



Australian Government
Classification Board

Donald McDonald AC
Director

C11/58

Ms Julie Dennett
Committee Secretary
Senate Legal and Constitutional Committee
PO Box 6100
Parliament House
Canberra ACT 2600

A handwritten signature in dark ink, appearing to read 'Don McDonald'.

Questions on Notice – Inquiry into the Australian film and literature classification scheme: additional information

I refer to my letter of 20 April 2011, and my commitment to provide the Committee with relevant submissions prepared by the Classification Board (the Board).

The Board has today provided some preliminary observations to the Australian Law Reform Commission (ALRC). This document includes background information on the functions and procedures of the Board, and raises a range of discussion points the ALRC may wish to consider in the early stages of their review.

Please find the document attached. I trust you will find this information useful.

Yours sincerely

Donald McDonald
Director
6 May 2011

The Classification Board welcomes the opportunity to make some preliminary observations prior to the release of the ALRC's Issues Paper, and looks forward to further engagement during the course of the ALRC's Inquiry. This document seeks to provide the ALRC with background information on the functions and procedures of the Classification Board, as well as with suggestions for discussion points (in italics) that the ALRC may wish to canvass in the Issues Paper.

The Classification Board

The Classification Board (the Board) is an independent statutory body consisting of the Director, Deputy Director, Senior Classifier and other members.

The Board classifies films, computer games and certain publications. The Board also classifies online content on application.

Since the 1970s, there have been profound changes in the approach to censorship in Australia including the adoption of the concept of classifying material on the basis of the views of reasonable adults and changing the name of the Censorship Board to the Classification Board to reflect that:

“... rather than focussing on preventing material from being disseminated, policy now concentrates more on classifying films and publications into defined categories, with restrictions on dissemination only being imposed at the upper limits of what is considered acceptable by the general community.”

[Australian Law Reform Commission Report #51 on Censorship Procedure (1991)]

We now have a classification scheme that classifies material into appropriate categories rather than censoring material. The primary purpose of the scheme is to provide information and advice to consumers, particularly parents, so that they may make informed decisions about what they or their children read, hear and see.

The Director of the Board has a range of statutory functions under the *Classification (Publications, Films and Computer Games) Act 1995* (the Act) which include:

- managing the administrative affairs of the Board;
- convening and presiding at Board meetings;
- determining the constitution of the Board for classifying particular products;
- determining how decisions are recorded;
- arranging the business of the Board;
- calling in publications, films and computer games for classification;
- determining procedures for the Board; and
- providing the Minister with the Board's annual report.

In addition to the Director's powers in relation to the Board, the Act confers a number of additional functions and powers on the Director which include:

- approving forms for the purpose of the Act;
- providing certificates and notice of decisions including evidentiary certificates;
- authorising of industry assessors; and
- determining applications for fee waivers.

The Director and Deputy Director of the Board are authorised to grant permission to import or export prohibited or potentially prohibited goods in accordance with the *Customs (Prohibited Imports) Regulations 1956* and *Customs (Prohibited Exports) Regulations 1958*.

The Attorney-General's Department is responsible for the financial management of the Board.

The Classification Branch of the Department is co-located with the Board in Sydney.

The Board regularly engages with stakeholders such as tertiary and secondary educational institutions, community organisations, professional bodies and industry, about classification and community standards, through attendance, as speakers and participants, at forums and conferences, and informal dialogue.

Classification

The Board must make classification decisions in accordance with the Act, the National Classification Code and the Classification Guidelines. The Board must make its decision on an application for classification within 20 working days.

The Guidelines for the Classification of Films and Computer Games and The Guidelines for the Classification of Publications (The 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 elements (themes, violence, sex, language, drug use and nudity).

Only "submittable publications" must be classified before they can legally be advertised or distributed in Australia. There are four classifications for publications – Unrestricted, Category 1 restricted, Category 2 restricted and RC (Refused Classification).

On application, the Board can issue a serial classification declaration. This means that a classification (and conditions, if applicable) given to one issue of a periodical will apply to a specified number of future issues of the same periodical.

The classification categories for film are G, PG (Parental guidance recommended), M (Recommended for mature audiences), MA15+ (Not suitable for people under 15. Under 15s must be accompanied by a parent or adult guardian), R18+ (Restricted to 18 and over) and X18+ (Restricted to 18 and over).

From July 1 2009 to June 30 2010, the Board received 7,302 applications, including applications to classify 4,820 films, 1,101 computer games, 291 publications (228 single issue and 63 serial publications), 258 online content referrals from the Australian Communications and Media Authority (the ACMA) and 88 referrals from enforcement agencies. These figures are generally consistent with the number of applications the Board has received over the previous two years.

