemptions for each event at which we plan to screen these films.[70]

7.61 These exemptions, however, present administrative difficulties for the NFSA, given the frequency with which it has to apply for an exemption. Additionally, because the exemption is granted under state and territory enforcement legislation, the NSFA often has to apply to multiple jurisdictions to facilitate national tours.[71]

7.62 Due to the difficulties arising from the NFSA's large unclassified collection, it proposed the inclusion of a blanket exemption for cultural institutions which would allow them to screen unclassified material.[72] The NFSA expected that, under such a provision, the relevant institution would self-classify material in a manner similar to that adopted by television broadcasters, and could be subject to oversight by the Classification Board.[73]

'Advocating terrorism'

7.63 Section 9A of the *Classification Act 1995* provides for the refusal of classification for publications, films or computer games that advocate terrorist acts.[74]

7.64 Material is considered to advocate the doing of a terrorist act if:

(a) it directly or indirectly counsels or urges the doing of a terrorist act; or

(b) it directly or indirectly provides instruction on the doing of a terrorist act; or

(c) it directly praises the doing of a terrorist act in circumstances where there is a substantial risk that such praise might have the effect of leading a person (regardless of his or her age or any mental impairment (within the meaning of section 7.3 of the *Criminal Code*) that the person might suffer) to engage in a terrorist act.[75]

7.65 However, a publication, film or computer game is not considered to advocate the doing of a terrorist act if it depicts or describes a terrorist act, but the depiction or description could reasonably be considered to be done merely as part of public discussion or debate, or as entertainment or satire.[76]

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70 *Committee Hansard*, 27 April 2011, p. 2.

71 National Film and Sound Archive, *Submission 27*, p. 2.

72 National Film and Sound Archive, *Submission 27*, p. 2.

73 National Film and Sound Archive, *Submission 27*, p. 3.

74 *Classification Act 1995*, s. 9A.

75 *Classification Act 1995*, ss. 9A(2).

76 *Classification Act 1995*, ss. 9A(3).

7.66 The committee received three submissions relating to section 9A. Each submitter recommended the repeal of section 9A from the *Classification Act 1995*.

7.67 Professor George Williams from the Gilbert and Tobin Centre of Public Law argued against section 9A on a number of grounds, including that it removes discretion from the independent Classification Board and Classification Review Board, pre-empting the decision at a political level.[77] In particular:

> [Section 9A] is inconsistent with the principle that the Boards' classification decisions should be discretionary, as part of the guided balancing of complex, unquantifiable values. Section 9A eliminates the [Classification] Boards' discretion as to what classification to give in certain circumstances. If they find that material advocates a terrorist act, they must classify it 'RC'.[78]

7.68 Similarly, Professor Williams noted that the provision was introduced without the support of all states and territories, undermining the cooperative, uniform nature of the National Classification Scheme.[79]

7.69 Professor Williams also argued that the application of section 9A is overly broad, by virtue of the test established in paragraph 9A(2)(c):

> Many publications, including innocuous and valuable publications that concern past liberation struggles like that of Nelson Mandela against apartheid in South Africa, could be considered to laud a terrorist act. If that objective purpose could be made out, what s 9A(2)(c) would then require is simply proof that the publication could possibly have a malign effect on one member of a very large class of people. And that class includes people (the mentally ill and the young) who are likely to be far more susceptible to such effects than the ordinary adult. This is the nub of the problem with the amendments. It will be difficult for the courts to construe s 9A(2)(c) so that it does not do too much.[80]

7.70 Dr Katharine Gelber expressed a similar view, noting that the test established in paragraph 9A(2)(c) is a significant departure from the 'reasonable person' test that characterises most other aspects of the National Classification Scheme.[81]

7.71 Dr Gelber submitted that other provisions could be used to refuse classification to material that promotes, incites or instructs in matters of crime or

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77 Professor George Williams, *Submission 1*, p. 2.

78 Professor George Williams, *Submission 1*, Attachment 2, p. 3.

79 Professor George Williams, *Submission 1*, p. 2.

80 Professor George Williams, *Submission 1*, Attachment 1, p. 15.

81 Dr Katharine Gelber, *Submission 7*, p. 1. The Queensland Council for Civil Liberties, *Submission 43*, p. 6, also advocated the repeal of section 9A.

violence, meaning that section 9A adds nothing of benefit to the classification of material that could realistically lead people to commit terrorist acts.[82]

7.72 Finally, both Professor Williams and Dr Gelber submitted that section 9A inhibits academic research. Professor Williams noted that two publications that had been bought by the University of Melbourne for a course on jihad were removed in response to the section 9A provisions.[83] Dr Gelber recommended that, if section 9A is not repealed in its entirety, it should at least be amended so as to allow an exception to permit scholarly research.[84]

82 Dr Katharine Gelber, *Submission 7*, p. 1.

83 Professor George Williams, *Submission 1*, Attachment 2, p. 21.

84 Dr Katharine Gelber, *Submission 7*, p. 2.

CHAPTER 8

Convergence of media in a digital age

8.1 One of the major issues which arose in the course of this inquiry is the growth of digital media and the ramifications for a classification system that was established over 15 years ago. This issue relates directly to the following terms of reference: (l) the interaction between the National Classification Scheme and the role of the Australian Communications and Media Authority (ACMA) in supervising internet content; and (m) the effectiveness of the National Classification Scheme in dealing with new technologies and new media, including mobile phone applications, which have the capacity to deliver content to children, young people and adults.

8.2 The treatment of online content by the National Classification Scheme is of particular note. The evidence provided to the committee reflects significant confusion over the classification requirements for online-based or distributed publications, films and computer games. This confusion is also evident in relation to publications, films and computer games provided through mobile devices.[1]

Interaction between the National Classification Scheme and new media

8.3 The National Classification Scheme deals with the classification of publications, films and computer games. However, in the 15 years since the establishment of the National Classification Scheme, the means by which publications, films and computer games are accessed has changed significantly. As a result, the National Classification Scheme in its current iteration is not keeping pace.

8.4 The ability of a national classification system to adequately deal with new media content is extremely important given the growth of these industries. In particular, children and young Australians are avid consumers of content delivered through new media. Accordingly, a scheme that adequately protects children will need to adapt to new media forms.

Use of online and mobile services by children

8.5 A significant proportion of the media accessed and utilised by Australian children is done through the internet or using mobile phones.

1 Digital convergence is affecting the television and recorded music industries as well. These industries are discussed in Chapter 9.

Online activity

8.6 According to the ACMA, online activity is the second most time-consuming media activity for Australian youth, behind watching television.[2] In 2007, eight to 17 year-olds reported spending an average of one hour and 17 minutes per day accessing and using the internet.[3]

8.7 Young Australians spent the most time using instant messaging services (23 per cent of internet time for eight to 17 year olds), followed by gaming online (19 per cent), homework (17 per cent), and social networking (14 per cent).[4] A report by Screen Australia also noted that online activities including video streaming, social media and online gaming are dominated by the 14–17 and 18–29 year old demographic.

8.8 More generally, Screen Australia noted that the proportion of people viewing films on DVD or Blu-ray fell over the last five years, but was offset by online video.[5] Importantly, films on DVD and Blu-ray are subject to classification under the National Classification Scheme, while online video may not be.

8.9 In 2010, 20 per cent of Australians had used a computer to watch video online, and two per cent had done so using a mobile phone.[6] Australians are increasingly engaging with online content, as noted by Screen Australia:

> At current growth rates, by the end of 2011 more than 50 per cent of Australians will be engaging with Facebook at least once every four weeks, and more than 30 per cent with YouTube. This has not only prompted new considerations in marketing methods but also highlights the broadcasting power of the internet.[7]

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2 The Australian Communications and Media Authority, *Trends in media use by children and young people*, June 2010, p. 39, http://www.acma.gov.au/WEB/STANDARD/pc=PC_312210, (accessed 31 May 2011).

3 The Australian Communications and Media Authority, *Trends in media use by children and young people*, June 2010, p. 39, http://www.acma.gov.au/WEB/STANDARD/pc=PC_312210, (accessed 31 May 2011).

4 The Australian Communications and Media Authority, *Trends in media use by children and young people*, June 2010, p. 41, http://www.acma.gov.au/WEB/STANDARD/pc=PC_312210, (accessed 31 May 2011).

5 Screen Australia, 'Beyond the Box Office' 2011, answer to question on notice, received 5 May 2011.

6 Screen Australia, 'Beyond the Box Office' 2011, answer to question on notice, received 5 May 2011.

7 Screen Australia, 'Beyond the Box Office' 2011, answer to question on notice, received 5 May 2011.

Mobile phone activity

8.10 The use of mobile phones by children to access media is increasingly prevalent. By 2007, 75 per cent of Australian 12–14 year-olds and 90 per cent of 15–17 year olds owned a mobile phone.[8]

8.11 This reflects a similar statistic in the United States, where, in 2009, 66 per cent of eight to 18 year olds owned a mobile phone. Twenty per cent of all media consumption among American youth occurred using mobile devices, including mobile phones, iPods or handheld video game players,[9] and the committee expects that the Australian experience is likely to be similar in this regard.

8.12 A 2007 Australian study found that the use of a mobile phone for other media activities by young Australians was also starting to emerge:

> Over three diary days, 22 per cent of eight to 17 year olds reported using a mobile phone to take photographs, 16 per cent played games, 10 per cent listened to music/radio, seven per cent recorded video footage, and three per cent reported using their mobile phone to watch TV shows/clips/videos.[10]

8.13 Fourteen per cent of eight to 17 year olds reported playing games on a mobile phone over three diary days.[11]

8.14 However, the increasing uptake of more advanced phones is likely to have boosted these figures since the survey period.[12] The committee expects that the consumption of media through mobile devices is likely to continue to increase.

Regulation of online content

8.15 Online content is regulated through the Online Content Scheme under Schedules 5 and 7 of the *Broadcasting Services Act 1992*.[13]

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8 The Australian Communications and Media Authority, *Trends in media use by children and young people*, June 2010, p. 4, http://www.acma.gov.au/WEB/STANDARD/pc=PC_312210, (accessed 31 May 2011).

9 The Australian Communications and Media Authority, *Trends in media use by children and young people*, June 2010, p. 2, http://www.acma.gov.au/WEB/STANDARD/pc=PC_312210, (accessed 31 May 2011).

10 The Australian Communications and Media Authority, *Trends in media use by children and young people*, June 2010, p. 27, http://www.acma.gov.au/WEB/STANDARD/pc=PC_312210, (accessed 31 May 2011).

11 The Australian Communications and Media Authority, *Trends in media use by children and young people*, June 2010, p. 35, http://www.acma.gov.au/WEB/STANDARD/pc=PC_312210, (accessed 31 May 2011).

12 The Australian Communications and Media Authority, *Trends in media use by children and young people*, June 2010, p. 27, http://www.acma.gov.au/WEB/STANDARD/pc=PC_312210, (accessed 31 May 2011).

8.16 The ACMA administers the co-regulatory Online Content Scheme, including internet and mobile-phone content. The Online Content Scheme aims to address community concerns about offensive and illegal material online and, in particular, to protect children from exposure to material that is unsuitable for them.[14]

8.17 The ACMA investigates complaints about online content and encourages the development of codes of practice for the online-content service-provider industries, as well as registering and monitoring compliance with such codes.[15]

8.18 Under Schedule 7 of the *Broadcasting Services Act 1992*, prohibited content includes content that has been classified or is likely to be classified:

- RC (Refused Classification);
- X18+;
- R18+ unless it is subject to a restricted access system; or
- MA15+ and is provided on a commercial basis (that is, for a fee) unless it is subject to a restricted access system.[16]

8.19 The determination of whether online content is prohibited is made by reference to the classification categories established under the National Classification Scheme. The ACMA refers Australian-hosted content that is substantially likely to be prohibited to the Classification Board for classification. The ACMA may also refer content hosted overseas to the Classification Board. In 2010, the Classification Board made 148 decisions on content referred to it by the ACMA.[17]

8.20 If the online content is prohibited and is hosted in or provided from Australia, the ACMA will direct the content service provider to remove or prevent access to the content (that is, it will issue a take-down notice). If the prohibited internet content is hosted outside Australia, the ACMA will notify suppliers of approved filters of the content. Approved filters are updated regularly to block content that the ACMA has found to be prohibited. If the content is sufficiently serious (for example, child

13 Department of Broadband, Communications and the Digital Economy, *Online content regulation*, http://www.dbcde.gov.au/broadband/online_content_regulation, (accessed 10 May 2011).

14 Department of Broadband, Communications and the Digital Economy, *Online content regulation*, http://www.dbcde.gov.au/broadband/online_content_regulation, (accessed 10 May 2011).

15 The Australian Communications and Media Authority, *Online Regulation*, http://www.acma.gov.au/WEB/STANDARD/pc=PC_90154, (accessed 26 May 2011).

16 Department of Broadband, Communications and the Digital Economy, *Online content regulation*, http://www.dbcde.gov.au/broadband/online_content_regulation, (accessed 10 May 2011).

17 Attorney-General's Department, *Submission 46*, p. 14.

pornography or terrorist-related material), the ACMA will refer the content to the appropriate law-enforcement agency for criminal investigation.[18]

8.21 In addition, since 2004, the *Criminal Code Act 1995* (Cth) has included offences relating to the possession and distribution of offensive material. Such material includes child pornography or child-abuse material on, for example, the internet, radio and television.[19] From 2005, the *Criminal Code Act 1995* (Cth) has similarly prohibited the distribution of suicide-related material.[20]

Online content: Classification Act 1995, Broadcasting Services Act 1992 or both?

8.22 As described above, online content is regulated through sections 5 and 7 of the *Broadcasting Services Act 1992*. The Online Content Scheme thus falls under the *Broadcasting Services Act 1992*, not the *Classification Act 1995*, and is not technically part of the National Classification Scheme. There are, however, links between the two systems, including harmonised classification categories and the roles of the Classification Board and the Classification Review Board in classifying content under the provisions of the *Broadcasting Services Act 1992*.

Definitions of publications, films and computer games

8.23 One particular area where submitters highlighted ambiguity is the distinction between publications, films and computers games that are available both offline and online.

8.24 The National Classification Scheme provides a definition for publications, films and computer games. A publication is defined as any written or pictorial matter, that is not a film, or a computer game, or an advertisement for a publication, film or computer game.[21]

8.25 A film is a cinematograph film, a slide, video tape and video disc and any other form of recording from which a visual image, including a computer-generated image, can be produced (together with its soundtrack).[22]

8.26 A computer game is a computer program and any associated data capable of generating a display on a computer monitor, television screen, liquid crystal display,

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18 Department of Broadband, Communications and the Digital Economy, *Online content regulation*, http://www.dbcde.gov.au/broadband/online_content_regulation, (accessed 10 May 2011).

19 *Criminal Code Act 1995*, s. 474.19 and s. 474.22.

20 *Criminal Code Act 1995*, s. 474.29A.

21 *Classification Act 1995*, s. 5.

22 *Classification Act 1995*, s. 5. This does not include a computer game or advertisement for a publication, film or computer game.

or similar medium that allows the playing of an interactive game.[23] 'Interactive game' is further defined as a game in which the way the game proceeds and the result achieved at various stages of the game is determined in response to the decisions, inputs and direct involvement of the player.[24]

8.27 The broad nature of these definitions creates some ambiguity about what is included under the National Classification Scheme and what is not, resulting in industry and consumer confusion. Telstra, which considered the National Classification Scheme to include the provisions of both the *Classification Act 1995* and the *Broadcasting Services Act 1992*, highlighted this uncertainty:

> After more than a decade of incremental changes, the National Classification Scheme as it stands today is a complex arrangement of parallel and sometimes overlapping systems of classification. While many aspects of the National Classification Scheme are operating effectively, regulatory complexity has created areas of overlap, inconsistency and uncertainty that have the potential to be confusing for consumers and costly for industry participants implementing the scheme.[25]

8.28 Telstra informed the committee that the Internet Industry Association developed an industry code of practice for commercial content providers, which was approved by the ACMA in 2008:

> Section 8 of the Content Services Code [of Practice] 2008 provides that commercial content providers must ensure that all content that is considered likely to be classified as MA15+ or above must be assessed and categorised against the *Guidelines for the Classification of Films and Computer Games 2005* by a trained content assessor. Content that is classified as, or is determined by trained assessors to be likely to be classified as MA15+ by the Classification Board must then be placed behind a Restricted Access System in accordance with the requirements set out in the Restricted Access Systems Determination 2007. This content assessment process mirrors the 'in house' classification arrangements in place for both the free to air and subscription television sectors.[26]

8.29 Telstra noted, however, that online content provided in accordance with Schedule 7 of the *Broadcasting Services Act 1992* and the Content Services Code of Practice may also remain subject to the provisions of the *Classification Act 1995*:

> This superfluous 'double classification' obligation for online content creates unnecessary uncertainty for industry participants implementing these arrangements and raises the spectre of prohibitive compliance costs should

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23 *Classification Act 1995*, s. 5A. A computer program that is capable of generating new elements or additional levels of an original game is also defined as a computer game.

24 *Classification Act 1995*, s. 5.

25 Telstra, *Submission 26*, p. 2.

26 Telstra, *Submission 26*, p. 3.

> online content provided by Australian content providers need to be formally classified by the Classification Board.[27]

8.30 The Australian Home Entertainment Distributors Association (AHEDA) agreed that the proliferation of separate legislation governing classification is increasingly out of date:

> However, AHEDA also sees limitations in the Scheme and the way it is governed through legislation such as the Classifications, Broadcasting and Telecommunications Acts which regulate different platforms but the same content. The Classifications Act is an analogue piece of legislation in a digital world.[28]

8.31 AHEDA informed the committee that, in its view, trying to understand the legal scope of the *Classification Act 1995* and how it relates to online content remains the subject of confusion:

> AHEDA has been advised by the Attorney-General's Department...that the [Classification] Act 'does not exclude' classifying content on the internet but can only consider such content if a valid application is received. This matches evidence given to a Senate Estimates Committee hearing by [the] Classifications Board Director...
>
> AHEDA has previously been advised by the Classifications Board, its former Director and the former [Office of Film and Literature Classification] that it does not have a mandate to classify and assess content made available via the internet. In this matter, the only thing that is clear is that there are many confused people both in industry and government proving that the system needs urgent reform.[29]

8.32 This confusion extends to the online distribution of computer games. The Interactive Games and Entertainment Association (IGEA) noted that, while the computer game industry understands and complies with the application of the National Classification Scheme for traditional content distribution methods, its application to digitally-distributed content is unclear and creates a number of challenges to establishing effective models for digital distribution.[30] This issue is not limited to the *Classification Act 1995*, but also extends to state and territory enforcement legislation:

> While it is arguable that the definition of computer games is broad enough to include Digitally Distributed Games and Online Games, there are no provisions within the [state and territory] Enforcement Laws that clearly

27 Telstra, *Submission 26*, p. 5.

28 Australian Home Entertainment Distributors Association, *Submission 31*, p. 3.

29 Australian Home Entertainment Distributors Association, *Submission 31*, p. 5.

30 Interactive Games and Entertainment Association, *Submission 38*, p. 3.

> specify that Digitally Distributed Games and Online Games should be subject to the Scheme.[31]

8.33 IGEA informed the committee that, under the provisions of the *Broadcasting Services Act 1992*, publishers are able to internally assess unclassified computer games released online, such as unclassified 'Add On Content', and release such computer games in accordance with the provisions of the *Broadcasting Services Act 1992*. Further:

> If the [National Classification] Scheme was to apply to content distributed over the internet, the publishers of such content would be subject to two regulators (the Classification Board and ACMA) and two regulatory regimes (the Scheme and the [Broadcasting Services Act]). Publishers and game developers would be unable to benefit from the reactive enforcement provisions of the [Broadcasting Services Act]; instead they would be subject to the compliance burdens of the Scheme. Such regulation undermines the purpose of the [Broadcasting Services Act and] has the potential to stifle innovation and industry progression within the online environment.[32]

8.34 This ongoing confusion led a number of witnesses and submitters to call for a uniform approach to content, regardless of the platform used to access that content. For example, the Australian Mobile Telecommunications Association (AMTA) submitted:

> [W]hile some content can now be accessed more readily in a converging and increasingly mobile environment, the regulations relating to content should remain focussed on the content itself, and not the means or technological platform used to access it. Content regulation must be platform neutral. It should make no difference which "screen" a consumer uses to view content, the regulation of that content must be equitably applied to each platform.[33]

8.35 Mr Bruce Arnold explained this issue further:

> In the digital age, where there is increasing convergence of previously separate infrastructure and media streams and where content is delivered across a range of platforms, implementing an effective classifications scheme that will cross platforms and that will be future proof poses a great challenge, regulators and parliament should be wary of simplistic solutions and of unsubstantiated claims regarding harms. We recommend that classification should be tied to media content rather than a platform, and that it should apply across platforms. It is desirable to have a cross-jurisdictional system of classifying content... This should include standard

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31 Interactive Games and Entertainment Association, *Submission 38*, p. 8.

32 Interactive Games and Entertainment Association, *Submission 38*, p. 11.

33 Australian Mobile Telecommunications Association, *Submission 42*, p. 2.

> classifications on uniform criteria and a common approach to displaying classified and restricted publications and films.[34]

8.36 Electronic Frontiers Australia (EFA) went a step further, arguing that the National Classification Scheme will soon have 'outlived its usefulness'.[35] EFA argued that the National Classification Scheme system would be difficult to apply to online material for a number of reasons, including the sheer volume and globalised nature of content, and the increasing amount of content generated by individual citizens rather than commercial publishers.[36]

8.37 The Cyberspace Law and Policy Centre argued that caution should be exercised in any application of offline classification regimes to online content:

> [I]t cannot be assumed that parity between on-line and off-line classification and censorship schemes in terms of how laws are formulated or what outcomes are sought is appropriate or cost-effective. In particular, achieving similar outcomes for on-line and off-line censorship is not practicable. The sheer size and constant evolution of internet content makes it impossible to achieve similar classification outcomes off-line and on-line cost-effectively, especially given the subjectiveness of classification criteria. Complete or partial automation of classification or censorship through filtering has its own problems...[37]

The ACMA's online content role

8.38 Term of reference (l) refers to the interaction between the National Classification Scheme and the role of the ACMA in supervising internet content. The ACMA refers Australian-hosted content that is substantially likely to be prohibited to the Classification Board for classification, and may also refer content hosted overseas to the Classification Board.

8.39 In the 2009–10 financial year, the ACMA made 266 applications for individual classifications to the Classification Board. In 78 of these cases, the Classification Board determined the material should be Refused Classification. In the 2010–11 financial year, to 15 April 2011, there have been 131 applications made by the ACMA to the Classification Board, of which 39 were Refused Classification.[38]

8.40 The ACMA informed the committee that the vast majority of these applications to the Classification Board were made as the result of a complaint:

> [The] ACMA has own-motion investigative powers under the [*Broadcasting Services Act 1992*]. They would normally be referred

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34 *Committee Hansard*, 25 March 2011, p. 79.

35 Electronic Frontiers Australia, *Submission 13*, p. 3.

36 Electronic Frontiers Australia, *Submission 13*, p. 2.

37 Cyberspace Law and Policy Centre, *Submission 54*, p. 2.

38 *Committee Hansard*, 27 April 2011, p. 33.

> investigations from a complaint. So, while they are not technically investigations triggered by complaint, they are associated material with a complaint and, in the normal course of opening these investigations, they would be around serious content, sufficiently serious content and basically offensive depictions of children.[39]

8.41 The ACMA also explained that the kinds of decisions where it would refer overseas hosted content to the Classification Board would be threshold classification issues, where the ACMA is unclear about the Classification Board's views on a particular issue. In the course of an investigation, the ACMA has a discretionary power to submit any online content hosted overseas to the Classification Board, but must refer anything determined as being hosted in Australia.[40]

Prohibited content

8.42 Submissions outlined a number of concerns in relation to the ACMA's powers with respect to prohibited content. The Arts Law Centre of Australia (Arts Law Centre) highlighted the inconsistency in the treatment of 'prohibited content', compared with similar material available offline:

> 'Prohibited content' is defined in Schedule 7 of the *Broadcasting Services Act 1992* as being content classified by the Classification Board as refused classification, X18+, R18+ and MA15+ material not subject to an age verification system. The ACMA may also make determinations as to potential prohibited content, namely content that has not been classified by the Classification Board but if the content were to be classified there is a substantial likelihood that the content would be prohibited content. This requires the ACMA to essentially make classification decisions over content that should be made by the Classification Board by guessing as to what the Classification Board would decide. Such decisions by ACMA are problematic because unlike the Classification Board where a publication, film or computer game is banned within Australia if it is refused classification, the ACMA is able to blacklist or take down not only material that is illegal or refused classification, but material rated X18+, R18+ and MA15+ if not restricted behind an age verification system. Such material is legitimately available in Australia in an offline format, and should not be treated differently simply because it is on the internet.[41]

8.43 Ms Irene Graham also referred to the problems arising from the ACMA exercising classification powers:

> There have been a number of instances in recent years where the ACMA has guessed that particular internet [content] is 'prohibited content' but on subsequent referral to the Classification Board, the same content has been classified as not 'prohibited'. The ACMA has demonstrated that it is not

39 *Committee Hansard*, 27 April 2011, p. 34.

40 *Committee Hansard*, 27 April 2011, p. 34.

41 Arts Law Centre of Australia, *Submission 33*, p. 15.

> capable of accurately guessing how particular content would be classified by the Classification Board (and nor would be any other government agency). Hence ACMA should not have the power to order take-down, or blacklist, any internet content prior to having obtained a classification decision from the Classification Board.[42]

8.44 Further, Ms Graham questioned whether the Classification Board should have the power to classify content on the internet, given the volume of content on the World Wide Web.[43]

8.45 The Arts Law Centre also noted inconsistencies in decision-making between the ACMA and the Classification Board:

> Arts Law is concerned that the ACMA has in the past made decisions as to 'prohibited content' that are in conflict with decisions of the Classification Board. For example, in March 2009 it was reported in the news media that several images by artist Bill Henson which had been already cleared by the Classification Board were included on the ACMA blacklist thus considered 'prohibited content' not to be viewed online in Australia.[44]

8.46 The Arts Law Centre submitted that, although the inclusion of Mr Henson's material on the ACMA's list of prohibited, and potentially prohibited, overseas-hosted content (or 'blacklist') was an error, this merely emphasised concerns in relation to the non-publication of the ACMA's blacklist:

> ...[I]t is worrying that such an error is capable of being made in the first place, especially since the contents of the ACMA blacklist are not released to the public. Such secrecy undermines any confidence in the ACMA's decision-making and its ability to judge content...and creates the very real potential of scope creep where the list of prohibited content or potential prohibited content expands to include material beyond its original intention. Officials of the ACMA, while perhaps trained by the Classification Board, do not have the expertise or experience of the Classification Board which grant the Classification Board legitimacy. Furthermore, whereas decisions from the Classification Board can be applied for review by the Classification Review Board, there does not appear to be a similar obvious method of appeal for content added to the confidential ACMA blacklist.[45]

8.47 Similarly, the Cyberspace Law and Policy Centre noted that the ACMA's blacklist of prohibited content is not public, giving rise to the possibility of 'overreach' by the ACMA in relation to making determinations about prohibited content. This can be contrasted with decisions of the Classification Board, which are public, meaning

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42 Ms Irene Graham, *Submission 20*, p. 4.

43 Ms Irene Graham, *Submission 20*, pp 4-5.

44 Arts Law Centre of Australia, *Submission 33*, pp 15-16.

45 Arts Law Centre of Australia, *Submission 33*, pp 15-16.

that any 'overreach of the [Refused Classification] classification can be avoided through appeal and reclassification processes'.[46]

Mandatory filtering of Refused Classification content

8.48 In December 2009, the Minister for Broadband, Communications and the Digital Economy announced further details of the Australian Government's cyber-safety measures, including the introduction of mandatory internet service provider (ISP) level filtering of Refused Classification content.[47]

8.49 Collective Shout expressed strong support for the implementation of a mandatory filter for RC content and criticised those who objected to such a filter:

> Those who oppose filtering on the grounds of free speech, civil liberties or an alleged right of adults to see anything they want are best described as sexual assault or child porn libertarians rather than 'civil' libertarians. There is nothing 'civil' about the material that gets Refused Classification under the national classification scheme.[48]

8.50 The Cyberspace Law and Policy Centre argued that the introduction of such a filter would need to be supported by 'a better empirical understanding' about public concerns and 'in particular attitudes of children and their parents towards risks associated with on-line content'.[49]

8.51 Mr Bruce Arnold and Dr Sarah Ailwood highlighted that internet filtering needs to be complemented by parental responsibility and educational initiatives:

> In a globally networked environment, irrespective of technological fixes such as national broadband filters and geolocation restrictions, effective content regulation requires the participation of parents. It is not something that can or should be shrugged off as a matter for the state...Parental responsibility should be underpinned through an express content regulation component in the national curriculum and its state/territory counterparts.[50]

8.52 The committee also notes advice it received from an officer of the Department of Broadband, Communications and the Digital Economy about the status of the introduction of mandatory filtering for RC content:

> ...[T]he minister indicated...that the next step with respect to the commitment to introduce mandatory filtering of refused classification

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46 Cyberspace Law and Policy Centre, *Submission 54*, pp 2-3.

47 Senator the Hon. Stephen Conroy, Minister for Broadband, Communications and the Digital Economy, 'Measures to improve safety of the internet for families', Media Release, 15 December 2009.

48 Collective Shout, *Submission 65*, pp 20-21. See also Mr Lyle Shelton, Australian Christian Lobby, *Committee Hansard*, 25 March 2011, p. 3.

49 Cyberspace Law and Policy Centre, *Submission 54*, p. 2.

50 Mr Bruce Arnold and Dr Sarah Ailwood, *Submission 37*, p. 10.

> material was dependent upon a consideration or a review of the 'refused classification' classification...That is being conducted as part of the ALRC review of the National Classification Scheme...[Therefore] the next step in the introduction of mandatory ISP filtering is tied to the ALRC activity.[51]

National Classification Scheme and mobile devices

8.53 Developments in the field of mobile telephony have led to increasingly sophisticated mobile devices which are capable of functioning as miniature computers. Such devices can be used to access online content. In addition, many are capable of running software applications of increasing sophistication, including applications which are computer games.

8.54 The Attorney-General's Department (Department) informed the committee that mobile phone and online games are regulated by both the *Classification Act 1995* and the *Broadcasting Services Act 1992*. State and territory enforcement legislation makes it an offence to sell or distribute these games to the public without classification.[52]

8.55 However, at present, the majority of these games are not classified prior to being made available. This has led to concerns from the Classification Board, industry and consumers about adherence to classification requirements.[53]

Confusion about mobile phone applications

8.56 The committee received evidence from a number of organisations suggesting widespread confusion over whether mobile phone games and applications require classification prior to sale.

8.57 The number of games and applications (apps) for mobile devices is growing rapidly, as described by Research in Motion (RIM):

> There are now over 500,000 apps and games available for Australian consumers to download onto their phones. Consumers spent an estimated $6.2 billion in 2010 in mobile application stores and games remain the number one most popular apps, ahead of mobile shopping, social networking, utilities and productivity tools.[54]

8.58 While developers would appear to be responsible for having their applications classified under the National Classification Scheme, relatively few are apparently

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51 *Committee Hansard*, 27 April 2011, p. 34.

52 Attorney-General's Department, *Submission 46*, p. 15.

53 Attorney-General's Department, *Submission 46*, p. 15.

54 Research in Motion, *Submission 17*, p. 5.

doing so at present.[55] RIM is only aware of five games for mobile devices that have been classified, which are its own.[56]

8.59 The Australian Mobile Telecommunications Association (AMTA) noted that it was increasingly unclear how to distinguish between computer games as they have traditionally been known, and the increasing number of mobile applications.[57] The AMTA maintained that the vast majority of mobile applications, including many games, consist of content that would not be considered 'submittable' under the National Classification Scheme:

> ...[I]t is hard to define a 'game' that may cause concern from the many 'games' that would not, such as a Sudoku application for a mobile. They both may be available for download to a mobile device.[58]

8.60 RIM pointed out that, while a Sudoku application may have to be classified, those same Sudoku puzzles could be published in a newspaper without classification.[59]

8.61 Both AMTA and RIM informed the committee that most application developers are individual hobbyists or small enterprises.[60] As a result, the classification fee can be onerous for such developers, reducing competitiveness for smaller market participants.[61] AMTA also noted that Australia is perceived as a small market, meaning additional costs of regulation may lead to developers avoiding the release of their products in Australia.[62]

8.62 AMTA submitted that mobile applications are already subject to self-regulation by online stores:

> The providers of such online stores have already implemented their own guidelines and safeguards with respect to applications available in their stores. AMTA maintains that the vast majority of these applications are not 'submittable' material in nature and that, in any case, the industry is successfully self-regulating in this market.[63]

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55 Research in Motion, *Submission 17*, p. 5.

56 Research in Motion, *Submission 17*, p. 1.

57 Australian Mobile Telecommunications Association, *Submission 42*, p. 4.

58 Australian Mobile Telecommunications Association, *Submission 42*, p. 4.

59 Research in Motion, *Submission 17*, p. 3.

60 Australian Mobile Telecommunications Association, *Submission 42*, p. 4; Research in Motion, *Submission 17*, p. 5.

61 Research in Motion, *Submission 17*, p. 5.

62 Australian Mobile Telecommunications Association, *Submission 42*, p. 5.

63 Australian Mobile Telecommunications Association, *Submission 42*, p. 5.

8.63 Finally, RIM observed that, if all applications are in fact sent to the Classification Board for classification, given the number of applications developed each year, the Classification Board would have a significantly increased workload.[64]

Mobile phone premium services

8.64 As noted above, many mobile devices are capable of accessing the internet and any content contained thereon. In addition, phone users may be able to access mobile premium services through a Short Message Service (SMS) or Multimedia Message Service (MMS), or a proprietary network. The mobile premium services fall under Schedule 7 of the *Broadcasting Services Act 1992*, and therefore adopt classification definitions linked to the National Classification Scheme.[65] As a result, many of the same arguments raised above in relation to online content apply to mobile premium services.

8.65 In addition, FamilyVoice Australia made the point that, while parents may be able to exert some control over the use of a family computer to access online content, this may be less true of mobile devices. Mrs Roslyn Phillips from FamilyVoice Australia stated:

> Now that there are mobile phones with internet access, all that my child has to do is to go to school and see the pornography on a friend's phone. Parents cannot control that. I do think there is a strong case for the government to step in when I believe, as in this case, there is proven harm from the freely available pornographic and violent sites.[66]

8.66 Mobile premium service content is subject to the same prohibitions applying to other forms of online content services. In addition, it is prohibited to provide MA15+ content through a mobile premium service unless it is subject to a restricted access system.[67]

8.67 Telstra noted that the mobile content it provides is subject to age restriction where required, whether the mobile service is provided through a post-paid account or pre-paid service.[68]

8.68 Under Schedule 7 of the *Broadcasting Services Act 1992*, Telstra engages Trained Content Assessors to categorise the likely classification (for example G, PG, MA15+, R18+) of relevant content that has not been classified by the Classification

64 Research in Motion, *Submission 17*, p. 7.

65 *Broadcasting Services Act 1992*, Schedule 7, clause 15.

66 *Committee Hansard*, 25 March 2011, p. 76.

67 *Broadcasting Services Act 1992*, para. 20(1)(d).

68 Telstra, *Submission 26*, p. 4.

Board. Telstra then restricts access to this content in different ways, depending on the nature of the service being provided.[69]

8.69 In order to obtain a post-paid service with Telstra, a person must be 18 years of age or older, which is verified at the time of activation. Only account owners may request access to age-restricted services, in a process outlined in Telstra's submission:

> A customer who wishes to access age-restricted content can do so by calling Telstra customer service who will verify the caller as the account owner by asking for the account password and other information that only the account owner would know. Once verified as the account owner, the customer is by definition verified as being 18 years or older and a confirmation letter is sent to the account owner's address.[70]

8.70 Pre-paid customers wishing to access age-restricted content must apply for the service and provide proof of age. Once a post-paid or pre-paid account has been age-verified in this manner, the user can access age-restricted content.[71]

69 Telstra, answer to question on notice, received 21 April 2011.

70 Telstra, *Submission 26*, p. 4.

71 Telstra, *Submission 26*, p. 4.

CHAPTER 9

Television, radio and recorded music

9.1 A number of important media do not fall within the National Classification Scheme applying to publications, films and computer games. The content of media such as television, radio, recorded music and advertising (including outdoor advertising) are subject to co-regulatory and self-regulatory arrangements.

9.2 This chapter briefly discusses, at a general level, the advantages and disadvantages of these types of regulatory mechanisms.

9.3 The chapter addresses term of reference (l), which refers to the interaction between the National Classification Scheme and the role of the ACMA in supervising broadcast standards for television. In the context of television content, the application of the National Classification Scheme to music videos (term of reference (i)) is also examined.

9.4 There is also discussion of term of reference (j), the effectiveness of the ARIA/AMRA Labelling Code of Practice for Recorded Music Product Containing Potentially Offensive Lyrics and/ or Themes' (ARIA/AMRA Labelling Code).

Effectiveness of self-regulation

9.5 The committee received a range of evidence regarding the effectiveness of industry self-regulation. In general, the industries themselves were in favour of self-regulation. Broadly, industry groups noted that self-regulatory schemes provide a degree of flexibility to the industry, while minimising the burden on government (since most schemes are industry-funded).[1]

9.6 Additionally, industry groups tended to maintain that the standards applied under their codes of practice reflect community standards and are often drawn from the two sets of guidelines for classification established by the National Classification Scheme.[2]

9.7 A number of witnesses, however, questioned the ability of industries to adequately reflect community standards, particularly noting the proliferation of sexualised content.[3]

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1 See, for example, Advertising Standards Bureau, *Submission 41*, p. 7.

2 See, for example, Australian Recording Industry Association (ARIA) and Australian Music Retailers Association (AMRA), *Submission 52*, p. 2.

3 See, for example, Ms Melinda Tankard Reist, Collective Shout, *Committee Hansard*, 27 April 2011, p. 21. The sexualisation of children and objectification of women are discussed further in Chapter 11.

Complaints-based systems

9.8 Most forms of industry self-regulation feature a complaints system whereby members of the public can make complaints if they feel material has been inappropriately classified. In the case of industries covered by the *Broadcasting Services Act 1992*, the ACMA is able to examine complaints if the industry itself is not able to provide a remedy that is satisfactory to the complainant.

9.9 The complaints system provides a mechanism by which consumers, and potentially the ACMA, can have input into classification decisions and providing feedback to the industry.

9.10 Nevertheless, the committee received substantial evidence of community dissatisfaction with the various complaints systems. The committee heard that many consumers are unaware of the existence of a complaints process, or how to go about making a complaint.[4] Additionally, as complaints can only be made once material has been placed in the public domain, objectionable material may remain in public for some time before any action is taken.[5]

Television

9.11 Under its broadcasting power,[6] the Commonwealth regulates content on television and radio broadcasts through the *Broadcasting Services Act 1992*.

9.12 Television and radio content is co-regulated by each industry and the ACMA. The *Broadcasting Services Act 1992* provides that radio and television industry groups are to develop codes of conduct governing the content they can broadcast, in consultation with the ACMA.[7] The *Broadcasting Services Act 1992* specifies that, in developing these codes, community attitudes to the following matters are to be taken into account:

a) the portrayal in programs of physical and psychological violence;

b) the portrayal in programs of sexual conduct and nudity;

c) the use in programs of offensive language;

d) the portrayal in programs of the use of drugs, including alcohol and tobacco;

e) the portrayal in programs of matter that is likely to incite or perpetuate hatred against, or vilifies, any person or group on the basis of ethnicity,

4 See, for example, Media Standards Australia, *Submission 21*, p. 30.

5 See, for example, Professor Elizabeth Handsley, Australian Council on Children and the Media, *Committee Hansard*, 25 March 2011, p. 64.

6 Section 51(v) of the Constitution.

7 *Broadcasting Services Act 1992* (Cth), ss. 123(1).

nationality, race, gender, sexual preference, age, religion or physical or mental disability;

f) such other matters relating to program content as are of concern to the community.[8]

9.13 The *Broadcasting Services Act 1992* requires that industry groups apply the classification system developed under the *Classification Act 1995* in classifying films for broadcast. Additional requirements include the restriction of the broadcasting of certain classifications to particular times and the provision of consumer advice.[9] These codes of practice are then registered with the ACMA.[10]

9.14 The Commercial Television Code of Practice, developed under the provisions of the *Broadcasting Services Act 1992* by the industry, regulates content on commercial free-to-air television.[11] Subscription television is subject to codes of practice developed by the Australian Subscription Television and Radio Association (ASTRA).[12] The Australian Broadcasting Corporation (ABC) and Special Broadcasting Service (SBS) each have a code of practice as provided for in their respective establishing legislation.[13] The ACMA is notified of the ABC and SBS codes of practice.

9.15 Under the code of practice system, complaints about content are first made to the broadcaster. If a complainant is dissatisfied with the broadcaster's response, or the broadcaster fails to respond within 60 days, the complaint may be referred to the ACMA.[14]

9.16 Table 9.1 sets out the classifications adopted by the television industry participants under their respective codes of practice. Each code of practice specifies times when particular content can be shown. For example, MA and MA15+ material can typically only be shown after 9:00 pm or 9:30 pm, depending on the broadcaster.

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8 *Broadcasting Services Act 1992*, ss. 123(3).

9 *Broadcasting Services Act 1992*, s. 123.

10 Attorney-General's Department, *Submission 46*, p. 12.

11 Free TV Australia, *Submission 50*, p. 3.

12 Australian Subscription Television and Radio Association (ASTRA), *ASTRA Overview*, http://astra.org.au/pages/astra-overview, (accessed 26 May 2011).

13 See the *Australian Broadcasting Corporation Act 1983*, ss. 8(1); *Special Broadcasting Service Act 1991*, ss. 10(1). The codes of practice registered with or notified to the ACMA are available from http://www.acma.gov.au/WEB/STANDARD/pc=PC_300080, (accessed 20 December 2010).

14 The Australian Communications and Media Authority, *Complaints that need to be made to the broadcaster first*, http://www.acma.gov.au/WEB/STANDARD/pc=PC_90139, (accessed 10 May 2011).

Table 9.1: Television classifications

ABC	G, PG, M, MA15+[15]
SBS	G, PG, M, MA15+, MAV15+ [strong violence][16]
Commercial TV	P [Preschool], C [Children], G, PG, M, MA, AV [Adult Violence][17]
Community TV	G, PG, M, MA
Pay TV and Open Narrowcast TV	G, PG, M, MA15+, R18+[18]

9.17 In addition to the codes of practice, the *Broadcasting Services Act 1992* requires the ACMA to determine standards for programs for children for commercial television broadcasters.[19]

9.18 The Children's Television Standards (CTS) requires networks to broadcast 390 hours of programming per year specifically for school-aged children and preschoolers, denoted by the P (Preschool) and C (Children) classification (as shown

15 ABC Code of Practice 2004, http://www.abc.net.au/corp/pubs/codeprac04.htm, (accessed 26 May 2011); ABC television program classifications are based on the *Guidelines for the Classification of Films and Computer Games*.

16 The SBS classifications are 'based on the *Guidelines for the Classification of Films and Computer Games*'. SBS schedules programs, or modifies them, to ensure that they are suitable for broadcast, or broadcast at particular times: SBS, *Codes of Practice 2006*, http://media.sbs.com.au/home/upload_media/site_20_rand_2138311027_sbscodesofpractice2010.pdf, (accessed 20 December 2010), p. 13.

17 Films are classified according to *Guidelines for the Classification of Films and Computer Games*, while most other programs are classified according to Television Classification Guidelines included in the Code of Practice. Films that would be classified MA15+ because of violence under the *Guidelines for the Classification of Films and Computer Games* must be classified AV or modified to M level violence or lower: *Commercial TV Code of Practice*, January 2010, http://www.freetv.com.au/media/Code_of_Practice/2010_Commercial_Television_Industry_Code_of_Practice.pdf, (accessed 20 December 2010), p. 8.

18 R18+ movies must be able to be restricted by a disabling device: ASTRA, *Codes of Practice 2007*, http://www.acma.gov.au/webwr/aba/contentreg/codes/television/documents/stbcodesofpractice2007.pdf, (accessed 20 December 2010), pp 6–10.

19 *Broadcasting Services Act 1992*, s. 122.

in the table above). This programming must be provided at certain times of the day as prescribed by the CTS.[20]

9.19 Only programming which has been cleared and certified by the ACMA can be 'counted' toward the CTS quota. The programming must be suitable for viewing by children and must be specifically designed with their educational and emotional needs in mind. It must also comply with prescriptions with respect to depictions of gender, race and unsafe behaviour.[21]

9.20 Television broadcasters generally need to include consumer advice with their broadcasts. For example, stations operating under the Commercial Television Industry Code of Practice must provide consumer advice for all MA-rated and AV-rated programs, M-rated films and short series, and all PG-rated films. In addition, PG-rated programs broadcast within certain times may be required to be accompanied by consumer advice.[22]

9.21 The Subscription Broadcast Television and Subscription Narrowcast Television codes of practice outline the requirements for classification of content broadcast by those services.[23] Unlike the free-to-air broadcast codes, there are no requirements for the limitation of content to certain time zones, although classification symbols and consumer advice must be clearly displayed at the commencement of each program.[24] Material rated R18+ can only be broadcast by a subscription narrowcast service, and only where access to that material is restricted.[25]

Effectiveness of television codes of practice

9.22 The committee received a number of submissions criticising the ACMA's role in the supervision of television standards (term of reference (l)). For example, FamilyVoice Australia cautioned that, even where the ACMA investigates breaches of the code under present arrangements, there are no significant penalties imposed:

> We feel that when there has been a breach of the guidelines, for example, with TV stations, nothing is done to the TV station as a result. There is no punishment. For example, only the other week, after six months, a complaint of mine was upheld by the Australian Communications and Media Authority about the wrong classification of an ABC program. I believed that it was wrongly classified M and [the] ACMA agreed with me,

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20 Free TV Australia, *Submission 50*, p. 4.

21 Free TV Australia, *Submission 50*, p. 4.

22 Commercial Television Code of Practice, http://www.freetv.com.au/media/Code_of_Practice/2010_Commercial_Television_Industry_Code_of_Practice.pdf, (accessed 13 June 2011), para. 2.20.

23 ASTRA, *Submission 24*, p. 2.

24 ASTRA, *Submission 24*, pp 2-3.

25 ASTRA, *Submission 24*, p. 3.

> but nothing has happened as a result. There has been no apology to me from the ABC, and there has been no reprimand by [the] ACMA. There was not even a media release. If there is no punishment, why have the guidelines?[26]

9.23 In answer to a question on notice, however, the ABC acknowledged that the particular program had been incorrectly classified by the ABC:

> The ABC has reclassified this episode...as MA15+ for future broadcasts. [The] ACMA's report on the breach decision has been circulated to ABC TV Management and to Classifiers.[27]

9.24 Broadcast industry television participants were of the view that co-regulation is effective. Free TV Australia submitted:

> Compliance with both the Code and the [Children's Television Standard (CTS)] are licence conditions of the commercial broadcast networks which are enforced by the ACMA. The ACMA has extensive powers to investigate complaints regarding non-compliance and apply penalties for breaches as appropriate. The Code is regularly reviewed to ensure it accords with prevailing community standards.[28]

9.25 Free TV Australia also noted that, relative to the amount of content broadcast each year, the industry receives very few complaints:

> This system of regulation, which is underpinned by a robust complaints handling process which applies across the Code of Practice, the CTS and the AANA Codes, is working well. This is evidenced by the fact that there is a very low level of complaint about programming content (including advertisements), even though commercial free-to-air broadcasters are transmitting content twenty-four hours a day, three hundred and sixty five days a year across nine channels.[29]

9.26 SBS also noted that it receives few complaints. By way of example, SBS informed the committee that, since 2005, it had received 246 complaints, of which 15 were appealed to the ACMA. Only two of these were upheld.[30]

9.27 However, the Australian Christian Lobby (ACL) objected to the use of complaint statistics as evidence of the underlying community sentiment:

> ACL believes that it is problematic to measure community standards by the number of complaints generated by a particular broadcast or telecast. It would come as news to a great number of people within the community to learn that their view of the contemporary media environment was judged

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26 Mrs Roslyn Phillips, FamilyVoice Australia, *Committee Hansard*, 25 March 2011, p. 78.