The Board continues to monitor the classification compliance levels of adult publications and films. During the 2010-2011 financial year, the Director called in 444 adult films and 49 adult magazines. Failure to comply with a call-in notice is a breach of classification laws and the Attorney-General's Department refers all breaches to the relevant State or Territory law enforcement agencies for appropriate attention and action.

Pre- Issues Paper discussion points

The National Classification Scheme

The National Classification Scheme is a cooperative arrangement between the Commonwealth, States and Territories. The Intergovernmental Agreement on Censorship underpins the scheme.

Currently, the Board's classification decisions are enforced by Customs and by the States/Territories, under their own State/Territory legislation which can vary from jurisdiction to jurisdiction. Enforcement of classification legislation is not prioritised by law enforcement agencies, and so breaches can occur without clear consequence.

Examine applying consistency and uniformity to enforcement legislation in all jurisdictions, and examine the penalties for breach.

Currently, X18+ product can only be legally sold, hired or distributed in the ACT and parts of the Northern Territory. However, there are numerous examples of restricted premises selling X18+ product in the States. If, for example, legislation around the availability of X18+ was made uniform nationally, Refused Classification items may become a clearer priority for law enforcement agencies.

The Act

1. Section 3: Purpose; and Section 6: Amendments to the Code and Section 12: Classification guidelines

Examine the requirement for unanimity on any changes to classification tools (The Code and The Guidelines) by all States/Territories and the Commonwealth to look to achieve an improved flexibility and responsiveness of the National Classification Scheme.

Examine the requirement for three separate classification tools – the Act, the Code and The Guidelines.

2. Section 5: Definitions under the Act

Examine definitions in the Act and The Guidelines in light of current understandings, formats and technology - such definitions should be uniformly reflected in the Act, the Code and The Guidelines.

Key definitions in the Act and The Guidelines include (but are not limited to):

“Publication: Any written or pictorial matter, but does not include a film, a computer games or an advertisement for a publication, a film or a computer game.”

“Submittable publication means an unclassified product that...contains depictions of 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 publications; or
- (c) are unsuitable for a minor to see or read.”

“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 or similar medium that allows the playing of an interactive game.”

“Interactive game means 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.”

“A film includes 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 sound track), but does not include:

- (a) a computer game; or
- (b) an advertisement for a publication, a film or a computer game.”

“Minor means a person under 18.”

“Reasonable adult” and “reasonable adults”, in Section 11 of the Act and the Code, and defined in the Guidelines for the Classification of Publications as “possessing commonsense and an open mind, and able to balance personal opinion with generally accepted community standards”.

3. Section 7: Types of Classification

Examine whether content (film, computer games and publications) could be covered by one set of classification categories (regardless of format supplied).

There are currently two types of classification under the Act – one for films and games; and another for publications. With new technology, formats and platforms to see/hear/read material (digital ebooks, digital magazines, downloads of movies direct from the internet to mobile phone, ipad, TV, computer), and material no longer being confined to being a physical product, is this the best system for the future? Could, for example, Category 2 Publications fall into an X18+ category in one set of Guidelines?

Examine the classification categories for best fit against current community standards and expectations.

For example, would it be informative to have an additional category between PG and M – an additional category such as PG13 as in the US classification system? Currently, three classifications for films and computer games (PG, M and MA15+) are hinged to the 15-years age group.

Examine key international classification schemes, such as BBFC, PEGI and/or MPAA, and whether there is opportunity for, and advantages in, Australia dovetailing with any of these.

Examine the logistics of classifying products sold/distributed/displayed in Australia that are in non-English languages.

4. Section 13: Applications for classification of publications

Examine the grounds on which the Board has the right to revoke a serial classification, particularly around failure to observe conditions or labelling requirements imposed by the Board.

For example, there may be a condition the product must be displayed in an opaque bag, or a labelling requirement of: “M – not recommended for readers under 15 years.”

5. Part 6, Division 1: Establishment of the Board

Examine the terms and conditions of Board appointment.

Board members serve a first term up to 5 years (in practice mostly 3 years) and a maximum term of 7 years. Examine the term of Board members against industry standards, and whether there are benefits in maintaining the Board's acquired knowledge and experience for a longer period. Examine how the term of temporary Board members is to be calculated – whether by calendar years or days served.

6. Section 14: Applications for classification of films

Examine whether it should be mandatory for applicants to provide advertising and marketing material on request, to assist in assessing the target age group of a product.

7. Section 17: Applications for classification of computer games

Examine whether it should be mandatory for a sample of gameplay to be provided by the applicant for all games, in addition to the requirement under 17 (2) for computer games containing contentious material (flow-on examination of fee structure).