27 ABC, answer to question on notice, received 13 May 2011.

28 Free TV Australia, *Submission 50*, p. 2.

29 Free TV Australia, *Submission 50*, pp 2–3.

30 SBS, answer to question on notice, received on 21 April 2011.

> solely on their formally complaining to the relevant authorities. With so many complaints in the largely co-regulatory and self-regulated media environment being rejected, the centrality of complaint processes in the regulation of content is a frustration for viewers and listeners, who come to feel the system is weighted against them.[31]

9.28 The potential for inconsistency in classification decision-making between the co-regulatory scheme for television, as supervised by the ACMA, and the Classification Board, was also an issue raised with the committee.

9.29 In this context, the committee received a substantial submission from Mr David Tennant, which focussed on the ABC's classification procedures, and a 'history of classification standards which are inconsistent with the...Classification Board'.[32]

9.30 The ABC defended its ability to effectively classify broadcast television in line with community standards, noting the professionalism of its assessors. Mr Michael Brealey from the ABC asserted:

> For the ABC we spend a lot of time and effort in getting it right. We have over 120 pages of editorial policy, a code, guidelines and in-house classification. With the actual practical implication...we look at programs quite differently. So we do not look at the whole set. We will look at individual programs in a series and we need to be able to assess each of those programs to decide what its classification should be. If it needs to change, we have the ability to edit and that is quite important. We are not looking at the whole set; we are looking at individual—and aside from that, we have in-house classifiers and that is their job, their bread and butter. They are professional people and they do it as their job. They have the corporate knowledge and the expertise to do it as well as anyone else.[33]

Digital television and online delivery of broadcast television

9.31 As noted in the previous chapter, the digitisation of media has resulted in a convergence of content accessible from multiple platforms. This includes the rise of internet-based television channels, many of which are run by traditional television broadcasters to supplement free-to-air services. Internet services such as the ABC's iView, as well as others maintained by commercial free-to-air broadcasters, allow consumers to access programs on demand, and as such do not adhere to time zones for particular ratings agreed to under the various television codes of practice.

9.32 Additionally, new digital television sets are capable of connecting directly to the internet, allowing certain online services to be viewed in a manner which mimics traditional broadcast television. It is unclear how existing television codes of practice

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31 Australian Christian Lobby, *Submission 25*, p. 10.

32 Mr David Tennant, *Submission 70*, p. 1.

33 *Committee Hansard*, 7 April 2011, p. 21.

relate to these new forms of content delivery. In its submission, Free TV Australia drew attention to this issue:

> Free TV strongly endorses the application of equal regulation to all players. Due largely to the time zone system set out above, there is currently a significant gap between the regulations that apply to content provided on commercial free-to-air television and that on comparable platforms, such as pay television and IPTV [Internet Protocol Television], with far more restriction applied to free-to-air television. This creates a complex and confusing system for viewers, most of whom will be unaware that different standards apply to different platforms. Free TV therefore urges standardisation of classification regulation across all platforms.[34]

9.33 Ms Julie Flynn of Free TV Australia elaborated on this further:

> Increasingly now TVs are connected TVs. That means they have an Ethernet port...There is any variety of TVs and, in the future, you will be getting content across multiple platforms and on multiple devices and increasingly, unless we come up with a more consistent approach to working out what we want to regulate and how we want to regulate it, we will find that people will be accessing different forms of content in different ways, and the same piece of content will be regulated differently depending on which platform or device it occurs on.[35]

9.34 The committee notes that these new developments undermine existing methods by which television content is regulated.

Different treatment for recorded and broadcast music videos

9.35 Term of reference (i) refers to the application of the National Classification Scheme to music videos. For this reason, the committee focussed on the treatment of music videos in the context of television regulation.

9.36 Music videos are subject to different forms of classification depending upon the means by which they are distributed. If released on DVD or similar recorded form, a music video is technically a film and is subject to classification under the National Classification Scheme. Music videos broadcast on television, however, are instead subject to industry codes of practice under the *Broadcasting Services Act 1992*.

9.37 The majority of evidence about music videos related to their broadcast on free-to-air television and, to a lesser extent, subscription television.

9.38 The committee questioned the Attorney-General's Department (Department) about the different mechanisms used to classify a music video released on DVD versus the same content broadcast on television, noting the apparent inconsistent treatment. In response, an officer from the Department stated:

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34 Free TV Australia, *Submission 50*, p. 7.

35 *Committee Hansard*, 7 April 2011, p. 24.

> In relation to something that is not sold through a store but broadcast on television, the decision about what is appropriate still refers back to the [National Classification Scheme]. The timing of when there might be some regulatory intervention might change, in the sense that, as my colleagues from [the] ACMA were saying, the first classification assessment would have been done by the industry regulators under their code. But that is not something they do stand-alone. There is interaction between the [Classification] [B]oard and industry regulators in terms of training and consistency of decision making. Then there is the capacity for complaints. As I understand it, if [the] ACMA receives a complaint, it is obliged to act on it and follow it through.
>
> There are different entities, but that is because there are different media through which the material is being viewed, but all are trying to achieve consistency under the one national scheme or arrangement...[I]n terms of the scheme and the decisions that are made under it, there is a consistency of approach.[36]

9.39 The officer described the classification mechanism for television as a 'two step arrangement with the industry', featuring self-classification by the industry, with the recourse to complaints and a formal assessment by the ACMA.[37]

Music videos and community standards

9.40 The committee received a range of evidence highlighting community concern about music videos on television. As ACL noted, a substantial number of music videos are broadcast on weekend mornings.[38]

9.41 Mr Gavin Rosser expressed to the committee his dismay that overtly sexual music clips are played during prime viewing times for children:

> Twice recently I have been appalled by the overtly sexual nature of music video clips. The first time was watching TV on Saturday morning with my kids (the oldest was about six at this time). We don't usually watch music video clips, but thought it would be fun to boogie around the lounge to some good upbeat music. Unfortunately the first clip was too explicit for my young children to watch, so I turned it off and turned it on a bit later. Over a period of about five songs only one or two were appropriate for that age group. The remainder were drenched in aural and visual sexual references, innuendo, sexual dancing, sexual thrusting etc. We haven't tried to watch video clips since.[39]

9.42 Media Standards Australia (MSA) shared Mr Rosser's concerns:

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36 *Committee Hansard*, 27 April 2011, p. 31.

37 *Committee Hansard*, 27 April 2011, p. 32.

38 Australian Christian Lobby, *Submission 25*, p. 10.

39 Mr Gavin Rosser, *Submission 62*, p. 1.

> Increasing numbers of parents have expressed their grave concerns to MSA, with regard to the sexual content, explicit lyrics, (particularly with regard to the dancing – including sexually-provocative gyrations), and sometimes even the violence contained in many music videos. This is particularly worrying in regard to Saturday and Sunday morning video clips programmes on television (Rage on ABC and Video Hits on Ten), since these are largely unsupervised timeslots in most households.[40]

9.43 ACL referred to the findings of the Senate Environment, Communications and the Arts Committee's (ECA Committee) 2008 inquiry into the sexualisation of children in the contemporary media environment. That committee's report recommended that 'broadcasters review their classification of music videos specifically with regard to sexualising imagery'.[41] ACL noted that since that inquiry:

> [O]ne of Kylie Minogue's former producers declared publicly that, "The music industry has gone too far" in its sexualised content, and "Ninety-nine per cent of the charts is R 'n B and 99 per cent of that is soft pornography".[42]

9.44 Professor Elizabeth Handsley of the Australian Council on Children and the Media was of the opinion that the government response to the recommendations of the ECA Committee was lacking:

> When the government came out with its statement in response to the Senate committee's report, it came out on that particular recommendation with pretty much the same words that the industry had started with, that is, that there had not been any complaints and therefore there was no community concern about it. We were deeply concerned by that response from the government, I am sorry to say. We thought that showed a lack of engagement with that particular issue and a lack of engagement with the Senate process that had concluded there was community concern, something did need to be done, and they just basically overlooked that, which was very disappointing. The postscript to that is that the television industry has subsequently reviewed its code, made a number of changes, but has not changed one word in relation to the classification of video clips. So, we were very disappointed about that.[43]

9.45 The sexual nature of many music videos played in G and PG viewing times may contribute to the sexualisation of children. The level of sexual content in music videos also led ACL to conclude that current self–classification system for television broadcasters has failed. ACL called for the ACMA to conduct a review of the classification of music videos:

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40 Media Standards Australia, *Submission 21*, p. 23.

41 Senate Standing Committee on Environment, Communications and the Arts, *Report on the Sexualisation of children in the contemporary media*, June 2008, p. 42.

42 Australian Christian Lobby, *Submission 25*, p. 10.

43 *Committee Hansard*, 25 March 2011, p. 71.

> Obviously music videos are a particular class of media for which several people have identified an issue involved with the sexualisation of society. ACL's recommendation is not as strong as getting those music videos classified externally beyond the broadcasters; it is for the ACMA to conduct a specific investigation into the classification of music videos to ensure that the television industry is actually applying industry standards appropriately. Unless the television industry itself is willing to self-regulate the content that it is willing to broadcast in often PG-rated music video programs, then there is obviously a need for additional red tape, if that is what it is to be called.[44]

9.46 In contrast, Free TV Australia supported the ability of the commercial broadcasters to effectively self-classify broadcast content, noting that, in the case of music videos, all are viewed by the network's classifiers to ensure that they are appropriate for the relevant classification time zone (usually G or PG). Any video found to be unsuitable is either edited before broadcast or not included in the program.[45] In addition, Free TV Australia submitted:

> For G classified programs networks take extra steps to ensure the videos are very mild in impact and safe for children to watch without adult supervision, as required by the Code of Practice. For a PG program, the networks apply the Code at the lower end of the PG classification requirements as they are mindful that younger viewers could be watching these programs.[46]

9.47 Free TV Australia noted that the ACMA has never upheld any complaints about music videos being broadcast in inappropriate time zones:

> [O]f the more than 1500 submissions that Free TV received as part of its most recent review of the Commercial Television Code, only 5 argued for additional classification laws with respect to music videos.[47]

9.48 Free TV Australia also noted that the introduction of digital television would further improve the ability of parents to control access to inappropriate content:

> As of 4 February 2011, a Parental Lock mechanism must be embedded in all equipment designed to receive digital television, allowing parents to limit the content their children can access based on the classification information provided by the broadcaster. Parents are able to use these locks to definitively control what television their children may view.[48]

9.49 While subscription television is not limited to certain time zones in the same manner as free-to-air television, the technology used also allows parents to exercise

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44 Mr Benjamin Williams, Australian Christian Lobby, *Committee Hansard*, 25 March 2011, p. 7.

45 Free TV Australia, *Submission 50*, p. 8.

46 Free TV Australia, *Submission 50*, p. 8.

47 Free TV Australia, *Submission 50*, p. 8.

48 Free TV Australia, *Submission 50*, p. 6.

control over access by other members of the household. As Ms Petra Buchanan of ASTRA explained:

> We strongly believe in information, so ensuring that classification comes up at the commencement of any program, that there is detail about that on the electronic program guides as well as in printed guides, so information to make sure that every consumer is the most savvy in terms of monitoring and managing that. Then there is the technology overlay so that they can put that into practice to protect members of the household or however they would like to manage the viewing.[49]

9.50 In addition, Ms Buchanan noted that subscription television services involve a direct reciprocal relationship with a subscriber, as opposed to the unrestricted audience of a free-to-air broadcaster:

> [I]n a sense they are very different business models in terms of how and why they exist. We obviously have a very direct reciprocal relationship with a subscriber who, in some instances, may be purchasing it because they want to get those music channels and they want to know that they can have them on all day long whenever they want to see that content and product. Whereas, obviously, more generalised services like the commercial and the national broadcasters have the whole of the viewing audience to account for.[50]

Classification of music videos under the National Classification Scheme

9.51 The committee heard that, even in cases where music videos are classified in accordance with the *Guidelines for the Classification of Films and Computer Games*, as is generally the case under broadcasting codes of practice, there remains a risk of overly sexual content within the G and PG ratings. Speaking about the classification of music videos by the Classification Board, FamilyVoice Australia noted:

> Classification guidelines for films, in dealing with the element of sex, perhaps fail to take into account fully the issue of 'sexualised imagery' and action. Dancers in a music video do not normally engage in or even explicitly simulate sexual acts. However, the overall nature of the video can be highly sexualised. Because music is such a powerful influence on children parents are rightly concerned about the overall impact of repeated viewing of such material by younger children.[51]

9.52 The Australian Council on Children in the Media also argued that the current classification of film clips using guidelines similar to the National Classification Scheme does not 'catch' the depictions that cause concern:

> Such depictions include partially clad females dancing erotically, some sadism, violence and degradation, and have an outcome of involving

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49 *Committee Hansard*, 7 April 2011, p. 25.

50 *Committee Hansard*, 7 April 2011, p. 25.

51 FamilyVoice Australia, *Submission 15*, p. 19.

> children in the trappings not just of adult sexuality but of destructive and exploitative adult sexuality. On the other hand, the present classification criteria revolve around depictions of nudity, sexual activity and sexual references. These fail to prevent widespread screening of sexualized images.[52]

9.53 As a result, submissions and witnesses argued for a significant tightening of the guidelines used to classify music videos to combat the sexualisation of children and objectification of women. This subject is addressed further in Chapter 11.

Case study

9.54 MSA provided the committee with an example of the difficulties in making a complaint about an objectionable music video.

9.55 The example relates to the screening of the uncut video of the song 'Girls on Film' by Duran Duran, which features some nudity and eroticised content. Mr Paul Hotchkin from MSA observed the music video playing at a McDonalds restaurant in Western Australia, apparently as part of the restaurant's use of the MAX channel, available on subscription television.[53] Mr Hotchkin described his experience upon attempting to make a complaint:

> I immediately sent a letter of complaint by registered express mail direct to McDonald's head office, with no reply. When we complained to the store directly, we were told it was company policy to screen the MAX music video channel.
>
> I then emailed the ACMA, who suggested I contact ASTRA or the Classification Branch of the Attorney-General's Department. ASTRA said I should complain to Foxtel, which I did, but I have still had no reply. Someone from the Classification Branch actually phoned me and said they had no record of any Duran Duran Girls on Film video that had a rating of higher than PG, which to me meant they only had a record of the censored version.[54]

9.56 The committee believes that Mr Hotchkin's experience highlights the frustration held by many members of the public with respect to complaint mechanisms. As Mr Hotchkin stated:

> When we explain to people that there is a complaints process and explain what steps to take, we never hear from them again—even after we have asked them to keep us informed of their progress. Even I have personally experienced the futility of it firsthand. We believe the complaints process is

52 Australian Council on Children and the Media, *Submission 44*, p. 6.

53 Media Standards Australia, answer to question on notice, received 21 April 2011.

54 *Committee Hansard*, 7 April 2011, p. 36.

> generally too hard for the public and a lot of complaints are flying under the radar.[55]

9.57 This led Mr Hotchkin to suggest the establishment of special 'one-stop' independent complaints department to cover a range of media, in order to simplify the complaints process.[56]

9.58 The ACMA explained its handling of MSA's complaint:

> From the ACMA's reading of the complaint it appeared that MSA was not so much concerned by the classification of the material that was being made available in the restaurant as by the availability of the material for viewing at a venue that is likely to be frequented by children. This is not a matter that is within the ACMA's jurisdiction for investigation. As a result the ACMA sent an email response to MSA...advising MSA of this.[57]

Recorded music

9.59 The Australian Recorded Industry Association (ARIA) and the Australian Music Retailers Association (AMRA) are jointly responsible for the ARIA/AMRA Recorded Music Labelling Code of Practice (ARIA/AMRA Labelling Code), which applies to audio-only recordings in various formats.[58]

9.60 The ARIA/AMRA Labelling Code adopts a three-tiered labelling regime:

- Level 1: 'Warning: Moderate impact—coarse language and/or themes': for material that contains infrequent aggressive or strong coarse language; or moderate-impact references to drug use, violence, sexual activity or themes;
- Level 2: 'Warning: Strong impact—coarse language and/or themes': for material that contains frequent aggressive or strong coarse language or strong-impact references to, or detailed description of, drug use, violence, sexual activity or themes; and
- Level 3: 'Restricted: High impact themes—not to be sold to persons under 18 years': for material that contains graphic description of drug use, violence, sexual activity or very strong themes, which have a very high degree of intensity and which are high in impact.[59]

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55 *Committee Hansard*, 7 April 2011, p. 36.

56 *Committee Hansard*, 7 April 2011, p. 36.

57 The Australian Communication and Media Authority, answer to question on notice, received 13 May 2011.

58 ARIA and AMRA, *Submission 52*, p. 1. The formats specifically mentioned in the code include CDs, cassettes and records. The ARIA/AMRA Recorded Music Labelling Code of Practice (ARIA/AMRA Labelling Code) does not include music videos.

59 ARIA, *Labelling Code*, http://aria.com.au/pages/labelling-code.htm, (accessed 21 December 2010).

9.61 The ARIA/AMRA Labelling Code requires all products released or sold by ARIA or AMRA members—whether imported or local—to be labelled if it is appropriate to do so.[60]

9.62 Recorded material exceeding Level 3 is not permitted to be released and/or distributed by ARIA members or sold by AMRA members. This includes recordings containing lyrics which promote, incite, instruct or exploitatively or gratuitously depict drug abuse, cruelty, suicide, criminal or sexual violence, child abuse, incest, bestiality or any other revolting or abhorrent activity in a way that causes outrage or extreme disgust.[61] The committee was informed that, under the current ARIA/AMRA Labelling Code, no recordings have ever been included in the 'not to be sold' category.[62]

9.63 The ARIA/AMRA Labelling Code is approved by the Standing Committee of Attorneys-General (SCAG).[63]

9.64 In 2002, the then Attorney-General, the Hon Daryl Williams AM QC MP, described the legal status of the ARIA/AMRA Labelling Code as follows:

> The guidelines are neither a law nor a by-law…[T]hey exist as part of the industry-regulated ARIA scheme for labelling audio recordings with explicit lyrics. The effectiveness of the ARIA scheme is monitored by Commonwealth, State and Territory Ministers with classification responsibilities. Ministers have recently required ARIA to amend the ARIA Code to prohibit the sale to minors of audio recordings carrying the strongest ARIA warning label…[T]he Classification Act does not provide for the classification of audio recordings unless they also contain visual material.[64]

9.65 AMRA administers a Complaints Handling Service for handling and resolving all complaints relating to the classification, labelling and/or sale of recorded material.[65] Complaints are resolved by consultation with relevant retailers, either directly, or through ARIA.[66] If ARIA or AMRA members fail to cooperate with the scheme, they may be expelled from their respective organisation.[67]

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60 ARIA and AMRA, *Submission 52*, p. 6.

61 ARIA and AMRA, *Submission 52*, pp. 14-15.

62 Mr Ian Harvey, AMRA, *Committee Hansard*, 25 March 2011, p. 26.

63 ARIA and AMRA, *Submission 52*, p. 2.

64 The Hon. Daryl Williams AM QC MP, Attorney-General, *House of Representatives Hansard*, 17 June 2002, p. 3601.

65 ARIA and AMRA, *Submission 52*, pp 15-17.

66 ARIA and AMRA, *Submission 52*, p. 16.

67 ARIA and AMRA, *Submission 52*, p. 17.

9.66 The ARIA/AMRA Labelling Code also establishes a Music Ombudsman to assist members of both AMRA and ARIA mediate any unresolved complaints. The Music Ombudsman provides an annual report to the Standing Committee of Attorneys-General on the operation of the ARIA/AMRA Labelling Code.[68]

Effectiveness of the ARIA/AMRA Labelling Code

9.67 Mr Ian Harvey from AMRA was of the opinion that the ARIA/AMRA Labelling Code is working well. He noted that, in 2010, 358 of approximately 5,800 recordings released or sold by ARIA and AMRA carried a warning label.[69] Additionally, he noted that the complaints service took between five and 10 complaints per annum that required action.[70] Accordingly:

> To date we believe the code has been an effective tool, or as an effective tool as can be created, to provide consumers with the appropriate advice regarding the product that they are picking up in stores. The code of course is aligned to the National Classification Scheme in that our level 1, 2 and 3 labelling regime follows the same criteria and is applied to the extent that it can given that it is only audio, as the M, MA and R18+ classifications are applied to film and other media.[71]

9.68 The ARIA/AMRA Labelling Code complaints mechanism is supported by a Recorded Music Labelling Code Ombudsman. However, in her evidence to the committee the Ombudsman, Mrs Una Lawrence, noted that it was rare for complaints to be escalated to her level. In describing her role, Mrs Lawrence stated:

> I really do two things for ARIA and AMRA. I prepare a sort of overview report of the operation of the whole scheme on an annual basis, and that is submitted to [the Standing Committee of Attorneys-General]. I also act as an appeal/complaints review person. In the time in which I have been involved with the scheme, which is since 2003, only one person has actually chosen to escalate a complaint to me. So, that has not been a very onerous part of my role, but on that occasion the complaint was upheld.[72]

9.69 Mr Harvey from AMRA informed the committee that as the ARIA/AMRA Labelling Code has matured, it has become entrenched in the culture of the industry. This industry awareness has improved overall compliance. For example, retailers who receive an unlabelled product that they believe should be labelled often inform AMRA as a matter of course.[73]

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68 ARIA and AMRA, *Submission 52*, p. 17.

69 *Committee Hansard*, 25 March 2011, p. 14.

70 *Committee Hansard*, 25 March 2011, p. 15.

71 *Committee Hansard*, 25 March 2011, p. 15.

72 *Committee Hansard*, 25 March 2011, p. 17.

73 *Committee Hansard*, 25 March 2011, p. 21.

9.70 Mr Harvey also noted that artists themselves are aware of the scheme and seek to comply with classification standards:

> One of the services that we offer is an advisory group within ARIA and AMRA. On a number of occasions we have been asked to sit to look at a particular product, and to look at an artist's work. They are concerned that they might be heading towards the R level restrictions. They do not want to be restricted, so they have sought some advice on how to effectively tone it down so that only a level 2 label is applied. The artists do self-censure from time to time once they actually understand the code themselves. Others, of course, might see it as a status raising mark to have an R level restricted recording. It depends on the artist.[74]

Case study

9.71 The submissions of Collective Shout and FamilyVoice Australia both referred to a song by Cannibal Corpse entitled 'Stripped, Raped and Strangled' as an example of a recording that is available in Australia under the ARIA/AMRA Labelling Code, albeit subject to a Level 3 Warning. The song lyrics graphically describe the serial rape and murder of young women.[75] Collective Shout argued:

> It would be appropriate for the classification of music lyrics to become part of the national classification scheme with guidelines which more effectively exclude form release or sale lyrics which celebrate sexual violence against women.[76]

9.72 ARIA responded to FamilyVoice's submission in relation to the lyrics of 'Stripped, Raped and Strangled' stating:

> [T]he fact is that in relation to the particular Cannibal Corpse release cited by FamilyVoice Australia, this release may not categorically be refused classification under the [ARIA/AMRA Labelling] Code. Each release must be reviewed and classified on the basis of the product supplied to the particular ARIA or AMRA member. In the instance cited, there was no cover artwork, the lyrics were not reproduced and the vocals are indecipherable. Based on the product that was supplied for classification it is difficult to find anything offensive in either of these acts if you are just listening to the recording or even watching them on YouTube. It is difficult to be offended when you have no idea of what is being said.[77]

9.73 A Cannibal Corpse album released prior to the introduction of the ARIA/AMRA Labelling Code featured a lyric sheet as part of the album artwork. As album artwork is a submittable publication under the National Classification Scheme, it was assessed by the Classification Board and deemed Refused Classification

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74 *Committee Hansard*, 25 March 2011, p. 23.

75 Collective Shout, *Submission 65*, p. 18; FamilyVoice Australia, *Submission 15*, p. 20.

76 Collective Shout, *Submission 65*, p. 18.

77 ARIA and AMRA, answers to questions on notice, received 29 April 2011.

because of the printed lyrics. In response, the band redesigned the album artwork, eliminating the lyric sheet, which was then passed by the Classification Board.[78]

9.74 Despite the fact that the audio lyrics remain unchanged, the album is allowed to be sold under the ARIA/AMRA Labelling Code because the lyrics are unintelligible.[79] As Mr Harvey explained:

> You have to understand that you cannot actually understand the lyric that is being sung in Cannibal Corpse. It is just vocal noise; you cannot discern the words, and this is quite important. Importantly therefore, we cannot actually classify what we cannot understand. It is English, but absolutely unintelligible.[80]

9.75 Mr Harvey and Mrs Lawrence emphasised to the committee that, despite the lyrics being available on internet websites, under the terms of the ARIA/AMRA Labelling Code, audio recordings can only be classified using the material included with the album itself.[81] ARIA and AMRA defended the application of the ARIA/AMRA Labelling Code in this way:

> [I]t is procedurally unfair if we...take the view that we should refuse classification for a particular release on the basis of the previous releases by an artist. Each release must be reviewed at face value and each Cannibal Corpse release (or in fact any release by an artist) would be reviewed and classified in accordance with the principles of the [ARIA/AMRA Labelling] Code.[82]

9.76 ARIA and AMRA noted that Cannibal Corpse are 'not considered mainstream artists', have never entered the ARIA top 100 singles or albums chart in Australia, and 'are not representative of the vast majority of recorded music in Australia'.[83]

9.77 Aside from extreme cases such as Cannibal Corpse, FamilyVoice Australia noted that songs by mainstream artists such as Kid Rock, the Pussycat Dolls, Ludacris and 50 Cent include lyrics that sexualise or degrade women.[84]

9.78 Another example, drawn to the attention of the committee by Salt Shakers, was the classification of the album 'Loud' by Rihanna. Salt Shakers noted that three of

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78 Mr Ian Harvey, AMRA, *Committee Hansard*, 25 March 2011, p. 23.

79 Mr Ian Harvey, AMRA, *Committee Hansard*, 25 March 2011, p. 23.

80 *Committee Hansard*, 25 March 2011, p. 23. However, the committee understands that there are versions of this Cannibal Corpse song where the lyrics of the song are discernable.

81 *Committee Hansard*, 25 March 2011, p. 23.

82 ARIA and AMRA, answers to questions on notice, received 29 April 2011.

83 ARIA and AMRA, answers to questions on notice, received 29 April 2011.

84 FamilyVoice Australia, *Submission 15*, p. 20.

the songs on the album include sexual references, while others have specific descriptions of violence.[85] As Salt Shakers submitted:

> To find out what Loud would be rated by the ARIA Labelling Code of Practice one cannot turn to the ARIA website. The website states the three levels as Level 1: Moderate, Level 2: Strong, Level 3: Restricted but does not have a way to see what albums are actually rated.
>
> Even calling up ARIA General Inquiries did not help in determining the classification of this album.
>
> Loud is available on both Sanity and JB Hi Fi websites for purchase but neither express any classification whatsoever. Only by physically looking at the album or, in this case, getting a Sanity employee to observe the album cover (we phoned the store and the employee couldn't tell us without going and looking at the album cover and reporting the 'rating' to us) did we discover that Loud is classified PG for "infrequent moderate coarse language".[86]

9.79 Salt Shakers and FamilyVoice Australia were therefore in favour of strengthening the existing code, including the possibility of incorporating music in the National Classification Scheme.[87]

Online delivery of music

9.80 Another significant issue raised in the context of recorded music was the increasing prevalence of online music stores. Mr Harvey informed the committee that the ARIA/AMRA Labelling Code does not apply to online music stores, creating a gap in classification:

> This is the difficult issue for us at both ARIA and AMRA levels. The two principal suppliers of online digital product into this market are members of neither organisation. There is no reason for them to be members of either organisation. Their content is held offshore, it is not domestic, although one of the companies is an Australian company. BigPond's content is held in Singapore, as I understand; they use an international provider and they put a BigPond front end to it. iTunes, of course is a US company and I think their servers are stored in Canada. We have no leverage with those organisations to deliver either our code, or probably more pertinently, the National Classification Scheme.[88]

9.81 Telstra clarified this point for the committee, stating that all of its media content is streamed from servers in Australia. As such, it complies with both Schedule 7 of the *Broadcasting Services Act 1992* and the Content Services Code

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85 Salt Shakers, *Submission 2*3, pp 13-14.

86 Salt Shakers, *Submission 2*3, p. 14.

87 Salt Shakers, *Submission 23*, p. 14; FamilyVoice Australia, *Submission 15*, p. 22.

88 *Committee Hansard*, 25 March 2011, p. 16.

when providing such content.[89] The committee notes that, while the Content Services Code and AMRA/ARIA Labelling Code are similar in nature, there may be some discrepancies.

9.82 In regards to iTunes, Mr Harvey informed the committee that iTunes manages its own classification regime, which includes a warning about explicit content next to song titles.[90]

9.83 In this context, MSA outlined its concerns about the apparent lack of regulation applying to online music stores:

> Frustration is growing, in many areas, in relation to the increasing amount of music being downloaded from iTunes and similar services. No alerts are provided, however, where offensive lyrics are involved, and this needs to be urgently addressed. Parents are now giving out alerts among their own networks, but the whole issue is still difficult for them to police in their own homes.[91]

89 Telstra, answer to question on notice, received 21 April 2011.

90 *Committee Hansard*, 25 March 2011, p. 18.

91 Media Standards Australia, *Submission 21*, p. 23.

CHAPTER 10

Self-regulation of the advertising industry

10.1 Term of reference (h) refers to the possibility of including outdoor advertising, such as billboards, in the National Classification Scheme. This chapter outlines the current self-regulatory regime for advertising, including outdoor advertising. The chapter also discusses the arguments for and against including outdoor advertising in the National Classification Scheme.

Regulation of advertising

10.2 In general, advertising is not subject to the National Classification Scheme, which applies only to advertising for publications, films, and computer games.[1] However, a system of self-regulation was established by the Australian Association of National Advertisers (AANA) in 1997.[2]

10.3 The AANA established the Advertising Standards Board as an independent body to consider complaints about all forms of advertising in Australia. The Advertising Standards Board comprises 20 people from a broad range of age groups and backgrounds, who are not from the advertising industry.[3]

10.4 The Advertising Standards Board, and its secretariat, the Advertising Standards Bureau, are funded by a voluntary levy of $3.50 per $10,000 of gross media expenditure, collected mainly through media-buying agencies but also directly from advertisers and advertising agencies that buy their own media space.[4]

Codes of practice

10.5 The Advertising Standards Bureau administers a number of codes, including the AANA Code of Ethics, which is the AANA's core self-regulatory code:

> The AANA Code of Ethics provides the overarching set of principles with which all advertising and marketing communications, across all media should comply. It complements Australia's long standing statutory regulation system and coregulatory systems.
>
> The AANA Code of Ethics comprises two parts.
>
> Section 1 of the Code deals with questions or truth, accuracy and questions or law.

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1 Australian Association of National Advertisers, *Submission 28*, p. 4.

2 Australian Association of National Advertisers, *Submission 28*, p. 4.

3 Ms Fiona Jolly, Advertising Standards Bureau, *Committee Hansard*, 27 April 2011, p. 7.

4 Australian Association of National Advertisers, *Funding of the self regulation system*, http://www.adstandards.com.au/self-regulation-system/funding, (accessed 17 December 2010).

> Section 2 of the Code deals with maintaining standards of taste and decency in advertising and marketing. Section 2 contains provisions dealing with the portrayal of people (including discrimination and vilification), portrayal of violence, treatment of sex, sexuality and nudity, use of language and prevailing community standards on health and safety.[5]

10.6 The AANA Code of Ethics is currently under review.[6]

10.7 In addition to the AANA Code of Ethics, the Advertising Standards Bureau administers a number of other codes, including:

- AANA Code for Advertising & Marketing Communications to Children;
- AANA Food and Beverages Advertising & Marketing Code;
- Federal Chamber of Automotive Industries Voluntary Code of Practice for Motor Vehicle Advertising;
- AANA Environmental Claims in Advertising and Marketing Code;
- Australian Food and Grocery Council Responsible Children's Marketing Initiative of the Australian Food and Beverage Industry; and
- Australian Quick Service Restaurant Industry Initiative for Responsible Advertising and Marketing to Children.[7]

10.8 The AANA codes are supplemented by practice notes, which provide further guidance to advertisers.[8]

10.9 The Advertising Standards Board accepts written complaints, considering them in light of all of the codes and, accordingly, may apply any part of those codes in reaching a determination. It is not limited in its considerations to issues raised in the complaint.[9]

10.10 Where the Advertising Standards Board upholds a complaint, the advertiser has five business days to respond, and must agree to remove or modify the advertisement in question. If the advertiser refuses to do so, the Advertising Standards Board will:

- if appropriate, refer the case report to the appropriate government agency;
- include the advertiser/marketer's failure to respond in the case report;

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5 Australian Association of National Advertisers, *Submission 28*, p. 6.

6 Australian Association of National Advertisers, *Submission 28*, p. 2.

7 Advertising Standards Bureau, *Codes we administer*, http://www.adstandards.com.au/advertisingstandards/codesweadminister/, (accessed 26 May 2011).

8 See Australian Association of National Advertisers, *Submission 28*, Attachment 1 for the full text of the practice notes.

9 Australian Association of National Advertisers, *Submission 28*, p. 17.

- forward the case report to media proprietors; and
- post the case report on the Advertising Standards Bureau's website.[10]

10.11 Non-compliant advertisements are often removed by industry participants other than the actual advertiser.[11]

Outdoor advertising

10.12 Outdoor advertising, including billboard advertising, is also subject to a code of ethics. The Outdoor Media Association (OMA) is the peak industry body which represents most of Australia's outdoor-media-display companies and production facilities, and some media-display asset owners. The OMA Code of Ethics incorporates the AANA Code of Ethics by reference.[12]

10.13 OMA represents outdoor media display companies that advertise third party products. As such, they do not represent businesses that install 'on-premise' advertisements (vehicles, billboards and other structures that advertise the business, services and products on the advertiser's property).[13]

10.14 OMA's members conduct internal reviews of advertisements before they are displayed, to ensure as far as possible that the advertisements do not breach an applicable code.[14]

10.15 Members of the public are able to complain to the Australian Standards Board about particular advertisements. The Advertising Standards Board complaint-handling process described above is no different for outdoor advertising.

Effectiveness of self-regulation of outdoor advertising

10.16 In its submission to the inquiry, AANA was strongly in favour of continuing the current arrangements for advertising, arguing that self-regulation is common internationally:

> Australia is not alone in having an industry self regulation system for advertising and marketing communications. A self regulatory system for advertising and marketing communications is a common feature of many other jurisdictions. These self regulatory systems apply across all media,

10 Australian Association of National Advertisers, *Submission 28*, p. 18.

11 Ms Fiona Jolly, Advertising Standards Bureau, *Committee Hansard*, 27 April 2011, p. 8.

12 Outdoor Media Association, *Code of Ethics 2009*, http://oma.org.au/media/Pdf/Code_of_Ethics_2009.pdf, (accessed 17 December 2010).

13 Outdoor Media Association, *Submission 57*, p. 4.

14 Outdoor Media Association, *Submission 57*, p. 4.

> including broadcast, print and outdoor. AANA is not aware of any jurisdictions where outdoor media is subject to a classification system.[15]

10.17 AANA listed a number of benefits of self-regulation, including:

- the costs of the system are borne by the advertiser and the industry – there is no cost to government;
- a self-regulatory system is flexible and can adapt easily to changes in community attitudes – by contrast, legislation is more costly, time-consuming and difficult to amend;
- self-regulation can adapt quickly and more efficiently than government regulation;
- the resolution time for complaints is faster than for co-regulatory and regulatory schemes;
- compliance with a self-regulatory system can be seen through compliance with both the letter and the spirit of the regulation; and
- industries which support self-regulation have an interest in its success – regulation through legislation would undermine this support.[16]

10.18 In its submission, the OMA explained the difference between 'third-party advertising', which is the industry the OMA represents, and 'on-premise advertising':

> Outdoor media display companies advertise third-party products including:
>
> - on buses, trams, taxis, pedestrian bridges, billboards and free-standing advertisement panels;
> - on street furniture (e.g. bus/tram shelters, public toilets, bicycle stations, phone booths, kiosks); and
> - in bus stations, railway stations, shopping centres, universities and airport precincts.
>
> ...The industry members build, clean and maintain the pedestrian bridges and street furniture, and provide other community infrastructure such as park benches, bins and bicycles.
>
> ...The OMA does not represent businesses that install 'on-premise' advertisements (vehicles, billboards and other structures that advertise the business, services and products on the advertiser's property).[17]

10.19 The OMA noted that on-premise advertising is more prolific than third-party advertising, citing the example of Parramatta Road, between Broadway and

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15 Australian Association of National Advertisers, *Submission 28*, p. 4.

16 Australian Association of National Advertisers, *Submission 28*, p. 6.

17 Outdoor Media Association, *Submission 57*, p. 8.

Leichhardt in Sydney, where there are about 2,140 on-premise signs compared to 14 third-party advertisements.[18]

10.20 The committee notes that there would seem to be a significant amount of outdoor advertisements that are not covered by the OMA Code of Ethics.

Outdoor advertising: a special case?

10.21 The committee notes evidence that billboards may be a special case compared to other advertisements, by virtue of their public nature. A number of witnesses highlighted the public nature of billboards and were accordingly critical of the self-regulation regime.

10.22 Women's Health Victoria described outdoor advertising as 'unique in that it is consumed in public space and therefore imposed on the public, which is not offered a choice of whether or when to view'.[19] The Australian Christian Lobby (ACL) noted that viewers are unable to 'switch off' the content of outdoor advertising as with other forms of media such as television, radio or film.[20]

10.23 Professor Elizabeth Handsley, from the Australian Council on Children and the Media, described the difficulty that parents face in relation to limiting their children's exposure to billboards:

> [T]hey are the most difficult form of media for parents and children to avoid being exposed to. There is really very little you can do other than just stay inside your house and stay off the main roads if you do not want to be exposed to billboards. Every other medium that you can think of, just about, you can do at least something to limit your exposure to them.[21]

10.24 Such lack of choice about whether a person is exposed to outdoor advertising distinguishes this form of advertising from other mediums.

10.25 In its submission, the Advertising Standards Bureau noted the importance of the 'relevant audience' test in the AANA Code of Ethics, which allows the Advertising Standards Board the flexibility to consider the different audiences that may exist for various media, locations and time zones.[22]

10.26 As an example of how the self-regulatory code takes into account the general audience of outdoor advertising, Ms Fiona Jolly from the Advertising Standards

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18 Outdoor Media Association, *Submission 57*, p. 8.

19 Women's Health Victoria, *Submission 16*, p. 2. See also Mr Andrew and Mrs Jody van Burgel, *Submission 6*, p.1; Mr Johann Trevaskis, *Submission 32*, p. 3.

20 Australian Christian Lobby, *Submission 25*, p. 9.

21 *Committee Hansard*, 25 March 2011, p. 65. See also Australian Council on Children and the Media, *Submission 44*, p. 5.

22 Advertising Standards Bureau, *Submission 41*, p. 12.

Bureau led the committee through the Advertising Standards Board's decision with respect to an advertisement for Bardot jeans, featuring a semi-naked woman. This advertisement appears on a bus and was the subject of complaints to the Advertising Standards Board:

> Section 2.3 of the code deals with issues of sex and it states that advertising and marketing communications must treat sex, sexuality and nudity with sensitivity to the relevant audience...This is not a blanket prohibition on any sexy images or suggestions of sex. But the [Advertising Standards Board] is required to take into account whether in its view the ad treats sex or a sexualised image with sensitivity to the relevant audience...The ad sits on a bus, so it is open to a general audience...The [AANA Code of Ethics] does not prohibit sexually suggestive material. It says that ads have to treat sex, sexuality and nudity with sensitivity to the relevant audience. 'Sensitivity' does not equal zero. The [Advertising Standards Board] takes into account the broad audience and takes its view on whether or not that ad is sensitive to the relevant audience, but it certainly does look at the fact that that is on a bus and so it is available for viewing by young people, old people, liberal people, conservative people and religious people.[23]

Community standards under advertising codes of practice

10.27 Noting the lack of an ability to avoid outdoor advertising, a number of witnesses called for stricter regulation of the industry.

10.28 Media Standards Australia (MSA) was of the view that media industries, particularly advertisers, could not be trusted to adequately police themselves:

> Media producers are hardly likely to act contrary to their own financial interests. Predictably, they have pushed the boundaries of community standards to excite interest in the controversial as a means of advertising their products. There is abundant evidence that the media drives community standards, and is not regulated by such standards.[24]

10.29 This point was also made by Ms Melinda Tankard Reist from Collective Shout, specifically in relation to the complaints mechanism:

> You have a problem of regulatory capture because the [Advertising Standards Bureau] has vested interests to represent its member bodies. There is no separation. There is no system of pre-vetting. Again, it relies on consumers, citizens like ourselves, who have to put our time into monitoring these things, protesting and complaining, because, again, the industry has failed to regulate itself. That is why we have called for some separation where you can have a third party without a profit motive

23 *Committee Hansard*, 27 April 2011, p. 10.

24 Media Standards Australia, *Submission 21*, p. 6.

> assessing and making decisions about the appropriateness of this advertising.[25]

10.30 Ms Tankard Reist specifically expressed concerns about the degree to which outdoor advertising contributes to the objectification of women and the sexualisation of children.[26]

10.31 Ms Fiona Jolly rejected arguments that the Advertising Standards Board is not capable of reflecting community standards in the adjudication of public complaints. Ms Jolly informed the committee that the Advertising Standards Board comprises 20 people from a broad range of age groups and backgrounds, is gender balanced and is broadly representative of the diversity of Australian society. Furthermore, she noted that the system is responsive to community concerns:

> Advertising Standards Board members are not from the advertising industry; they are community members who have shown, in their work and lives, an interest in community standards. Where the Board's view on occasion has not aligned with the community, the Board has responded and has become stricter. Where the codes do not meet the community's expectations, they are capable of fast and simple review by the AANA or other relevant industry associations.[27]

10.32 Ms Jolly also told the committee that the membership of the Advertising Standards Board is changed in a staggered manner over time, to ensure that new members are 'challenging the way that the [Advertising Standards] Board as a group considers the provisions of the [AANA Code of Ethics] and the community's views'.[28] Further, membership on the Advertising Standards Board is regularly turned over to avoid desensitisation of its members.[29]

10.33 Speaking specifically to claims that outdoor advertising contributes to the sexualisation of children and the objectification of women, Ms Jolly stated that the self-regulation system is effective in meeting current community standards and developing community standards around depictions of women in advertising:

> As mentioned, the [Advertising Standards] Board's work is broadly in line with community standards. If the provisions of codes limit the Board's ability to reflect community standards, this information is passed to the owners of the codes for their consideration and appropriate review.[30]

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25 *Committee Hansard*, 27 April 2011, p. 23.

26 *Committee Hansard*, 27 April 2011, p. 21.

27 *Committee Hansard*, 27 April 2011, p. 7.

28 *Committee Hansard*, 27 April 2011, p. 9.

29 *Committee Hansard*, 27 April 2011, p. 9.

30 *Committee Hansard*, 27 April 2011, p. 7.

10.34 The contribution of outdoor advertising to the sexualisation of children and objectification of women was raised by a range of community organisations and is discussed in further detail in Chapter 11.

Bringing billboards within the scope of the National Classification Scheme

10.35 Submissions and witnesses were supportive of applying the National Classification Scheme to outdoor advertisements and, particularly, of requiring outdoor advertising to be G-rated, on the basis that it is visible to a general audience.[31] However, the inclusion of outdoor advertising under the National Classification Scheme was not supported by the Advertising Standards Bureau or by other advertising industry participants who contributed to this inquiry. Industry participants argued that self-regulation remains the superior regulatory option.[32]

10.36 Organisations that supported the inclusion of outdoor advertisements under the National Classification Scheme included Salt Shakers and the Anglican Public Affairs Commission.[33]

10.37 The Family Council of Victoria, FamilyVoice Australia, ACL and Kids Free 2B Kids were among a number of organisations that recommended a G-rating on all outdoor advertisements, regardless of whether billboards are included in the National Classification Scheme.[34] ACL submitted that all outdoor advertising should be G-rated because it is a public form of media.[35]

10.38 The AANA Code of Ethics and other similar advertising codes do not create classification categories such as a G-rating. FamilyVoice Australia, in describing what a G-rating for outdoor advertising would involve, used the guidelines for advertising adopted in the Commercial Television Industry Code of Practice as an example. Programs and commercials screened during G-rating viewing periods on commercial broadcast television cannot include material involving, among other things, visual depiction of nudity or partial nudity or sexual behaviour, except of the most innocuous kind.[36] FamilyVoice Australia noted that the advertising of adult products or services was also not allowed under the G-rating.[37]

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31 See, for example, FamilyVoice Australia, *Submission 15*, p. 17; Kids Free 2B Kids, *Submission 63*, p. 32.

32 See, for example, Australian Association of National Advertisers, *Submission 28*, p. 6.

33 Salt Shakers, *Submission 23*, p. 13; Anglican Public Affairs Commission, *Submission 18*, p. 2.

34 FamilyVoice Australia, *Submission 15*, p. 17; Kids Free 2B Kids, *Submission 63*, p. 32; Australian Christian Lobby, *Submission 25*, p. 9; Family Council of Victoria, *Submission 22*, p. 11.

35 Australian Christian Lobby, *Submission 25*, p. 9.

36 See *Commercial Television Industry Code of Practice 2010*, ss. 3.8.8 and ss. 3.8.9.

37 FamilyVoice Australia, *Submission 15*, pp 17-18.

10.39 However, OMA pointed to the small number of complaints relative to the size of the industry as evidence that the system of self-regulation is in fact effective, and did not support the application of the National Classification Scheme to outdoor advertising. As Ms Charmaine Moldrich, from OMA explained:

> [T]he self-regulatory system is efficient and effective, with only seven out of 30,000 ads posted last year upheld by the [Advertising Standards Board]. We have a 99.98 per cent accuracy rate which is an excellent record by any reasonable standards. It is simply a popular myth that outdoor advertising is dominated by a multitude of inappropriate images. While the OMA hopes to achieve a figure that is even closer to 100 per cent, we consider the inclusion into a National Classification Scheme would be unnecessarily costly and onerous both for government and for business.[38]

10.40 On the subject of requiring that outdoor advertisements comply with a G-rating, Ms Moldrich told the committee that, in the majority of cases, outdoor advertising is G-rated. However, Ms Moldrich went on to state that a G-rating does not necessarily mean that there would not be any themes of nudity, sexuality or language.[39] Ms Alina Bain of the AANA also made reference to this point:

> Certainly under the National Classification Scheme, under the G criteria, some references to sex and some forms of nudity are permitted in that classification zone. Our view is that to apply the G classification criteria to outdoor advertising would be a very heavy regulatory stick for what is a very small number of breaches found.[40]

Complaints mechanisms for outdoor advertising

10.41 As noted above, members of the public who feel that a particular outdoor advertisement is inappropriate are able to complain to the Advertising Standards Board. FamilyVoice Australia gave some evidence to the committee about the relative number of complaints directed at outdoor advertising:

> In 2009 complaints about outdoor advertising represented 23.92% of all complaints up from just 3.67% in 2006. In 2010 four of the ten most complained-about advertisements were billboard advertisements, with between 45 and 70 complainants for each advertisement. The [Advertising Standards Board] upheld two of the complaints and dismissed two of them.[41]

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38 Ms Charmaine Moldrich, Outdoor Media Association, *Committee Hansard*, 7 April 2011, p. 8. See also Ms Fiona Jolly, Advertising Standards Bureau, *Committee Hansard*, 27 April 2011, p. 7.