8. Section 21: Declassification of classified films or computer games that are modified

Examine re-classification requirements for 3D or other technological variations to a film or computer game that has been classified. Currently, if a classified film or computer game is modified, it becomes unclassified when the modification is made.

9. Section 22: Application of publications, films or computer games containing advertisements

Examine the definitions of “film” and “advertisement” and how these apply if it is an enforcement application or an item referred to the Board under Schedule 7 of the Broadcasting Services Act (BSA). Examine alignment of the BSA Schedule 7 Clause 25 (where content that is not a film, computer game or eligible publication is to be treated and classified as a film) and the definition of “advertisement” in the Act.

10. Provisions in the Act and Regulations covering Authorised Assessors

Examine the consistency and uniformity of legislation covering the four Assessment Schemes (Authorised Assessor Scheme for Games, Additional Content Assessment Scheme, Advertising Assessment Scheme, and Authorised TV Assessor Scheme), around, for example, revocation, barring notices and training. Examine whether this legislation should be extended to cover Staff Assessors employed by the Attorney-General's Department.

National Classification Code

The National Classification Code states that:

1. 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;

- (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.

1. Publications/films/computer games that:

- (a) 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 standards of morality, decency and propriety generally accepted by reasonable adults to the extent that they should not be classified; or
- (b) 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
- (c) promote, incite or instruct in matters of crime or violence

are to be refused classification.

Examine whether the wording of 1 (b) best captures the inclusion of depictions of a person in animation, comics, cartoons, drawings and anime.

Examine the key point in 1 (b) which requires a determination to be made on whether a person is, or appears to be, a child under 18.

Examine the use of the word “promote” in 1 (c) and whether it best captures the intent of the clause – for example, could a movie dramatisation of a crime be interpreted in any circumstances to be promoting in matters of crime?

The Guidelines

Examine whether 2 sets of Guidelines are the most appropriate for the future.

Would there be benefit in having one set of Guidelines, with subclauses?

Examine whether The Guidelines would be a more useful tool for the future if they referred to a set of general principles rather than specific acts, such as specific fetishes listed in X18+ in The Guidelines for the Classification of Films and Computer Games.

General principles would reduce the reliance on use of specific terms in The Guidelines, such as “genital emphasis”, “genital contact”, “touching of genitals” currently used to describe what is and isn’t permitted under Sex and under Nudity (in The Guidelines for the Classification of Publications).

As an example, in Category 1 – Restricted, the Guidelines for the Classification of Publications say “... genital contact is not permitted” under “Sex”; under “Nudity”, “touching of genitals” is permitted. Genital Contact is defined as “genital manipulation, including penetration, in actual sexual activity”. “Touching of genitals” is defined as “displaying of genitals, or implying sexual activity”. Could a different treatment within The Guidelines provide greater clarity on the distinction between, for example, “genital contact” and “touching of genitals”?

For Unrestricted publications, the Guidelines for the Classification of Publications say “Nudity: ...Realistic depictions may contain discreet genital detail but there should be no genital emphasis. Prominent and/or frequent realistic depictions of sexualised nudity containing genitals will not be

permitted. Realistic depictions in which sexual excitement is apparent are not permitted... ”
“Sexualised nudity” is defined as “includes props, text and backgrounds that are sexually suggestive”; “discreet” is defined as “with little or no detail and generally not prominent”; “emphasised” is defined as “given prominence or strong focus. Factors include placement (within the publication or on the page), size (of image, article or text), style (including colour, clarity, realism), pose (of model), length of verbal description, and frequency”; “sexual excitement” is defined as “includes the male erection”. There has been discussion in the community about these definitions and the depiction of labia minora.

Examine whether level of impact could be used in place of the words “very discreet” for “Unrestricted Covers - Nudity: Depictions of nudity should be very discreet. Depictions of sexualised nudity, whether obscured or otherwise, are not permitted.”

Examine community expectations on whether limited violence, which is not sexualised, could be depicted in X18+ films if justified by context.

In the X18+ category, The Guidelines state: “No depiction of violence, sexual violence, sexualised violence or coercion is allowed in the category. It does not allow sexually assaultive depictions. Nor does it allow consensual depiction 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 or 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.”

Other

Examine whether material referred to the Board for classification by the ACMA under Schedule 7 of the Broadcasting Services Act should be provided to the Board in context.

Examine the use of stickers to obscure explicit material in distributed publications.

Examine requirements for when Consumer Advice must be displayed alongside classification markings.

Examine the Act alongside the Australian Human Rights Commission Act 1986 [Section 3 (1) and 11 (1)(f)] and Article 30 of the Convention on the Rights of Persons with Disabilities – for example, the Board receives applications to classify films that do not provide closed captioning for people with hearing disabilities.