39 *Committee Hansard*, 7 April 2011, p. 11.

40 *Committee Hansard*, 7 April 2011, p. 11.

41 FamilyVoice Australia, *Submission 15*, p. 14.

10.42 Professor Elizabeth Handsley of the Australian Council on Children and the Media also argued that the complaints-based system is ineffective, given the time it takes to process a complaint:

> We have a general concern with self-regulation, particularly of advertising media, for the following reasons. An advertising campaign would normally last a number of weeks, and certainly a billboard would normally last a number of weeks—let us say four to six weeks. That is probably about the length of time it would take for someone to complain about it and for the advertising standards board to go through the process of coming to a finding of breach. It is not at all unusual to find that there is that finding of breach that comes out pretty much when the advertising campaign has run its course anyway.[42]

10.43 This point was also made by FamilyVoice Australia, who noted that in the case of the Advanced Medical Institute's 'Want Longer Lasting Sex' advertising campaign, the Advertising Standards Board accepted that it could take Advanced Medical Institute up to 30 days to remove all of the relevant advertisements.[43]

10.44 For this reason, a number of organisations, including Family Voice Australia, Collective Shout and Kids Free 2B Kids, recommended that there should be strengthened vetting of outdoor advertisements prior to them being displayed in public.[44]

10.45 However, the Advertising Standards Bureau defended the effectiveness of the complaints mechanism:

> The vast majority of advertising and marketing communications in Australia comply with the relevant codes and do not receive any complaints, while the majority of those complained about are not found to be in breach of the codes. Where a breach is found, the Bureau has a record of nearly 100 per cent compliance by industry with Standards Board determinations — demonstrating the commitment of the vast majority of advertisers to the system and to maintaining high standards of advertising.[45]

10.46 Further, Ms Jolly agreed with the statement that advertisers respond 'pretty quickly' where breaches of the AANA Code of Ethics are found to have occurred.[46] Ms Jolly provided the committee with details of timeframes in which advertisers responded to decisions of the Advertising Standards Board, and subsequently removed or modified advertisements for which complaints were upheld:

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42 *Committee Hansard*, 25 March 2011, p. 64.

43 FamilyVoice Australia, *Submission 15*, p. 17.

44 FamilyVoice Australia, *Submission 15*, p. 18; Collective Shout, *Submission 65*, p. 15; Kids Free 2B Kids, *Submission 63*, Attachment 2, p. 32.

45 Advertising Standards Bureau, *Submission 41*, p. 4.

46 *Committee Hansard*, 27 April 2011, p. 8.

> [T]he [Advertising Standards] Board meet on a particular day. My job then the next day is to call the advertiser whose ads have had complaints upheld and to advise them of the Board's decision and, once they receive the case report, which is usually that day, they have five days to let us know what their intended course of action is. Most advertisers will remove their ad within those five days. In fact, if it is TV, it basically happens the next day; outdoor media can take a little longer because of where the outdoor billboard may be. But advertisers will bring their ads down within that time frame. Their obligation is to remove the ad. There is no question about that. They do have the capacity, though, to modify the ad, if it is possible for them to remove the offensive part of the ad.[47]

10.47 Ms Jolly was of the view that the complaints mechanism is complemented by a very efficient enforcement function, operating on the commitment of industry and resulting in enforcement outcomes far beyond those obtainable through a legislated system.[48] Ms Jolly argued that:

> In short, the advertising self-regulation system does reflect community views and has an effective enforcement system in place. It operates to effectively regulate outdoor advertising and, in our view, it is neither appropriate nor necessary to give responsibility for regulation of billboards to the national classification scheme.[49]

10.48 However, there have instances where advertisements have been found to breach the AANA Code of Ethics and advertisers have refused to remove the offending advertisement. Ms Jolly gave some examples to the committee of how the Advertising Standards Bureau has pursued these matters:

> I think we have had a couple of instances this year where we have been unable to get those small businesses to remove their signage. In that case, in two instances, we have asked for the assistance of the local council—one was an ad and one was a sandwich board—in having those removed. Councils are unable to do anything because councils do not have power over content of billboards, only about the size and placement. One matter related to a bus which had signage on it, which the [Advertising Standards] Board felt breached the code. Again the local council was not able to assist; and the Victorian Roads Authority were not able to assist because it was not actually a vehicle in the sense of it being driven around. So we have written to the Victorian government asking for them to make regulations to give Victoria Police the power to act...[50]

10.49 The committee notes that, in the examples above, the signage on a bus which the Advertising Standards Board is pursuing is an advertisement for adult premises.

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47 *Committee Hansard*, 27 April 2011, p. 8.

48 *Committee Hansard*, 27 April 2011, p. 7.

49 *Committee Hansard*, 27 April 2011, p. 7.

50 *Committee Hansard*, 27 April 2011, p. 8.

While Ms Jolly described the advertisement as 'a bus with the image of a woman lounging on it',[51] the Advertising Standards Board case report is more descriptive:

> This advertisement features a picture of a blonde woman in lingerie painted onto the side, front and back of a bus. The woman in the image is shown from the side, lying on her back, looking away and wearing only lingerie and high heels.[52]

10.50 The committee notes that, in this instance, the advertising was not associated with an OMA member.[53] In addition, this was one of only four cases in the last three years in which the Advertising Standards Board has had to refer decisions to government authorities to take action as the Advertising Standards Board has not been able to enforce its decision.[54]

10.51 Ms Jolly told the committee that the Advertising Standards Bureau is committed to continuous improvement:

> Since 2005, the [Advertising Standards] Bureau has undergone substantial remodelling, including a range of initiatives to improve the transparency and accountability of our complaints-handling service.[55]

10.52 The committee also notes that the Senate Environment, Communications and the Arts Committee (ECA Committee) examined similar issues in 2008 in its inquiry into sexualisation of children in the contemporary media. The ECA Committee came to the conclusion that the advertising complaints mechanism required reform, and recommended a complaints clearinghouse covering both broadcast media and advertising. Specifically, the ECA Committee recommended:

> The Advertising Standards Board and Free TV Australia consider establishing a media and advertising complaints clearing house whose functions would be restricted to:
>
> - receiving complaints and forwarding them to the appropriate body for consideration;
> - advising complainants that their complaint had been forwarded to a particular organisation; and
> - giving complainants direct contact details and an outline of the processes of the organisation the complaint had been forwarded to.[56]

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51 *Committee Hansard*, 27 April 2011, p. 9.

52 Advertising Standards Board, Case Report, Case Number 0225/10, http://122.99.94.111/cases/0225-10.pdf, (accessed 11 June 2011).

53 Ms Fiona Jolly, Advertising Standards Bureau, *Committee Hansard*, 27 April 2011, p. 10.

54 Advertising Standards Bureau, *Submission 41*, p. 26.

55 *Committee Hansard*, 27 April 2011, p. 7.

56 Senate Environment, Communications and the Arts Committee, *Sexualisation of children in the contemporary media*, June 2008, p. 60.

10.53 The committee notes that no action has been taken with respect to the ECA Committee's recommendation.

Case studies

Bardot Denim and Sprite advertisements

10.54 While the committee discussed a number of specific outdoor advertisements during the course of the inquiry, two specific examples were used as case studies for the committee to gain an understanding of the complaints mechanisms of the advertising industry self-regulatory code and the decision-making of the Advertising Standards Board. The committee also sought the views of a number of witnesses on these advertisements.

10.55 The advertisements were for 'Bardot Denim', for placement on buses, and an outdoor advertisement for 'Sprite':

Figure 10.1: Advertisement for Bardot Denim

Figure 10.2: Advertisement for Sprite

10.56 Complaints in relation to both advertisements were made to the Advertising Standards Board. In both cases, the Advertising Standards Board considered whether the advertisement breached section 2.3 of the AANA Code of Ethics (treat sex, sexuality and nudity with sensitivity to the relevant audience and, where appropriate, the relevant programme time zone). For the Bardot Denim advertisement, the Advertisement Standards Board also considered section 2.1 of the AANA Code of Ethics (advertising shall not portray people or depict material in a way which discriminates against or vilifies a person or section of the community on account of race, ethnicity, nationality, sex, age, sexual preference, religion, disability or political belief). The complaints against both advertisements were dismissed.

10.57 The Advertising Standards Board's decision on the Bardot Denim advertisement stated:

> The [Advertising Standards] Board noted that the image is on the back of a bus and is able to be seen by a broad audience.
>
> The Board considered that while some members of the community may find this advertisement to be inappropriate, the images of model posing wearing the product was relevant to the product.
>
> The Board considered that while the ad does depict some nakedness, the nudity does not expose any private areas at all. The Board noted that the model's breasts are not visible and her pose is only mildly sexually suggestive.
>
> Although available to a broad audience, the Board determined that the advertisement was not sexualised, did not contain inappropriate nudity and

> did treat sex, sexuality and nudity with sensitivity to the relevant audience and that it did not breach section 2.3 of the Code.[57]

10.58 In the case of the Sprite advertisement, the Advertising Standards Board's decision stated:

> The [Advertising Standards] Board viewed the advertisement and considered the pose of the woman to be so ridiculous that it was an obvious and clever use of self-referrential humour. The Board also felt that the image was actually mocking inappropriate use of sex, sexuality and nudity in advertising. The Board further considered that the image was appropriate for the target audience.[58]

10.59 In relation to both the Bardot Denim and Sprite advertisements, Ms Jolly stated:

> In our view, it is not possible to regulate so that no-one in the community is offended, and we argue that it is also not appropriate or necessary to do so. The two decisions you have referred to are two decisions out of 500 decisions that the [Advertising Standards Board] makes and we have an appropriate and balanced way to meet the broad community's expectations and standards, with 20 members of the community from diverse backgrounds, locations, professions, religious views and life experience who can apply the provisions of the code. Different people have different views, but what we do is make sure that the system works in a number of ways. We have a diverse board.[59]

10.60 Ms Moldrich from the OMA stated that 'the public have every right to complain about these ads'. Ms Moldrich went on to note that there is a complaints process in place, and the Advertising Standards Board dismissed the complaints. She concluded that she is 'neither happy nor sad' about the Advertising Standards Board's decision, but that she respected its decision.[60]

10.61 Media Standards Australia (MSA) made the following criticism of the Advertising Standards Board's decision on the Sprite advertisement:

> The woman holding the bottle near the tops of her legs is a very sexual image. Holding the bottle elsewhere would not have given a visual message as strong as this. We see many ads with bikini-clad woman, but this one adds the words 'sexy' to the message, and includes the image of the neck of the bottle near her crotch. Despite the views of the [Advertising Standards] Board, this renders the ad very suggestive and quite disgusting!!!
>
> It is also hard to see how the ad was 'mocking inappropriate use of sex, sexuality and nudity in advertising'. The target audience would not be

57 Advertising Standards Bureau, answers to questions on notice, 6 May 2011.

58 Advertising Standards Bureau, answers to questions on notice, 6 May 2011.

59 *Committee Hansard*, 27 April 2011, p. 10.

60 *Committee Hansard*, 7 April 2011, p. 15.

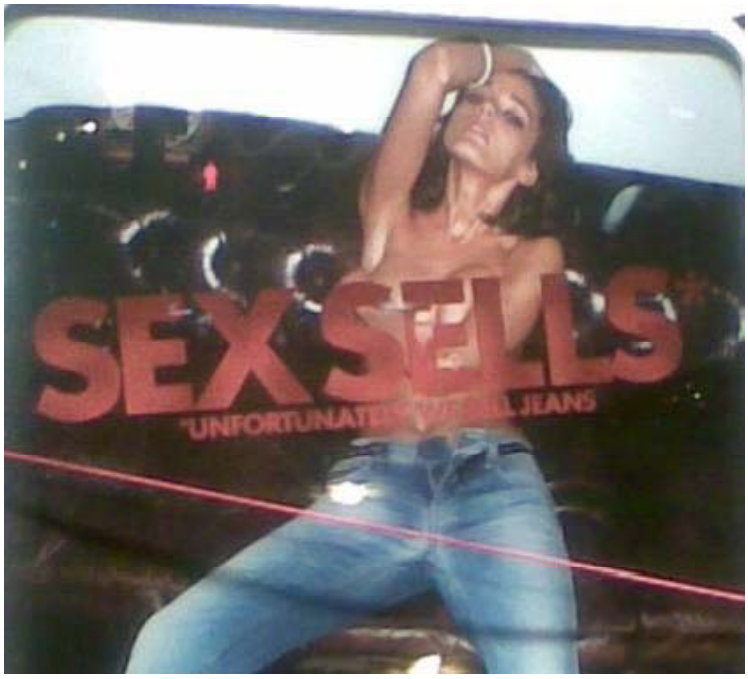
> viewing the ad with an idea of discerning the advertisers' intent to mock anything.[61]

10.62 In relation to the Bardot Denim advertisement, MSA questioned why, even if the ad was only 'mildly' sexually suggestive, it was nevertheless allowed to remain in a public place.[62]

Diesel Clothing advertisement

10.63 In a further example of concerns about complaints-handling, Kids Free 2B Kids provided the committee with a case report involving its complaint about an advertising campaign for Diesel Clothing Australia:

Figure 10.3: Diesel Clothing 'Sex Sells' Campaign



10.64 The complaint details included the following:

> The response from Diesel head office when contacted by one of the parents is typical of the industry. The response was condescending and lacked awareness and understanding about the impacts of the early sexualisation of children.
>
> Sherri, a mother of 7 and 5 yr old girls was taking the youngest to Kinder with the eldest in tow and was confronted with questions pertaining to the above slogan.
>
> Sherri feeling that this billboard was inappropriate contacted Diesel head office to air her concern. After being handballed a couple of times she was

61 Media Standards Australia, answer to question on notice, received 21 April 2011.

62 Media Standards Australia, answer to question on notice, received 21 April 2011.

> put in contact with who they felt were the appropriate party to handle this type of issue.
>
> Bernard from head office returned Sherrie's call saying, whilst laughing.... "it should be seen as an opportunity to discuss sex and sexual issues with your daughter and she should be open-minded and take it with a grain of salt. We don't want censorship in Australia."
>
> Bernard appeared to find the whole issue both very amusing and a positive reflection on the overall campaign...[63]

10.65 Kids Free 2B Kids noted in the complaint that they would like to see the industry become proactively responsible for what children are exposed to in public.[64]

63 Kids Free 2B Kids, *Submission 63*, Attachment 2, p. 21.

64 Kids Free 2B Kids, *Submission 63*, Attachment 2, p. 21.

CHAPTER 11

Sexualisation of children and objectification of women in the media

11.1 Term of reference (k) refers to the effectiveness of the National Classification Scheme in preventing the sexualisation of children and the objectification of women in all media, including advertising.

11.2 In relation to the prevention of the sexualisation of children in the media, the committee notes the 2008 report of the Senate Environment, Communications and the Arts Committee (ECA Committee), *Sexualisation of children in the contemporary media* (ECA Committee report). The ECA Committee report recommended that steps taken to address the issue by industry bodies and others should be further considered by the Senate in 18 months. The committee notes that it has been three years since the ECA Committee tabled its report and the matter has not been given further consideration by the Senate until the current inquiry.

Previous Senate inquiry

11.3 The ECA Committee report's first recommendation noted:

> ...that the inappropriate sexualisation of children in Australia is of increasing concern...[T]he [ECA] Committee believes that preventing the premature sexualisation of children is a significant cultural challenge. This is a community responsibility which demands action by society. In particular, the onus is on broadcasters, publishers, advertisers, retailers and manufacturers to take account of these community concerns.[1]

11.4 The ECA Committee made a number of recommendations to address its concern with respect to the sexualisation of children in the media, including:[2]

- The ACMA should consider revising the requirement that Children's Television Standard (CTS) content be broadcast for at least half an hour per day to enable broadcasters to schedule it in extended blocks at times which are more likely to attract children to watch it (Recommendation 3);
- Broadcasters should review their classification of music videos specifically with regard to sexualised imagery (Recommendation 4);
- Broadcasters should consider establishing dedicated children's television channels (Recommendation 5); and

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1 Senate Environment, Communications and the Arts Committee, *Sexualisation of children in the contemporary media*, June 2008, p. 3.

2 Senate Environment, Communications and the Arts Committee, *Sexualisation of children in the contemporary media*, June 2008, pp v-vii.

- The Advertising Standards Board should produce a consolidated half-yearly list of all complaints, including those received by phone, where the impact of an advertisement on children, however described, is a factor in the complaint (Recommendation 9).

11.5 In its response to the ECA Committee's report, the Australian Government:

- supported Recommendation 3, indicating that a draft CTS, released in August 2008, provided for flexible scheduling of children's programs;
- noted Recommendation 4, and stated that complaints statistics indicated that only a small percentage of complaints received by broadcasters were in relation to music videos;
- noted Recommendation 5, and provided funding for the ABC for the establishment and ongoing costs of a digital children's channel; and
- noted Recommendation 9, but recognised that the Advertising Standards Board is an independent organisation.[3]

Addressing sexualisation of children and objectification of women

11.6 There are several mechanisms in place which aim to address the sexualisation of children and the objectification of women in all forms of media in Australia.

National Classification Scheme

11.7 The Attorney-General's Department's (Department) submission noted the Australian Government's involvement with changes in the advertising industry to address the sexualisation of children.[4]

11.8 The Director of the Classification Board also noted material which may be Refused Classification, and referred the committee to his evidence to the ECA Committee in 2008. In evidence to that committee, the Director stated:

> Depictions of exploitative child nudity and sexual activity involving a child, sexual abuse or other exploitative or offensive depictions involving children are routinely refused classification.
>
> The classification scheme does not prevent the exploration of strong themes or the expression of controversial views. As such, films may deal with the issues of child sexual abuse and children's sexuality. The critical point for classification is how such issues are dealt with by the filmmaker.
>
> A key element of classification information is consumer advice, which the [Classification Board] formulates when making classification decisions.

3 Australian Government, *Government Response: inquiry into the sexualisation of children in the contemporary media environment*, July 2009, pp 6-8.

4 Attorney-General's Department, *Submission 46*, p. 14.

> Consumer advice, which is published along with the product, provides consumers with greater clarity in terms of the content that can be expected.
>
> Consumer advice generally lists the principal elements which have contributed to the classification of a film and indicates their intensity and/or frequency. It can also be used to alert consumers to serious or potentially distressing content.[5]

Television

11.9 The committee received evidence from various television networks and industry bodies in relation to measures that the television industry is taking to address the sexualisation of children and the objectification of women on television. The committee notes that a number of those initiatives are direct responses to recommendations in the ECA Committee's report.

11.10 In its submission, Free TV Australia advised:

> [N]etworks take classification very seriously and are very mindful of the need to protect children from harmful images, including those which present overly sexual content or unhealthy gender stereotypes.[6]

11.11 Free TV Australia's submission specifically referred to the provisions of the Commercial Television Industry Code of Practice (Code of Practice):

> [T]he depiction of certain sexual conduct, including explicit sexual acts [is prohibited]. It also contains an advisory note on the depiction of men and women in reporting and programming, which provides guidance on such issues as gender stereotypes and the portrayal of sexual violence.
>
> The Code of Practice also contains provisions proscribing discrimination based on gender (Clause 1.9.6) and the presentation of reality television participants in a highly (sexually) demeaning or highly exploitative manner (Clause 1.9.7).[7]

11.12 In evidence to the committee, Ms Julie Flynn from Free TV Australia noted that, in response to the ECA Committee's report, the ACMA has developed a new CTS.[8] Free TV Australia's submission expanded on the role of the CTS:

> All networks have specialised children's programming which is classified by the ACMA under the CTS. The CTS strictly prohibits the broadcast of material that may unduly distress children or encourage them to engage in dangerous behaviours.[9]

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5 Senate Environment, Communications and the Arts Committee, *Committee Hansard*, 30 April 2008, p. 67.

6 Free TV Australia, *Submission 50*, p. 8.

7 Free TV Australia, *Submission 50*, pp 8-9.

8 *Committee Hansard*, 7 April 2011, p. 26.

9 Free TV Australia, *Submission 50*, p. 9.

11.13 Free TV Australia's submission noted the conclusions of the ECA Committee in its report that the sexualisation of children in content and advertising during Preschool (P) and Children (C) programming was 'not an issue'.[10]

11.14 Ms Flynn also indicated that commercial television networks have adopted the Australian Association of National Advertisers' (AANA) Code for Advertising and Marketing Communications to Children, which is discussed further below.

11.15 The ABC stated that it 'treats its responsibility to the community seriously and the classification of broadcast content and music videos is treated with due care and attention'.[11] In terms of addressing the issues of the sexualisation of children and the objectification of women, the ABC's submission referred to the ABC's Editorial Policies:

> [I]n presenting content, the ABC has a responsibility to treat all sections of society with respect and to avoid the unnecessary use of prejudicial content...
>
> [S]pecial care should be taken to ensure that content which children are likely to watch or access unsupervised should not be harmful or disturbing to children.[12]

11.16 The ABC's submission also noted the role of its complaints-handling framework in providing an avenue to address concerns about the ABC's television classifications.[13]

11.17 As noted above, the ECA Committee recommended in its report that broadcasters should consider establishing dedicated children's television channels as an initiative to reduce the harmful impact of the premature sexualisation of children.[14] In December 2009, the ABC launched its digital children's channel which, according to the ABC, is 'the most watched television service in Australia among children less than 12 years of age'.[15]

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10 Free TV Australia, *Submission 50*, p. 9, quoting from Senate Environment, Communications and the Arts Committee, *Sexualisation of children in the contemporary media*, June 2008, p. 36.

11 Australian Broadcasting Corporation, *Submission 49*, p. 3.

12 Australian Broadcasting Corporation, *Submission 49*, p. 3, quoting from sections 11.8 and 11.13.2 of the ABC's Editorial Policies.

13 Australian Broadcasting Corporation, *Submission 49*, p. 3.

14 Senate Environment, Communications and the Arts Committee, *Sexualisation of children in the contemporary media*, June 2008, p. 44.

15 Australian Broadcasting Corporation, *Submission 49*, p. 3.

Advertising

11.18 The Communications Council stated in its submission that 'advertisers, and their agencies take community concerns about the sexualisation of children and objectification of women seriously'.[16]

Sexualisation of children

11.19 The Advertising Standards Bureau noted that it refers to the sexualisation of children in two contexts: first, the depiction of children in advertisements in sexualised poses; and, second, the exposure of children to sexualised images, themes or words in advertising.[17]

11.20 The Advertising Standards Bureau set out how the relevant provisions operate in relation to sexualised images of children in advertising:

> The AANA Code of Ethics (Code of Ethics) contains a requirement that "Advertising or Marketing Communications to Children"[18] shall comply with the AANA Code for Advertising and Marketing Communications to Children (Children's Code).
>
> The relevant provision of the Children's Code that specifically addresses the sexualisation of children is Section 2.4, which provides:
>
> *Advertising or Marketing Communications to Children:*
>
> *a) must not include sexual imagery in contravention of Prevailing Community Standards;*
>
> *b) must not state or imply that Children are sexual beings and that ownership or enjoyment of a Product will enhance their sexuality.*[19]

11.21 The Advertising Standards Bureau noted that section 2.4 of the Children's Code was inserted in early 2008 as part of a review of the Children's Code by the AANA.[20]

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16 The Communications Council, *Submission 47*, p. 7.

17 Advertising Standards Bureau, *Submission 41*, p. 10.

18 In this context, "Advertising or Marketing Communications to Children" is defined to mean: 'Advertising or Marketing Communications which, having regard to the theme, visuals and language used, are directed primarily to Children and are for [goods, services and/or facilities which are targeted toward and have principal appeal to Children].' "Children" is defined to mean children 14 years old or younger: Advertising Standards Bureau, *Submission 41*, p. 10.

19 Advertising Standards Bureau, *Submission 41*, p. 10. "Prevailing Community Standards" is defined in the Children's Code as meaning the community standards determined by the Advertising Standards Board as those prevailing at the relevant time, and based on research carried out on behalf of the Advertising Standards Board as it sees fit, in relation to Advertising or Marketing Communications to Children.

20 Advertising Standards Bureau, *Submission 41*, p. 11.

11.22 The Advertising Standards Bureau stated that sexualised images of children may also be addressed under section 2.3 of the Code of Ethics, which provides:

> Advertising or Marketing Communications shall treat sex, sexuality and nudity with sensitivity to the relevant audience and, where appropriate, the relevant programme time zone.[21]

11.23 In addition, the Advertising Standards Bureau advised that images of children must also meet the requirements of section 2.6 of the Code of Ethics:

> Advertising or Marketing Communications shall not depict material contrary to Prevailing Community Standards on health and safety.[22]

11.24 The Advertising Standards Bureau noted that the Advertising Standards Board could apply section 2.6 of the Code of Ethics through consideration of 'whether sexualised images of children breach community standards on child health or safety'.[23]

11.25 In terms of protecting children from exposure to sexualised images, themes or words, the Advertising Standards Bureau again noted the provisions in section 2.3 of the Code of Ethics and section 2.4 of the Children's Code. In particular, the Australian Standards Bureau highlighted that section 2.3 of the Code of Ethics provides for a 'relevant audience' test, which provides flexibility to consider the different audiences that may exist for different media, locations and time zones.[24]

11.26 The Advertising Standards Bureau also provided the committee with details of the numbers of complaints in relation to sexualised images of children and exposure of children to sexualised images, themes or words, along with specific examples in relation to the Advertising Standards Board's consideration of complaints.[25]

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21 Advertising Standards Bureau, *Submission 41*, p. 11. The Australian Association of National Advertisers (AANA) Code of Ethics provides that "Advertising or Marketing Communications" means (a) matter which is published or broadcast using any Medium in all of Australia or in a substantial section of Australia for payment or other valuable consideration and which draws the attention of the public or a segment of it to a product, service, person, organisation or line of conduct in a manner calculated to promote or oppose directly or indirectly the product, service, person, organisation or line of conduct; or (b) any activity which is undertaken by or on behalf of an advertiser or marketer for payment or other valuable consideration and which draws the attention of the public or a segment of it to a product, service, person, organisation or line of conduct in a manner calculated to promote or oppose directly or indirectly the product, service, person, organisation or line of conduct.

22 Advertising Standards Bureau, *Submission 41*, p. 11.

23 Advertising Standards Bureau, *Submission 41*, p. 11.

24 Advertising Standards Bureau, *Submission 41*, p. 12.

25 Advertising Standards Bureau, *Submission 41*, pp 11-12.

Objectification of women

11.27 The Advertising Standards Bureau informed the committee about initiatives the advertising industry has taken to address the issue of objectification of women:

> Complaints raising issues about the objectification of women may fall within Section 2.3 of the Code of Ethics, relating to the treatment of sex, sexuality or nudity, or Section 2.1 of the Code of Ethics, which includes discrimination and vilification on the basis of sex...
>
> Section 2.1 provides:
>
> Advertising or Marketing Communications shall not portray people or depict material in a way which discriminates against or vilifies a person or section of the community on account of race, ethnicity, nationality, sex, age, sexual preference, religion, disability or political belief.[26]

11.28 The Advertising Standards Bureau noted that the Advertising Standards Board has:

> ...consistently interpreted this term to include not just the physical characteristics of being a man or a woman (such as having breasts or being pregnant), but to also include discrimination or vilification on the basis of gender.[27]

11.29 The Australian Standards Bureau provided the committee with details of complaints received in relation to the objectification of women, and also specific examples of how the Advertising Board has considered complaints in relation to this issue.[28]

Outdoor media

11.30 The committee notes that the Outdoor Media Association (OMA) has its own Code of Ethics in which the OMA endorses the AANA's Code of Ethics and Children's Code.[29]

Recorded music

11.31 In its submission, the Australian Music Retailers Association (AMRA) and the Australian Recording Industry Association Limited (ARIA) set out how the ARIA/AMRA Recorded Music Labelling Code of Practice (ARIA/AMRA Labelling Code) addresses the issues of the sexualisation of children and the objectification of women. Noting that the ARIA/AMRA Labelling Code is 'conceptually parallel' to the

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26 Advertising Standards Bureau, *Submission 41*, pp 13-14.

27 Advertising Standards Bureau, *Submission 41*, p. 14.

28 Advertising Standards Bureau, *Submission 41*, pp 14-15.

29 Australian Association of National Advertisers, *Submission 28*, Appendix 1, p. 3.

National Classification Scheme, and that community standards are inherent in the National Classification Scheme, ARIA/AMRA argued:

> The [ARIA/AMRA Labelling Code] guidelines are sufficiently broad...to encompass the sexualisation of children and objectification of women when these issues arise in lyrics.
>
> The [ARIA/AMRA Labelling Code] guidelines are based on the degree of impact on the listener, generally assessed by looking at the explicitness and aggression in the language, as well as themes and reference to sex, violence, drug use and other matters. The low level of complaints about classified recorded audio product indicates that the link in standards in the [ARIA/AMRA Labelling Code] with the National Classification Scheme is delivering a system consistent with the expectations of the community, suggesting that community standards currently are being satisfactorily reflected. In the absence of any other mechanism to measure effectiveness, we can conclude that the [ARIA/AMRA Labelling Code] is giving adequate advice regarding these issues, and is sensitive to them.[30]

11.32 In evidence to the committee, representatives from AMRA and ARIA indicated that those organisations have not reviewed their code since the ECA Committee's report:

> [W]e have not [reviewed the AMRA/ARIA Labelling Code] since the 2008 report....[P]robably in 2006 we had a series of discussions with the [Office of Film and Literature Classification] at that time, reviewing the first three years or so of the application of the code. We took on board then their community values reflection. We took on board their most recent update of that information. The last formal examination of it would be somewhere around that 2006 period.[31]

Is enough being done to prevent the sexualisation of children and the objectification of women in all media?

11.33 The committee received substantial evidence in relation to the issue of whether the National Classification Scheme is effective in preventing the sexualisation of children and the objectification of women in all forms of media.

11.34 For example, in relation to the prevention of the objectification of women, Women's Health Victoria asserted:

> [We do] not believe that the National Classification Scheme has been successful in responding to the objectification of women, particularly in relation to advertising. The national voluntary system of advertising self-regulation is ineffective in preventing the objectification of women.

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30 Australian Recording Industry Association (ARIA) and the Australian Music Retailers Association (AMRA), *Submission 52*, p. 6.

31 Mr Ian Harvey, AMRA, *Committee Hansard*, 25 March 2011, p. 27.

> This is related to the fact that objectification is not identified as a separate factor in the Australian Association of National Advertisers' Advertiser Code of Ethics...As it currently stands, the Code [of Ethics] does not differentiate between experiences of discrimination or vilification, and objectification. Discrimination and vilification are distinct from objectification, which is particularly relevant to women's experiences.[32]

11.35 In contrast, Mr Robert Harvey argued that the 'National Classification scheme has never had [the] objective' of preventing the sexualisation of children and the objectification of women, noting that the role of the scheme is purely advisory.[33]

11.36 The Australian Subscription Television and Radio Association (ASTRA) noted that neither the National Classification Code, nor the *Guidelines for the Classification of Films and Computer Games*, specifically address these issues:

> ...[T]he [National Classification] Code already contains significant protections for children, providing that minors should be protected from material likely to harm or disturb them, and that everyone should be protected from exposure to unsolicited material that they find offensive. The Guidelines [for the Classification of Films and Computer Games] expressly prohibit depictions of child sexual abuse or any other exploitative or offensive descriptions or depictions involving a person who is, or appears to be, a child under 18 years.
>
> To the extent that the sexualisation of children and the objectification of women in the media are issues of community concern, it is noted that the Guidelines are intended to be interpreted in accordance with prevailing community attitudes.[34]

11.37 The Australian Council on Children and the Media also noted the absence of provisions addressing these issues in the National Classification Code:

> The [National Classification Code] is not effective in preventing either the sexualisation of children or the objectification of women. There are no laws that directly confront the dissemination of material that encourages children to see sexiness as a measure of success, nor as important for their self concept.[35]

Research and studies

11.38 The committee sought the assistance of witnesses in providing research and studies with respect to the impact of the sexualisation of children and the objectification of women, as well as community concerns in relation to these issues.

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32 Women's Health Victoria, *Submission 16*, p. 3.

33 Mr Robert Harvey, *Submission 9*, p. 3.

34 Australian Subscription Television and Radio Association, *Submission 24*, p. 5.

35 Australian Council on Children and the Media, *Submission 44*, p. 7.

Sexualisation of children

11.39 In its report, the ECA Committee referred to two articles by The Australia Institute published in 2006 on the issue of the sexualisation of children in the contemporary media: *Corporate paedophilia: sexualisation of children in the media* (*Corporate paedophilia* report); and *Letting children be children: stopping the sexualisation of children in Australia* (*Letting children be children* report). The ECA Committee noted that these articles 'prompted considerable public debate'.[36]

11.40 The *Corporate paedophilia* report analysed the sexualisation of children aged 12 and under in relation to three types of cultural material: advertising (both print and television); girls' magazines; and television programs (including music video-clips). The report discussed the potential harm to children of 'sexualising pressure', including:

- the evidence of a link between exposure to the ideal 'slim, toned' body type that is considered sexy for adults and the development of eating disorders in older children and teenagers; and
- the psychological impact of the sexualisation of children, such as increasing body dissatisfaction among children and an escalation in the level of sexual behaviour as an attention-seeking mechanism.[37]

11.41 The *Letting children be children* report discussed the regulatory framework in relation to media and advertising, and the reason that the framework is failing to prevent the sexualisation of children. Specifically, the *Letting children be children* report called for:

> existing codes of practice for advertising, television programming and children's magazines [to] be amended to allow for recognition of the fact that sexualising children, whether directly or indirectly, leads to a range of risks for children...[38]

11.42 The authors of the *Letting children be children* report also noted the impact that technological developments are having, and suggested a 'restructuring [of] the current regulatory environment to bring all media regulation together under the one organisation', which would provide the opportunity to address the sexualisation of children.[39]

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36 Senate Environment, Communications and the Arts Committee, *Sexualisation of children in the contemporary media*, June 2008, p. 1.

37 E. Rush and A. La Nauze, *Corporate Paedophilia: sexualisation of children in Australia*, The Australia Institute, Discussion Paper No. 90, 2006, pp vii-ix.

38 E. Rush and A. La Nauze, *Letting children be children: stopping the sexualisation of children in Australia*, The Australia Institute, Discussion Paper No. 93, 2006, p. 37.

39 E. Rush and A. La Nauze, *Letting children be children: stopping the sexualisation of children in Australia*, The Australia Institute, Discussion Paper No. 93, 2006, p. 38.

11.43 Submissions and witnesses to this inquiry also noted the findings of the *Corporate Paedophilia* and *Letting children be children* reports.[40]

11.44 A number of submissions referred the committee to a report of the American Psychological Association (APA) in relation to the sexualisation of girls.[41] The APA summarised some of the consequences of sexualisation of girls in the media:

> First, there is evidence that girls exposed to [sexualising] and objectifying media are more likely to experience body dissatisfaction, depression, and lower self esteem...Self objectification has been shown to diminish cognitive ability and to cause shame. This cognitive diminishment, as well as the belief that physical appearance rather than academic or extracurricular achievement is the best path to power and acceptance, may influence girls' achievement levels and opportunities later in life.
>
> Girls' sexual development may also be affected as they are exposed to models of passivity, and studies indicate that the media may influence a girl's perceptions of her own virginity or first sexual experience. Interpersonally, girls' relationships with other girls are affected, as such relationships can become policing grounds where girls support or reject other girls for reasons having to do with conformity to a narrow beauty ideal that involves a [sexualised] presentation or competition for boys' attention. Girls' relationships with boys and men are affected in that exposure to [sexualising] and objectifying media has been shown to relate to girls' and boys' views on dating, boys' sexual harassment of girls, and attitudes toward sexual violence.[42]

11.45 In terms of community perceptions with respect to the sexualisation of children, the Advertising Standards Bureau referred to research that it had

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40 See, for example, Anglican Public Affairs Commission, *Submission 18*, p. 6; Media Standards Australia, *Submission 21*, pp 28-29; Collective Shout, *Submission 65*, p. 11; Media Standards Australia, answers to questions on notice, received 21 April 2011. The committee was also directed to the submission of Professor Catharine Lumby and Dr Kath Albury to the ECA Committee inquiry, which criticised the methodology used in the *Corporate Paedophilia* report: Mr Matthew Whiteley, *Submission 19*, pp 7-9. The committee also notes that, since 2006, when the *Corporate Paedophilia* and *Letting Children be children* reports were published, there have been changes made to the advertising industry's Children's Code which directly addresses the sexualisation of children in advertising and marketing materials.

41 See, for example, FamilyVoice Australia, *Submission 15*, pp 22-23; Anglican Public Affairs Commission, *Submission 18*, p. 6; Media Standards Australia, answers to questions on notice, received 21 April 2011.

42 Task Force on the Sexualisation of Girls, *Report of the APA Task Force on the sexualisation of Girls*, American Psychological Association, 2007, p. 35.

commissioned into community perceptions of sex, sexuality and nudity in 2010.[43] The premature sexualisation of children was identified by respondents to the research as a key factor that contributes to unacceptable advertising:

> Respondents were unanimously sensitive to ads containing sexualised representations of teenagers and children, modelled on 'sexy' adults. The sexual innuendo and undertones within ads featuring and directed at young teenagers was also seen to be highly unacceptable...
>
> Respondents spontaneously raised concerns that these age inappropriate depictions of females in advertising encourage children to adopt sexualised appearances and behaviour at too early an age.[44]

Objectification of women

11.46 In relation to studies which identify the impacts of the objectification of women in the media, a number of submissions referred the committee to the work of the Portrayal of Women Advisory Committee (PWAC) regarding the portrayal of women in outdoor advertising.[45] Women's Health Victoria summarised the issues that PWAC identified in that regard, including:

- failure to represent the diversity of women in terms of body size and shape, as well as race, sexuality, disability and religion;
- use of women's bodies and body parts to sell products, for example, use of images which only show parts of women's bodies or depictions of women as inanimate objects for consumption; and
- association between women with sex, with women represented as sexual objects and/or as sexually available.[46]

11.47 The PWAC's report was released in 2002. Collective Shout, however, noted in its submission that it was unaware of any of the recommendations from that report being acted upon.[47]

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43 The Advertising Standards Bureau noted in its submission the experience and knowledge that members of the Advertising Board have in relation to social and child psychology, psychiatry and early education. Many Advertising Board members are also parents and grandparents and involved in community organisations working with children and young people. In addition, the Advertising Standards Bureau now conducts research into community standards on a regular basis, to measure whether the Advertising Board's decisions are in line with community standards: *Submission 41*, p. 13.

44 Advertising Standards Bureau, *Research Report: Community Perceptions of sex, sexuality and nudity in advertising*, produced by Colmar Brunton Social Research, June 2010, p. 21.

45 See, for example, Women's Health Victoria, *Submission 16*, p. 2; Collective Shout, *Submission 65*, p. 11.

46 Women's Health Victoria, *Submission 16*, p. 2.

47 Collective Shout, *Submission 65*, p. 11.

11.48 Media Standards Australia referred the committee to a report of the European Parliament's Committee on Women's Rights and Gender Equality on how marketing and advertising affects equality between men and women. The Explanatory Statement to that report noted:

> Research shows that the norms created by gender stereotypes in advertising objectify people, in the sense that both women and men—although women have suffered more up until now—are represented as objects. Reducing a human to an object leaves the individual exposed to violence and insults. Objectification in advertising is of key importance for the process by which an individual builds his/her identity and for how an image is perceived as 'normal'. Stereotyping relates to ideas about women and men and the relationships between them. Stereotyping in advertising is also seen as an instrument of power. The objective of gender equality policy is for everyone to have the power to shape society and their own existence. Constant exposure to objectifying and stereotyped messages impedes this objective.[48]

11.49 The Australian Standards Bureau's research into community perceptions of sex, sexuality and nudity also identified the 'reinforcement of women as sexual objects' as a key factor that contributed to an advertisement being unacceptable to respondents in the research:

> Respondents were highly sensitive to ads which objectify women because in their view such ads reinforce and desensitise women as sexualised 'objects'. They believe such ads portray women in this way to the broad community and are particularly concerned about the effect of such ads on developing and impressionable young women.
>
> Again, ads which portray women as sexualised 'objects' were seen to put young females at risk of mimicking or aspiring to these unacceptable [sex, sexuality and nudity] attitudes and behaviours (eg risky and premature sexual behaviours, self esteem and body image issues). Respondents also tied this issue back to their concerns about children's exposure.[49]

Improvements to the National Classification Scheme

11.50 The committee received evidence in relation to how the National Classification Scheme, and other regulatory frameworks for media, could be improved to address the issue of sexualisation of children and the objectification of women in the media.

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48 Committee on Women's Rights and Gender Equality, *Report on how marketing and advertising affect equality between women and men*, European Parliament, A6-0199/2008, 2008, p. 10.

49 Advertising Standards Bureau, *Research Report: Community Perceptions of sex, sexuality and nudity in advertising*, produced by Colmar Brunton Social Research, June 2010, p. 20.

11.51 For example, Ms Melinda Tankard Reist from Collective Shout called for a major overhaul of the National Classification Scheme:

> ...[W]ith the primary goal of making it more effective in reducing the prevalence and availability of material in all media which contains images or words which reduce women to sex objects, which condone or celebrate sexual violence against women and which promote the sexualisation of children.[50]

11.52 In contrast, Ms Irene Graham indicated that she does not support any changes to the National Classification Scheme for the purpose of preventing the objectification of women:

> [Any] such changes would be increased censorship, and censorship is a blunt and largely ineffective tool in terms of changing societal views or attitudes (particularly since the advent some 20 years ago of the world-wide communications system known as the Internet). Changes to classification criteria would...result in censorship of productions by women—history shows that censorship allegedly intended to 'protect' women has also censored female voices/productions.[51]

11.53 The Australian Christian Lobby (ACL) stated that the National Classification Scheme has taken inadequate account of the dual concerns of the sexualisation of children and the objectification of women. ACL suggested that changes to the *Guidelines for the Classification of Films and Computer Games* would address these issues:

> As the classification ratings in the Commercial Television Industry Code of Practice largely reflect the *Guidelines for the Classification of Films and Computer Games*, changes to the latter would cause there to be inducement for the television industry to also adopt any pro-child or pro-woman measure of the nature proposed when its Code is next updated.
>
> ACL suggests that the *Guidelines for the Classification of Films and Computer Games* should be amended so that any item that sexualises children is given a Refused Classification Rating. Any item that objectifies women as sexual objects must be given an M rating or above. The use of context should not preclude an item with such content from receiving the designated classification rating. Members of the Classification Board should be given appropriate training on how to identify, and understand the social impacts of sexualising children and objectifying women in the media.[52]

11.54 Similarly, Salt Shakers suggested expanding the scope of the National Classification Scheme guidelines to encompass all forms of advertising:

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50 *Committee Hansard*, 27 April 2011, p. 22.

51 Ms Irene Graham, *Submission 20*, p. 4.

52 Australian Christian Lobby, *Submission 25*, p. 11.

> Advertising needs to be controlled and restricted. The use of sex to sell items and services is not a new phenomenon but it seems to be getting out of hand.
>
> Parents lack control over what advertisements are shown on television. Because of this, broadcasting agencies should err on the side of caution and avoid using advertisements which have sexual themes.
>
> However, the broadcasting agencies have failed to do this and, therefore...the classification Guidelines should be expanded to regulate advertisements of all types.[53]

11.55 Women's Health Victoria suggested changes to the AANA's Code of Ethics to address the objectification of women in advertising, and specifically referred to a provision in New Zealand's *Advertising Code of Practice* which incorporates the concept of objectification in addressing how people are represented in advertising:

> Advertisements should not employ sexual appeal in a manner which is exploitative and degrading of any individual or group of people in society to promote the sale of products or services. In particular people should not be portrayed in a manner which uses sexual appeal simply to draw attention to an unrelated product. Children must not be portrayed in a manner which treats them as objects of sexual appeal.[54]

11.56 Women's Health Victoria noted that, although this provision mentions objectification of children (rather than women), it demonstrates how broader principles of objectification could be incorporated into the AANA's Code of Ethics.[55]

11.57 Women's Health Victoria provided the committee with a list of similar provisions from advertising codes around the English-speaking world, containing specific sections about the representation of women. For example, the Code of Standards for Advertising, Promotional and Direct Marketing in Ireland has the following clauses in relation to 'Decency and Propriety':

> 2.17 Marketing communications should respect the principle of the equality of men and women. They should avoid sex stereotyping and any exploitation or demeaning of men and women. Where appropriate, marketing communications should use generic terms that include both the masculine and feminine gender; for example, the term 'business executive' covers both men and women.
>
> 2.18 To avoid causing offence, marketing communications should be responsive to the diversity in Irish society and marketing communications which portray or refer to people within [particular] groups...should:
>
> a) respect the principle of equality in any depiction of these groups;

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53 Salt Shakers, *Submission 23*, pp 14-15. See also Family Council of Victoria, *Submission 22*, p. 11.

54 Women's Health Victoria, *Submission 16*, p. 5.

55 Women's Health Victoria, *Submission 16*, p. 5.

b) fully respect their dignity and not subject them to ridicule or offensive humour;

c) avoid stereotyping and negative or hurtful images;

d) not exploit them for unrelated marketing purposes;

e) not ridicule or exploit religious beliefs, symbols, rites or practices.

2.19 Advertisers should take account of public sensitivities in the preparation and publication of marketing communications and avoid the exploitation of sexuality and the use of coarseness and undesirable innuendo. They should not use offensive or provocative copy or images merely to attract attention...[A]dvertisers are urged to consider public sensitivities before using potentially offensive material.[56]

11.58 The Anglican Public Affairs Commission advocated for a review of the various codes of practice administered by the Advertising Standards Bureau and expansion of the National Classification Scheme to include advertising.[57]

56 Women's Health Victoria, answers to questions on notice, received 12 April 2011.

57 Anglican Public Affairs Commission, *Submission 18*, p. 8.

CHAPTER 12

Committee view and recommendations

12.1 This inquiry presented the committee with an opportunity to examine a range of important issues relating to the National Classification Scheme, as well as to assess the effectiveness of regulatory regimes for media not included in the National Classification Scheme. This was the first major review of the National Classification Scheme since it was introduced over 15 years ago. As explained earlier in the committee's report, the aim of the National Classification Scheme (set out in the Intergovernmental Agreement underlying its establishment) is to 'make, on a co-operative basis, Australia's censorship laws more uniform and simple with consequential benefits to the public and the industry'.[1] On the basis of evidence presented during the course of this inquiry, the committee has reached the conclusion that the National Classification Scheme has not been successful in achieving this aim. Simply put, the classification system in Australia is in many ways 'broken', and requires substantial and urgent reform.

Flaws in the National Classification Scheme

12.2 In the committee's view, the National Classification Scheme is flawed in a number of key areas:

- Aside from the complexity of its legislative framework, the scheme does not protect children from material that is likely to harm them; nor does it protect others more broadly from exposure to unsolicited material that they may find offensive. To this end, community concerns in relation to sexual violence and the portrayal of persons in a demeaning manner are being ignored.
- Publishers and distributors of magazines classified with a serial classification declaration do not maintain the material in the publications at the classification level given by the Classification Board for the period of the declaration. As a result, material which should be Refused Classification is appearing in publications which have a serial classification declaration.
- Publishers and distributors ignore call-in notices issued by the Director of the Classification Board, meaning that pornographic material which should be Refused Classification remains for sale throughout Australia.
- Numerous films with graphic depictions of actual sex have been classified R18+, despite the *Guidelines for the Classification of Films and Computer Games* setting out that the 'general rule' for R18+ classification is "simulation, yes – the real thing, no". Further, the *Guidelines for the Classification of Films and Computer Games* rely heavily on subjective assessments of impact

1 Intergovernmental Agreement relating to a revised co-operative legislative scheme for censorship in Australia, 28 November 1995, item B.

and context, resulting in what one submission described as a 'creep downwards' of material into lower classification categories.[2]

- Restricted magazines and R18+ films are displayed in retail outlets alongside magazines, comics and DVDs for children.
- 'Artistic merit' remains a defence to child pornography and child abuse material offences in many states, meaning that sexualised images of naked children can be exhibited in public galleries under the guise of 'art'.
- The scheme has failed to adequately keep pace with the advent of new technology, meaning that ambiguity now exists as to which regulatory regime applies to some content. A major example of this is the confusion over how films, publications and computer games that are provided online are to be classified. The interaction of the *Classification Act 1995* and the *Broadcasting Services Act 1992* creates complexity that is easily misunderstood by industry participants and consumers.
- Significantly, one of the shortcomings of the scheme is that it is not platform neutral. That is, it does not provide for a consistent classification decision-making framework in a converged media environment. The effect is that the same content, when viewed on different screens, may be subject to different classification regimes. An example of this phenomenon is the treatment of computer games that are provided on mobile phones. The same game may be available on a personal computer, or may be accessed online through a web browser. Evidence to the committee suggests that each format is likely to be treated differently as a result of industry confusion.

12.3 In the committee's view, the multiple flaws in the National Classification Scheme mean that it cannot be sustained in its current form. Accordingly, the committee believes that significant changes should be made to the system. In that regard, the committee notes the calls from many witnesses and submitters to the inquiry for consistency and uniformity with regards to classification. There are two aspects to 'uniformity': uniformity between jurisdictions; and uniformity in decision-making processes and treatment of content.

12.4 As a starting point, several key principles should underlie a classification scheme in Australia. Following adoption of those basic principles, the committee believes that the Australian Government should endeavour to investigate all constitutional options for strengthening its legislative power in the interests of establishing a truly national and uniform classification scheme. Finally, the committee considers that a range of specific amendments or enhancements to the scheme will improve its overall operability, and will allow it to more successfully achieve its intended purpose.

2 Family Council of Victoria, *Submission 22*, p. 7.

Reforming principles

12.5 As discussed earlier in the committee's report, the National Classification Code sets out four key principles which, as far as possible, should be taken into consideration when making classification decisions:

- adults should be able to read, hear and see what they want;
- minors should be protected from material likely to harm or disturb them;
- everyone should be protected from exposure to unsolicited material that they find offensive;
- community concerns should be taken into account in relation to:
    - depictions that condone or incite violence, particularly sexual violence; and
    - the portrayal of persons in a demeaning manner.

Aligning decision-making with community standards

12.6 The committee sought feedback from almost all witnesses who appeared before it in relation to whether the principles set out in the National Classification Code remain appropriate. This issue is particularly important given the easy access that children have to an array of content through a variety of media, and which can be accessed through mobile devices, making it increasingly difficult for parents to supervise all of their children's media viewing. There is also the matter of outdoor advertisements which, as witnesses pointed out to the committee, is very difficult to avoid.

12.7 A number of witnesses indicated that they supported the principles as set out in the National Classification Code.[3] However, other witnesses outlined changes that they would like to see made to the principles. Mr Lyle Shelton from the Australian Christian Lobby (ACL) indicated that, in his view, the key principle should be the protection of children from inadvertent exposure to material that is clearly not appropriate for them:

> I think there are not too many people who would argue that exposure to pornography and violence is not harmful to minors. Unfortunately, we have a situation where it is very easy for children to come across these sorts of images on all the media...[4]

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3 See, for example: Mr Ian Harvey, Australian Music Retailers Association, *Committee Hansard*, 25 March 2011, p. 15; Mr Chris Althaus, Australian Mobile Telecommunications Association, *Committee Hansard*, 25 March 2011, p. 40; Mr Bruce Arnold and Dr Sarah Ailwood, *Committee Hansard*, 25 March 2011, pp 81-82; Ms Charmaine Moldrich, Outdoor Media Association, *Committee Hansard*, 7 April 2011, p. 14; Ms Ann Landrigan, National Film and Sound Archive, *Committee Hansard*, 27 April 2011, p. 4.

4 *Committee Hansard*, 25 March 2011, pp 4-5.

12.8 Professor Elizabeth Handsley of the Australian Council on Children and the Media noted that the principles in the National Classification Code are intended to be balanced against each other;[5] and, in this context, the committee also acknowledges other evidence which emphasised the principle of the right of adults to choose what they want to read, hear and see.[6]

12.9 The committee received significant evidence about the link between exposure to material classified X18+ and the sexual abuse of children. Further, the committee also received evidence in relation to the harms caused by the sexualisation of children and the objectification of women in all media.

12.10 The committee believes that an express statement should be included in the National Classification Code which clarifies that the four key principles to be applied to classification decisions are to be given equal consideration and balanced against one another.

Sexualisation of children and objectification of women

12.11 In the committee's view, the National Classification Scheme does not adequately prevent the sexualisation of children and the objectification of women.

12.12 ACL highlighted that, in making classification decisions, in addition to taking into account views of the community with respect to violence and demeaning portrayals, there now needs to be formal recognition of community concerns about the sexualisation of society, and the objectification of women.[7] The committee agrees with this proposal, and suggests that the principles in the National Classification Code be expanded to take into account community concerns about the sexualisation of society, and the objectification of women.

12.13 In 2008, the Senate Environment, Communications and the Arts Committee (ECA Committee) recommended that its report, *Sexualisation of children in the contemporary media*, be further considered by the Senate in 18 months.[8] While the current inquiry did consider the issue of the sexualisation of children in the media, it only considered the issue in the context of the effectiveness of the National Classification Scheme, and various other regulatory regimes. Nevertheless, it is apparent that significant recommendations by the ECA Committee have not been implemented.

12.14 It was beyond the scope of this inquiry to undertake a comprehensive analysis of the progress made by industry bodies and others in addressing the sexualisation of

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5 Professor Elizabeth Handsley, *Committee Hansard*, 25 March 2011, p. 69.

6 See, for example, Pirate Party, *Submission 55*, p. 1.

7 Australian Christian Lobby, answers to questions on notice, received 20 April 2011.

8 Senate Environment, Communications and the Arts Committee, *Sexualisation of Children in the Contemporary Media*, June 2008, Recommendation 1, p. 3.

children in the contemporary media. Accordingly, the committee takes that view that the Senate, as a matter of urgency, should establish an inquiry to consider the progress made by industry bodies and others in addressing the sexualisation of children in the contemporary media, and specifically, the progress which has been made in the implementation of the ECA Committee's recommendations in its 2008 report.

Need for objective decision-making

12.15 The committee is concerned that the current decision-making framework in the National Classification Scheme allows for subjective judgements to influence classification decisions.

12.16 Ms Barbara Biggins, a former Convenor of the Classification Review Board, emphasised that a classifier should not be able to bring his or her own interpretation into the decision-making process. Importantly, it is the wording of the guidelines which must be followed:

> [T]he words are all important. If you are in a classifier's position, you are not at liberty to bring your own personal interpretation of what should be an M or MA+ or R18+; you are obliged to apply the guidelines as approved by the state and territory and federal ministers. It is those state and territory and federal ministers who bear the responsibility for the form of the criteria that are being applied. The classifiers are the servants of the ministers, and they do their job according to the criteria. The wording is all important.[9]

12.17 Therefore, the committee is of the view that the *Guidelines for the Classification of Films and Computer Games* and the *Guidelines for the Classification of Publications 2005* need to be revised. The preamble to both guidelines should expressly state that the methodology and manner of decision-making should be based on a strict interpretation of the words in the guidelines.

12.18 The committee was provided with some specific examples of subjective criteria being considered as part of the classification decision-making process. As the committee heard, the revision of the *Guidelines for the Classification of Films and Computer Games* in 2003 placed more emphasis on impact and context, with the result that there has been a ripple effect of content being pushed into lower classification categories.[10] In the committee's view, the subjective assessment of impact and context should not be a consideration in the making of classification decisions.

Community Assessment Panels

12.19 The committee is of the view that greater attention needs to be had to community concerns in relation to classification issues.

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9 *Committee Hansard*, 25 March 2011, pp 67-68.

10 See Ms Barbara Biggins, *Committee Hansard*, 25 March 2011, p. 67.

12.20 Community Assessment Panels have been used at various times in the history of the National Classification Scheme to assist in gauging community standards.[11] However, the Attorney-General's Department noted that Community Assessment Panels were not intended to be standing bodies:

> Classification Board members are themselves selected to be broadly representative of the Australian Community and [Community Assessment Panels have] been employed to ensure parity between Board decisions and the views of representative samples of community members.[12]

12.21 The committee appreciates that members of the Classification Board and the Classification Review Board are selected to be broadly representative of the community. However, standing Community Assessment Panels make a valuable contribution to the determination of community standards. The committee considers that standing Community Assessment Panels should be introduced to assist in the determination of community standards for the purpose of classification decision-making.

Other reforms: application of the National Classification Scheme to artworks and an exemption for cultural institutions

12.22 The committee notes that the application of the National Classification Scheme to artworks for public exhibition or display is limited. The committee commends the actions of artists who have sought classification of their work prior to public exhibition or display. In the committee's view, obtaining classification assists in ensuring that audiences can be provided with appropriate advice (and, where necessary, warnings) regarding the nature of the artwork.

12.23 The committee understands that the cost of application fees may present difficulties to artists, and believes that the classification of artworks should be exempt from application fees.

12.24 The committee strongly opposes the inclusion of the artistic merit defence for child pornography offences in state legislation. In the committee's view, the NSW Parliament has taken a positive step in removing the defence of artistic merit for the offences of production, dissemination and possession of child abuse material in the *Crimes Act 1900* (NSW). Accordingly, the committee recommends that the Australian Government, through the Standing Committee of Attorneys-General, pursue with relevant states the removal of the artistic merit defence for child pornography offences.

12.25 The committee notes the difficulties that cultural institutions, such as the National Film and Sound Archive, encounter in obtaining appropriate exemptions under state and territory legislation for the exhibition of unclassified films. The

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11 Attorney-General's Department, answers to questions on notice, received 6 April 2011.

12 Attorney-General's Department, answers to questions on notice, received 6 April 2011.

committee supports self-classification with appropriate oversight in the circumstances outlined by the National Film and Sound Archive in its evidence to the committee. Therefore, the committee recommends that provision be made in the *Classification Act 1995* for an exemption for cultural institutions, including the National Film and Sound Archives, to allow them to exhibit unclassified films. This exemption should be subject to relevant institutions self-classifying the material they exhibit and the Classification Review Board providing oversight of any decisions in that regard.

Towards a truly national scheme

12.26 A number of issues stem from the current federal system, including major differences between the states and territories with respect to classification matters. It is therefore clear to the committee that the National Classification Scheme does not provide a uniform and simple classification scheme across all jurisdictions and across all media.

12.27 For example, classification decisions under the National Classification Scheme are made in accordance with a complex array of legislation, codes and guidelines: the *Classification Act 1995*; the National Classification Code; the *Guidelines for the Classification of Publications 2005;* and the *Guidelines for the Classification of Films and Computer Games*. While this framework was intended to enable a national approach to classification,[13] some states and territories have preserved their censorship powers, establishing their own classification decision-making procedures outside the *Classification Act 1995*, and giving rise to the possibility of material having different classifications in different jurisdictions.[14]

12.28 Further, the states and territories are responsible for the enforcement of classification decisions made under the federal National Classification Scheme. To this end, each jurisdiction has put in place its own requirements in relation to the sale and display of classified material, particularly Restricted publications and films. The committee agrees with the sentiments expressed by the National Film and Sound Archive that the word 'daunting' does not even begin to describe the variety of requirements that a person can be confronted with when attempting to comply with the different considerations across the various jurisdictions.[15]

12.29 For these reasons, and after adoption of the fundamental reforming principles outlined earlier in this chapter, the committee proposes that a number of changes are

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13 See Australian Government, National Classification Scheme website at http://www.classification.gov.au/www/cob/classification.nsf/Page/ClassificationinAustralia_NationalClassificationScheme, (accessed 7 June 2011).

14 For an example of utilisation of state censorship powers, see Mrs Roslyn Phillips, FamilyVoice Australia, *Committee Hansard*, 25 March 2011, p. 77, who drew the committee's attention to the decision of the South Australian Classification Council to classify the film *Nine Songs* as X18+ in South Australia. The Classification Review Board had earlier classified the film R18+.

15 National Film and Sound Archive, *Submission 27*, p. 2, in describing the process of obtaining festival exemptions for each event it intends to show a film at across Australia.

required to the existing classification framework in Australia to achieve proper uniformity across all jurisdictions.

Constitutional issues

12.30 One of the barriers to uniformity and consistency of the classification system is the federal/state divide with respect to responsibilities in this area. The availability of X18+ films in the ACT and the Northern Territory is an example of the negative implications of the states and territories having responsibility for the enforcement of classification decisions. Films classified X18+ continue to be sold in the ACT and parts of the Northern Territory, despite numerous studies linking exposure to pornographic material contained in X18+ films to the sexual abuse of children. This is particularly disturbing given the situation in the Northern Territory where the Australian Government has legislated to prohibit the possession and supply of X18+ films in prescribed areas, and yet just outside the prescribed areas X18+ films are legally available.

12.31 The committee sought advice from witnesses as to the constitutional heads of power that might be used in order for the Australian Government to legislate for a truly national classification scheme. The Attorney-General's Department (Department) advised that the following powers would be relevant:

- trade and commerce power (section 51(i));
- corporations power (section 51(xx));
- communications power (section 51(v)); and
- territories power (section 122).

12.32 The committee also sought advice from officers of the Department as to whether the external affairs power (section 51(xxix) of the Constitution) might be used in this context. Officers of the Department indicated that the scope of the power is unclear:

> Most of the international conventions are about freedom of speech, particularly, for example, the International Covenant on Civil and Political Rights. They are about freedom of speech, so there are interesting issues about that.[16]

12.33 The committee notes the advice of the Department that it is not aware of any specific or relevant treaties which may be applicable to the use of the external affairs power in support of the implementation of Commonwealth classification law.[17]

12.34 The Arts Law Centre of Australia referred to the possibility of the states and territories referring their powers in this area to the Commonwealth.[18] The Australian

16 *Committee Hansard*, 27 April 2011.

17 Attorney-General's Department, answers to questions on notice, received 18 May 2011.

18 Arts Law Centre of Australia, answers to questions on notice, received 21 April 2011.

Christian Lobby (ACL) highlighted the need for constitutional heads of power issues to be addressed, otherwise 'we are going to continue to go around and around the mountain on this issue'.[19]

12.35 The committee agrees that this is an area that needs further action immediately. The committee recommends that the Australian Government take a leadership role through the Standing Committee of Attorneys-General in requesting the referral of powers in this area by states and territories to the Australian Government to enable it to legislate for a truly national classification scheme.

12.36 In the event that the Australian Government is not able to negotiate a satisfactory transfer of powers by all states and territories within the next 12 months, the committee recommends that the Australian Government prepare options for the expansion of the Australian Government's power to legislate for a new national classification scheme.

Inadequacy of enforcement powers

12.37 Aside from considerations of constitutional issues, several aspects of the enforcement system require urgent attention.

12.38 In addition to exercising enforcement powers with respect to the sale and display of classified material, state and territory law enforcement agencies are responsible for law enforcement actions regarding classification matters. This is a particularly disjointed and fractured arrangement of the so-called 'cooperative scheme', and one of the clear failings of the National Classification Scheme is the disregard which is shown for call-in notices issued by the Director of the Classification Board.

12.39 No systematic process exists by which the Commonwealth can pursue matters it has referred to state and territory law enforcement agencies. The committee heard from the Director of the Classification Board that the pursuit of classification matters 'really comes down to the priorities that the states and territories place on this'.[20] Some information about what occurs as a result of referrals is available to the Attorney-General's Department. However, this is provided in an ad-hoc manner and officers of the Department admitted that it is difficult to match information in inquiries received from state and territory law enforcement agencies to a precise referral.[21]

Establishment of national standards

12.40 In the committee's view, the differing requirements between states and territories as to how classified material can be sold, hired, exhibited, advertised and

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19 Mr Lyle Shelton, Australian Christian Lobby, *Committee Hansard*, 25 March 2011, pp 5-6.

20 *Committee Hansard*, 7 April 2011, p. 62.

21 *Committee Hansard*, 27 April 2011, p. 39.

demonstrated adds an unnecessary layer of complexity to the National Classification Scheme. Further, current legislative provisions in many states and territories means that Restricted material can be displayed in areas where children are able to see and access it. Appropriate measures need to be put in place immediately to ensure that children are protected from exposure to this type of material.

12.41 In the committee's view, the establishment of national standards for the display of Restricted publications and films will assist state and territory enforcement agencies to prioritise classification actions. In support of this, the committee notes the comments of the Classification Board in its preliminary observations to the ALRC's current review of the National Classification Scheme:

> [F]or example, [if] legislation around the availability of X18+ was made uniform nationally, Refused Classification items may become a clearer priority for law enforcement agencies.[22]

Need for cross-jurisdictional information-sharing

12.42 Another area of the enforcement system which the committee believes is in dire need of improvement is the lack of information-sharing between the Commonwealth and the states and territories in relation to referral of breaches of the *Classification Act 1995*.

12.43 The committee notes that the Classification Enforcement Forum is considering the establishment of a cross-jurisdictional information-sharing arrangement as a means of improving compliance with classification laws. However, in the committee's view, not enough is being done at the present time to expedite the establishment of a data-sharing network. A centralised database for tracking referrals by the Commonwealth to the states and territories and other classification enforcement actions is required as a matter of urgency.

Enhanced capacity for Classification Liaison Scheme

12.44 Currently the Classification Liaison Scheme has four officers and has the primary functions of educating industry about classification and assessing compliance with classification laws. In the committee's view, the resourcing of the Classification Liaison Scheme is woefully inadequate for the job for which it is tasked. Due to the lack of resourcing for the Classification Liaison Scheme, it has fallen to private citizens to draw to the attention of the Classification Board examples of non-compliance with the classification system. This situation is neither desirable nor sustainable. What is required is a commitment by the Australian Government to adequately fund and resource the Classification Liaison Scheme. An increase to the size and commensurate funding of the Classification Liaison Scheme must be made as a matter of urgency.

22 Classification Board, answer to question on notice, received 16 May 2011.

12.45 The committee believes that increasing the resources and funding of the Classification Liaison Scheme will enable it to conduct an increased number of compliance checks and audits on premises. For example, the committee notes concerns expressed during the inquiry in relation to the operation of serial classification declarations. The committee understands that the Classification Board has processes in place to monitor the material being made available under serial classification declarations: for example, compliance checking of publications; auditing of publications on receipt of a complaint; and a reduction in the declaration period. However, the committee believes these steps are insufficient to address the problems highlighted in the evidence it received during this inquiry. The committee believes that serial classification declarations are one aspect of the National Classification Scheme which could be subject to increased compliance and audit checking.

12.46 The committee also believes that the Classification Liaison Scheme requires a greater presence in all states and territories. Therefore, the committee recommends that the Classification Liaison Scheme have at least one representative in each state and territory. Further, the committee recommends that the Classification Liaison Scheme should be charged with responsibility for establishing and maintaining the database of information pertaining to classification enforcement actions, as described above.

12.47 Additionally, enforcement actions for failure to respond to call-in notices issued by the Director of the Classification Board should be made a priority for the Classification Liaison Scheme in providing assistance to state and territory law enforcement agencies. The committee recommends that the Australian Government should, through the Standing Committee of Attorneys-General, signal its intention to make enforcement actions for failing to respond to call-in notices a matter of priority.

12.48 In line with the expanded role and funding for the Classification Liaison Scheme, the committee considers that the reporting requirements for the Classification Liaison Scheme need to be strengthened. The committee recommends that more detailed information should be required to be included in the Attorney-General's Annual Report with respect to the operations of the Classification Liaison Scheme.

Platform neutrality: expanding the National Classification Scheme

12.49 In addition to achieving uniformity of the classification framework across Australia, the committee is strongly of the view that a uniform approach to the same or similar content is required, regardless of the medium of delivery. The committee is concerned that substantial categories of media fall outside the National Classification Scheme, particularly media which either appeals to children and young people (such as music videos on television), or media which cannot be avoided by children (such as billboards and outdoor advertising).

12.50 In its submission, Screen Australia summarised the benefits of a uniform classification system, particularly noting the benefits in a converged media environment:

> A uniform classification approach would provide certainty for the industry and avoid variable classifications that can affect the commercial prospects of film and television projects...
>
> In a converged environment, where content will not be confined to a single delivery platform but will instead be accessible on a range of platforms, including online, it would be of great benefit for there to be a consistent standard applied to the content itself rather than platform on which it is transmitted.[23]

12.51 In general, the committee accepts that the equal treatment of content, regardless of the platform used to access that content, should be a guiding principle of a reformed National Classification Scheme. However, the nature of the digital world – specifically its size and the lack of online borders – makes this difficult in practice. Nevertheless, the committee endorses reforms to the National Classification Scheme that would harmonise the classification of content across mediums, to the extent possible.

Expanding the National Classification Scheme's scope

12.52 The current situation, where the National Classification Scheme is loosely paralleled by co-regulatory and self-regulatory systems, is far from adequate, particularly given the increasing convergence of media. A number of witnesses questioned the ability of industries to adequately reflect community standards, while also noting that industry assessors may come to different opinions to the Classification Board.

12.53 The committee is aware that the exclusion of key media industries from the National Classification Scheme, and confusion over the status of online content, results in a lack of uniformity in content classification. For this reason, the committee proposes an expansion of particular elements of the National Classification Scheme to cover all mediums, including broadcast and subscription television, radio, recorded music and advertising. This expansion would result in harmonised standards, consumer advice and oversight by the Classification Board.

Reform of television, radio, recorded music and advertising regulation

12.54 Under the committee's proposed extension, classification standards in industry codes of practice would be required to imitate the classification principles and requirements of the National Classification Scheme, including the National Classification Code, relevant provisions in the *Classification Act 1995* and the relevant guidelines. This could potentially be achieved by incorporation of the principles of the National Classification Scheme by reference, if not already done so. The adoption of these measures by industry should be legally enforceable and subject to sanctions.

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23 Screen Australia, *Submission 56*, p. 1.

12.55 This would have varying effects depending on the industry, as many codes of practice are already tied to the National Classification Scheme in a number of ways. The advertising industry would be most affected because advertising codes of practice are not currently directly linked to the National Classification Scheme principles.

Industry self-assessment

12.56 Under the committee's proposal, industry participants who are currently subject to industry codes of practice would continue to self-assess their own content. However, this ability would come with enhanced responsibility.

12.57 The committee's view is that industry bodies wishing to exercise classification decision-making functions will need to be accredited by government. In order to be accredited, industry bodies must employ in-house classifiers, trained by the Classification Board. Industry bodies will also serve a probationary period of accreditation, in which all decisions will be subject to review to ensure that the classification decisions are made in accordance with the legislative framework. Subsequent to serving this probationary period, an organisation will be subject to an annual audit of decisions. Continuing accreditation as a classification decision-making body will be dependent on an organisation passing this audit process.

12.58 The committee considers that the Classification Liaison Scheme is well-placed to provide education and support to industry in this regard, particularly if it is given more resources as suggested above.

12.59 Further, the committee recommends that incorrect classifications by industry assessors in the television, recorded music and advertising industries should be subject to substantial monetary fines, payable by the organisation publicly displaying the content. Under the current system, there is not enough incentive for industries to abide by even their own codes of practice. To prevent industry participants from attempting to 'push the envelope', the committee recommends that transgressions of classification requirements must be punishable by such monetary fines. This punitive system could involve a 'three-strike' system or other such mitigating scheme design in order to function equitably.

Online content

12.60 As noted above, the committee would prefer that the National Classification Scheme treat all content equally, regardless of the means used to access it. However, the scale and borderless nature of the internet complicates the practicality of this preferred approach.

12.61 Two factors significantly complicate the application of the National Classification Scheme to online content: first, the distinction between overseas- and Australian-hosted content; and, second, the sheer volume of material provided on the internet by small scale and non-commercial publishers, including private citizens, who may not be covered by industry codes.

12.62 In principle, the committee believes that effective classification of online content will most likely involve:

- a focus on self-assessment;
- adequate systems to deal with overseas-hosted content;
- an effective complaints mechanism; and
- education of industry participants.

12.63 The committee did not receive enough evidence to make specific findings on this issue. However, this will be an important matter for the Australian Law Reform Commission's (ALRC) National Classification Scheme Review and the Australian Government Convergence Review to address in their current inquiries.

Consistency of ratings and consumer advice

12.64 The committee also notes that the Director of the Classification Board supported the suggestion by one witness of consistent ratings and consumer advice as a 'really fine ideal'.[24]

12.65 The Classification Board provided the committee with a very informative research paper in this regard by Dr Jeff Brand from Bond University: *A comparative analysis of ratings, classification and censorship in selected countries around the world* (the Brand Paper).[25] While dated, the Brand Paper does provide some excellent recommendations in terms of unifying classification regimes:

> ...[P]rocedural matters, markings, advertising, review processes and so on could be more unified and therefore streamlined to assist both consumers and content distributors.[26]

12.66 The committee considers that, in order to assist in achieving consistency, the National Classification Scheme's categories, principles, labelling, markings and warnings should be extended across all mediums in the form of recognisable classification symbols.

New roles for the Classification Board and Classification Review Board

12.67 The committee proposes to retain the Classification Board in its current role. In addition, the Classification Board should, as noted above, be responsible for providing training to industry classification bodies.

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24 *Committee Hansard*, 7 April 2011, p. 64.

25 Dr Jeff Brand, *A comparative analysis of ratings, classification and censorship in selected countries around the world*, Centre for New Media Research and Education, Bond University, 2003.

26 Dr Jeff Brand, *A comparative analysis of ratings, classification and censorship in selected countries around the world*, Centre for New Media Research and Education, Bond University, 2003, p. 20.

12.68 The committee proposes that the Classification Review Board serve as a review body for industry body classification decisions as well as Classification Board decisions. Review of a decision by an industry body or by the Classification Board or the Classification Review Board should be instigated by those people who can currently apply to the Classification Review Board for decisions.[27] Further, the committee proposes that the Classification Review Board should, on its own motion, be able to review the classification decisions of an accredited industry body.

12.69 Membership of the Classification Board and the Classification Review Board should continue to be in accordance with the provisions which currently exist in the *Classification Act 1995*.[28] However, the committee is concerned that, under current provisions, the appointment period for up to seven years is too long. The committee would prefer to see more regular, staggered turnover of board membership. For this reason, the committee recommends that terms of appointment should be for a maximum period of five years, with no option for reappointment.

Complaints-handling

12.70 In the committee's view, improved complaints-handling processes must be established across the National Classification Scheme, and across the co-regulatory and self-regulatory regimes.

12.71 Consumers need to be provided with clear information about how to make complaints in relation to classification matters. In order to make a complaint, a consumer should not be required to have a detailed knowledge of the classification system, along with the role of the various bodies involved in classification and their associated responsibilities.[29]

12.72 To this end, the committee notes the recommendation in the Senate ECA Committee's 2008 report, *Sexualisation of children in contemporary media*, for a complaints clearinghouse to be established for the advertising and commercial television industries.[30]

12.73 The committee endorses that proposal and itself recommends that the Australian Government establish a 'Classification Complaints' clearinghouse where complaints in relation to matters of classification can be directed. The clearinghouse would be responsible for:

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27 See *Classification Act 1995*, ss. 42(1).

28 See *Classification Act 1995*, s. 48 and s. 74.

29 See Media Standards Australia, answers to questions on notice, received 21 April 2011, which demonstrated the difficulty that one complainant had in ensuring that their complaint was considered by the appropriate organisation.

30 Senate Environment, Communications and the Arts Committee, *Sexualisation of Children in the Contemporary Media*, June 2008, Recommendation 8, p. 60.

- receiving complaints and forwarding them to the appropriate industry body for consideration;
- advising complainants that their complaint has been forwarded to a particular organisation for consideration; and
- giving complainants direct contact details and an outline of the processes of the organisation to which the complaint has been forwarded.

Complaints in self-assessing industries

12.74 Subject to the development of the clearinghouse, the introduction of content assessment accreditation and a monetary fine, the current complaints procedure for industries covered by a code of practice would remain largely in place.

12.75 Complaints in relation to classification decisions by an accredited industry body should, in the first instance, be directed to the relevant industry body to review and address. However, to ensure consistency across the National Classification Scheme, the committee recommends that the final point of appeal for classification decisions would be the Classification Review Board.

12.76 For example, community members disagreeing with a classification decision of the Advertising Standards Board would be able to ultimately appeal that decision to the Classification Review Board to ensure harmonisation of the overall scheme.

12.77 The committee is aware that a system in which the Classification Board is responsible for all classification would be ideal. However, the volume of content requiring classification is likely to preclude this possibility. For that reason, the committee has sought to provide a practical solution by ensuring that one body, in the form of the Classification Review Board, is the final arbiter of classification decisions in Australia.

ALRC's National Classification Scheme Review

12.78 Finally, the committee recognises that the Australian Government has tasked the ALRC with conducting a review of the National Classification Scheme. The committee recommends that the Attorney-General specifically direct the ALRC to consider, as part of its inquiry, all findings, proposals and recommendations put forward in this committee's report.

Recommendation 1

12.79 The committee recommends that an express statement should be included in the National Classification Code which clarifies that the key principles to be applied to classification decisions must be given equal consideration and must be appropriately balanced against one another in all cases. Currently, these principles are:

- **adults should be able to read, hear and see what they want;**
- **minors should be protected from material likely to harm or disturb them;**
- **everyone should be protected from exposure to unsolicited material that they find offensive;**
- **community concerns should be taken into account in relation to:**
    - **depictions that condone or incite violence, particularly sexual violence; and**
    - **the portrayal of persons in a demeaning manner.**

Recommendation 2

12.80 Further to Recommendation 1, the committee recommends that the fourth key principle in the National Classification Code should be expanded to take into account community concerns about the sexualisation of society, and the objectification of women.

Recommendation 3

12.81 The committee notes that there has been no further consideration by the Senate of the Senate Environment, Communications and the Arts Committee's 2008 report, *Sexualisation of children in the contemporary media*. The committee recommends that the Senate should, as a matter of urgency, establish an inquiry to consider the progress made by industry bodies and others in addressing the issue of sexualisation of children in the contemporary media; and, specifically, the progress which has been made in consideration and implementation of the recommendations made in the *Sexualisation of children in the contemporary media* report.

Recommendation 4

12.82 The committee recommends that the *Guidelines for the Classification of Films and Computer Games* and the *Guidelines for the Classification of Publications 2005* should be revised so that the preamble to both sets of guidelines expressly states that the methodology and manner of decision-making should be based on a strict interpretation of the words in the respective guidelines.

Recommendation 5

12.83 The committee recommends that the emphasis on context and the assessment of impact should be removed as principles underlying the use and application of the *Guidelines for the Classification of Films and Computer Games*.

Recommendation 6

12.84 The committee recommends that the Australian Government introduce Standing Community Assessment Panels to assist in the determination of community standards for the purpose of classification decision-making.

Recommendation 7

12.85 The committee recommends that the classification of artworks should be exempt from application fees.

Recommendation 8

12.86 The committee recommends that the Australian Government, through the Standing Committee of Attorneys-General, pursue with relevant states the removal of the artistic merit defence for the offences of production, dissemination and possession of child pornography.

Recommendation 9

12.87 The committee recommends that provision be made in the *Classification Act 1995* for an exemption for cultural institutions, including the National Film and Sound Archive, to allow them to exhibit unclassified films. This exemption should be subject to relevant institutions self-classifying the material they exhibit and the Classification Review Board providing oversight of any decisions in that regard.

Recommendation 10

12.88 The committee recommends that the Australian Government take a leadership role through the Standing Committee of Attorneys-General in requesting the referral of relevant powers by states and territories to the Australian Government to enable it to legislate for a truly national classification scheme.

Recommendation 11

12.89 In the event that a satisfactory transfer of powers by all states and territories is not able to be negotiated within the next 12 months, the committee recommends that the Australian Government prepare options for the expansion of the Australian Government's power to legislate for a new national classification scheme.

Recommendation 12

12.90 The committee recommends that, as a matter of priority, the Standing Committee of Attorneys-General should consider the development of uniform standards for the display and sale of material with a Restricted classification.

Recommendation 13

12.91 The committee recommends that:

- **Category 1 and 2 Restricted publications, and R18+ films, where displayed and sold in general retail outlets, should only be available in a separate, secure area which cannot be accessed by children; and**
- **the exhibition, sale, possession and supply of X18+ films should be prohibited in all Australian jurisdictions.**

Recommendation 14

12.92 The committee recommends that, as a matter of priority, the Commonwealth and the states and territories should establish a centralised database to provide for information-sharing on classification enforcement actions.

Recommendation 15

12.93 The committee recommends that the Classification Liaison Scheme should substantially increase its compliance and audit-checking activities in relation to, for example, compliance with serial classification declaration requirements.

Recommendation 16

12.94 The committee recommends that the Classification Liaison Scheme should have at least one representative in each state and territory.

Recommendation 17

12.95 The committee recommends that the Classification Liaison Scheme should be charged with responsibility for establishing and maintaining the centralised database to provide for information-sharing on classification enforcement actions, as proposed in Recommendation 14.

Recommendation 18

12.96 The committee recommends that the Classification Liaison Scheme should provide assistance to state and territory law enforcement agencies in relation to enforcement actions for failure to respond to call-in notices issued by the Director of the Classification Board.

Recommendation 19

12.97 The committee recommends that more detailed information should be included in the Attorney-General's annual report about the operations of the Classification Liaison Scheme.

Recommendation 20

12.98 The committee recommends that the Australian Government should increase the size of, and commensurate funding to, the Classification Liaison Scheme as a matter of priority.

Recommendation 21

12.99 The committee recommends that the Australian Government should, through the Standing Committee of Attorneys-General, signal its intention to make enforcement actions for failing to respond to call-in notices a matter of priority.

Recommendation 22

12.100 The committee recommends that, to the extent possible, the National Classification Scheme should apply equally to all content, regardless of the medium of delivery.

Recommendation 23

12.101 The committee recommends that industry codes of practice under current self-regulatory and co-regulatory schemes, including those under the *Broadcasting Services Act 1992*, the ARIA/AMRA Labelling Code and the advertising industry, should be required to incorporate the classification principles, categories, content, labelling, markings and warnings of the National Classification Scheme. The adoption of these measures by industry should be legally enforceable and subject to sanctions.

Recommendation 24

12.102 The committee recommends that industry bodies wishing to exercise classification decision-making functions should be required to be accredited by the Australian Government.

Recommendation 25

12.103 The committee recommends that the Classification Board should be responsible for the development of a content assessor's accreditation, including formalised training courses for all industries covered under the National Classification Scheme.

Recommendation 26

12.104 The committee recommends that the accreditation of content assessors should be subject to disqualification as a result of poor performance.

Recommendation 27

12.105 The committee recommends that transgressions of classification requirements within codes of practice by industry participants should, if verified by the Classification Board, be punishable by substantial monetary fines.

Recommendation 28

12.106 The committee recommends that the terms of appointment for members of the Classification Board and the Classification Review Board should be for a maximum period of five years, with no option for reappointment.

Recommendation 29

12.107 The committee recommends that the Australian Government should establish a 'Classification Complaints' clearinghouse where complaints in relation to matters of classification can be directed. The clearinghouse would be responsible for:

- **receiving complaints and forwarding them to the appropriate body for consideration;**
- **advising complainants that their complaint has been forwarded to a particular organisation for consideration; and**
- **giving complainants direct contact details and an outline of the processes of the organisation to which the complaint has been forwarded.**

Recommendation 30

12.108 The committee recommends that the Attorney-General should specifically direct the ALRC to consider, as part of its current review of the National Classification Scheme, all the findings, proposals and recommendations put forward in this report.

Senator Guy Barnett
Chair

DISSENTING REPORT BY GOVERNMENT SENATORS

1.1 The Australian Government recognises that the National Classification Scheme is in need of review, particularly in light of changes in technology, media convergence and the global availability of media content. For this reason, the Attorney-General has asked the Australian Law Reform Commission (ALRC) to conduct a review of the National Classification Scheme to ensure it continues to be effective in the 21st century.[1]

1.2 As the Attorney-General and the Minister for Home Affairs and Justice have noted, the ALRC's National Classification Scheme Review will be comprehensive, and will involve widespread public consultation across the community and industry.[2] In addition, the Attorney-General has appointed Professor Terry Flew, a Professor of Media and Communication in the Creative Industries Faculty at Queensland University of Technology, as Commissioner in charge of the ALRC's National Classification Scheme Review.

1.3 The ALRC's National Classification Scheme Review is ongoing and will not report until January 2012. Government Senators believe that the ALRC's review, given its comprehensive nature and expert leadership, is the appropriate forum in which to consider reform to the National Classification Scheme. For that reason, Government Senators cannot support many of the proposals in the committee's report.

1.4 Government Senators do, however, agree with and support the following recommendations in the majority report: Recommendations 3, 12 and 30.

Senator Trish Crossin
Deputy Chair

Senator Mark Furner

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1 The Hon. Robert McClelland MP, Attorney-General, and the Hon. Brendan O'Connor MP, Minister for Home Affairs and Justice, ' Review of the National Classification Scheme', Joint media release, 21 December 2010.

2 The Hon. Robert McClelland MP, Attorney-General, and the Hon. Brendan O'Connor MP, Minister for Home Affairs and Justice, 'Review of National Classification Scheme starts', Joint media release, 24 March 2011.

APPENDIX 1

SUBMISSIONS RECEIVED

Submission Number	Submitter
1	Professor George Williams
2	Ms Beth Stanger
3	Mr and Mrs Gerard and Joan O'Keeffe
4	Ms Susan Reid
5	Mrs Audrey Ogden
6	Mr and Mrs Andrew and Jody van Burgel
7	Dr Katharine Gelber
8	Life, Marriage and Family Centre, Catholic Archdiocese of Sydney
9	Mr Robert Harvey
10	Australian Customs and Border Protection Service
11	Catholic Women's League Australia
12	Dr M Jean Graham
13	Electronic Frontiers Australia
14	Office of Public Prosecutions Victoria
15	FamilyVoice Australia
16	Women's Health Victoria
17	Research in Motion
18	Anglican Public Affairs Commission
19	Mr Matthew Whiteley
20	Ms Irene Graham
21	Media Standards Australia
22	Family Council of Victoria
23	Salt Shakers
24	Australian Subscription Television and Radio Association (ASTRA)
25	Australian Christian Lobby
26	Telstra
27	National Film and Sound Archive
28	Australian Association of National Advertisers
29	Justice and International Mission Unit, Uniting Church in Australia
30	Council of Churches of Christ in Australia
31	Australian Home Entertainment Distributors Association
32	Mr Johann Trevaskis

33	Arts Law Centre of Australia
34	Civil Liberties Australia
35	Special Broadcasting Service Corporation (SBS)
36	Hon Nick Goiran MLC and Mr Peter Abetz MLA
37	Mr Bruce Arnold and Dr Sarah Ailwood
38	Interactive Games and Entertainment Association
39	Government of Western Australia
40	Name Withheld
41	Advertising Standards Bureau
42	Australian Mobile Telecommunications Association
43	Queensland Council for Civil Liberties
44	Australian Council on Children and the Media
45	Australian Catholic Bishops Conference
46	Attorney-General's Department
47	The Communications Council
48	Commissioner for Children and Young People WA
49	Australian Broadcasting Corporation (ABC)
50	Free TV Australia
51	Mr Greg Donnelly MLC
52	Australian Recording Industry Association (ARIA) and Australian Music Retailers Association (AMRA)
53	Name Withheld
54	Cyberspace Law and Policy Centre
55	Pirate Party Australia
56	Screen Australia
57	Outdoor Media Association
58	Australian Press Council
59	Australia's Right to Know
60	Eros Association
61	Confidential
62	Mr Gavin Rosser
63	Kids Free 2B Kids
64	National Association for the Visual Arts
65	Collective Shout
66	Bravehearts
67	Mr David Adams
68	Associate Professor Robert Nelson
69	Ms Polly Seidler
70	Mr David Tennant

ADDITIONAL INFORMATION RECEIVED

1. Documents tabled by Music Ombudsman at public hearing on 25 March 2011
2. Documents tabled by Australian Council of Children and Media at public hearing on 25 March 2011
3. Answers to questions on notice provided by Australian Council of Children and the Media on 30 March 2011
4. Answers to questions on notice provided by Australian Communications and Media Authority on 1 April 2011
5. Answers to questions on notice provided by FamilyVoice Australia on 5 April 2011
6. Answers to questions on notice provided by Attorney-General's Department on 6 April 2011
7. Documents tabled by Outdoor Media Australia at public hearing on 7 April 2011
8. Document tabled by Dr Lyria Bennett Moses at public hearing on 7 April 2011
9. Document tabled by ASTRA at public hearing on 7 April 2011
10. Documents tabled by Free TV Australia at public hearing on 7 April 2011
11. Answers to questions on notice provided by Women's Health Victoria on 12 April 2011
12. Answers to questions on notice provided by Arts Law Centre of Australia on 15 April 2011
13. Answers to questions on notice provided by Classification Board on 20 April 2011
14. Answers to questions on notice provided by Australian Christian Lobby on 20 April 2011
15. Answers to questions on notice provided by Free TV Australia on 21 April 2011
16. Answers to questions on notice provided by SBS on 21 April 2011
17. Answers to questions on notice provided by ASTRA on 21 April 2011
18. Answers to questions on notice provided by Media Standards Australia on 21 April 2011
19. Answers to questions on notice provided by Telstra on 21 April 2011

20. Answers to questions on notice provided by Arts Law Centre of Australia on 21 April 2011

21. Answers to questions on notice provided by The Communication Council on 25 April 2011

22. Answers to questions on notice provided by ARIA on 29 April 2011

23. Answers to questions on notice provided by Outdoor Media Association on 3 May 2011

24. Answers to questions on notice provided by Screen Australia on 5 May 2011

25. Answers to questions on notice provided by Advertising Standards Bureau on 6 May 2011

26. Answer to question on notice provided by Australian Association of National Advertisers on 12 May 2011

27. Answers to questions on notice provided by ABC on 13 May 2011

28. Answers to questions on notice provided by Advertising Standards Bureau on 13 May 2011

29. Answers to questions on notice provided by Australian Communications and Media Authority on 13 May 2011

30. Answers to questions on notice provided by Classification Board on 16 May 2011

31. Answers to questions on notice provided by Department of Broadband, Communications and the Digital Economy on 18 May 2011

32. Answers to questions on notice provided by Attorney-General's Department on 18 May 2011

33. Answers to questions on notice provided by Australian Customs and Border Protection on 25 May 2011

34. Answers to questions on notice provided by Research in Motion on 27 May 2011

35. Answers to question on notice provided by National Film and Sound Archive on 27 May 2011

APPENDIX 2

WITNESSES WHO APPEARED BEFORE THE COMMITTEE

Canberra, 25 March 2011

AILWOOD, Dr Sarah, Private capacity

ALTHAUS, Mr Chris, Chief Executive Officer, Australian Mobile Telecommunications Association

ARNOLD, Mr Bruce, Private capacity

BEACHLEY, Ms Adele, Managing Director, Australia and New Zealand, Research in Motion

BIGGINS, Ms Barbara, Chief Executive Officer, Australian Council on Children and the Media

HANDSLEY, Professor Elizabeth, President, Australian Council on Children and the Media

HARVEY, Mr Ian, Executive Director, Australian Music Retailers Association

LAWRENCE, Mrs Una, Recorded Music Labelling Code Ombudsman, Australian Recording Industry Association and the Australian Music Retailers Association

PHILLIPS, Mrs Roslyn, National Research Officer, Family Voice Australia

ROWLINGS, Mr William, Secretary/Chief Executive Officer, Civil Liberties Australia

SHAW, Mr James, Director, Government Relations, Telstra Corporation

SHELTON, Mr Lyle, Chief of Staff, Australian Christian Lobby

SIVAKUMAR, Ms Rohini, Legal Counsel, Australian Recording Industry Association

SWAN, Mr Robert, Coordinator, Eros Association

von BRASCH, Mr Arved, Member, Civil Liberties Australia

WATTS, Mr Timothy, Regulatory Manager, Telstra Corporation

WILLIAMS, Mr Benjamin, Deputy Chief of Staff, Australian Christian Lobby

Sydney, 7 April 2011

AYERS, Ms Robyn, Executive Director, Arts Law Centre of Australia

BAIN, Ms Alina, Director of Codes, Policy and Regulatory Affairs, Australian Association of National Advertisers

BENNETT MOSES, Dr Lyria, Acting Academic Co-Director, Cyberspace Law and Policy Centre

BREALEY, Mr Michael, Head of Strategy and Governance for ABC Television, Australian Broadcasting Corporation

BUCHANAN, Ms Petra, Chief Executive Officer, Australian Subscription Television and Radio Association

BUSH, Mr Simon, Chief Executive, Australian Home Entertainment Distributors Association

BUTERA, Ms Rita, Executive Director, Women's Health Victoria

CAMERON, Ms Fiona, Chief Operating Officer, Screen Australia

DEANER, Mr Matthew, Manager, Strategy and Research, Screen Australia

DUREY, Ms Rose, Senior Policy Officer, Women's Health Victoria

FLYNN, Ms Julie, Chief Executive Officer, Free TV Australia

GRIFFIN, Mr Trevor, Deputy Convenor, Classification Review Board

HOTCHKIN, Mr Paul, President, Media Standards Australia

LEESONG, Mr Daniel, Chief Executive Officer, The Communications Council

McDONALD, Mr Donald AC, Director, Classification Board

MEAGHER, Mr Bruce, Director, Strategy and Communications, Special Broadcasting Service Corporation

MOLDRICH, Ms Charmaine, Chief Executive Officer, Outdoor Media Association

O'BRIEN, Ms Lesley, Deputy Director, Classification Board

PAM, Mr Andrew, Board Member, Electronic Frontiers Australia

SCOTT, Mr Gregory, Senior Classifier, Classification Board

TENG, Miss Joanne, Solicitor, Arts Law Centre of Australia

Canberra, 27 April 2011

BANFIELD, Ms Wendy, Principal Legal Officer, Classification Branch, Attorney-General's Department

CAMPTON, Ms Ann, Assistant Secretary, Broadcasting and Switchover Policy Branch, Department of Broadband, Communications and the Digital Economy

COLLETT, Mr Chris, Acting Assistant Secretary, Classification Branch, Attorney-General's Department

FENTON, Mr Jeremy, Manager, Content Classification Section, Australian Communications and Media Authority

FITZGERALD, Mr Tim, Acting National Manager, Investigations, Australian

FONG, Ms Phyllis, Acting Executive Manager, Citizen and Community Branch, Australian Communications and Media Authority

GALE, Ms Julie, Director, Kids Free 2B Kids

JOLLY, Ms Fiona, Chief Executive Officer, Advertising Standards Bureau

LANDRIGAN, Ms Ann, Acting Chief Executive Officer, National Film and Sound Archive

LOUKAKIS, Mr Angelo, Executive Director, Australian Society of Authors

MAJOR, Ms Sarah, National Manager, Trade Policy and Regulation Branch, Australian Customs and Border Protection Service

MINOGUE, Mr Matt, First Assistant Secretary, Civil Law Division, Attorney-General's Department

MURPHY, Mr Mark, Principal Legal Officer, National Film and Sound Archive

PITMAN, Ms Sue, National Director, Trade and Compliance Division, Australian Customs and Border Protection Service

TANKARD REIST, Ms Melinda, Founder and Spokesperson, Collective Shout

WINDEYER, Mr Richard, First Assistant Secretary, Digital Economy Strategy Division, Department of Broadband, Communications and the Digital Economy

WINIKOFF, Ms Tamara, Executive Director, National Association for the Visual Arts