Submission

on the

Classification (Publications, Films and Computer Games) Amendment (Classification Tools and Other Measures) Bill 2014

to the

Senate Legal and Constitutional Affairs Committee

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1. Introduction

The *Classification (Publications, Films and Computer Games) Amendment (Classification Tools and Other Measures) Bill 2014* was introduced into the House of Representatives by the Minister for Justice, the Hon Michael Keenan on Wednesday 19 March 2014. It passed the third reading on 25 March 2014.

On 27 March 2014, the Senate referred the Bill to the Senate Legal and Constitutional Affairs Legislation Committee for inquiry and report.

The Committee has called for submissions to be received by 1 May 2014. The Committee is due to report by 19 June 2014.

The Bill would implement some of the 57 recommendations of the Australian Law Reform Commission (ALRC)'s February 2012 report on *Classification—Content Regulation and Convergent Media.*[1]

The implementation of these recommendations is proceeding in "tranches" as the proposals are considered by the Standing Council on Law and Justice.

After its meeting in Darwin on 4 April 2013 the Standing Council issued the following communique:

> ***Australian Law Reform Commission Review of the National Classification Scheme***
>
> *Ministers discussed a number of recommendations from the Australian Law Reform Commission's Final Report into the Review of the National Classification Scheme and:*
>
> *a) agreed to more streamlined, pragmatic and less legally complex exemption arrangements (Queensland agreed to this decision in principle);*
>
> *b) agreed to amend the Classification (Publications, Films and Computer Games) Act 1995 (Cth) to allow for the use of classification decision-making instruments, such as online questionnaires (Queensland abstained from this decision);*
>
> *c) agreed to include the requirement in the Classification (Publications, Films and Computer Games) Act 1995 (Cth) that classified content and advertisements for classified content must display classification markings. In addition, the Commonwealth Minister will be empowered to determine principles in regard to classification markings;*
>
> *d) agreed that the Classification (Publications, Films and Computer Games) Act 1995 (Cth) should be amended to make the current modification rules less prescriptive;*
>
> *e) agreed that the Classification (Publications, Films and Computer Games) Act 1995 (Cth) should be amended to enable consumer advice to be assigned or changed independently from the classification category. Ministers also agreed that any model for implementing these reforms should include an appropriate reporting requirement to ensure the integrity of publicly available classification information;*
>
> *f) noted that the Commonwealth plans to implement a three-stage program of research into classification matters; and*

g) *agreed to amend the Classification (Publications, Films and Computer Games) Act 1995 (Cth) to enable the Commonwealth Attorney-General's Department to notify law enforcement authorities of content that is potentially RC without first having the content classified by the Classification Board.*[2]

The Bill would implement decisions (a),(b),(c),(d) and (g) as given in this Communique.

2. Schedule 1 – Classification Tools

Schedule 1 of the Bill would implement decision (b) of the Standing Council and recommendation 7-8 of the Australian Law Reform Commission's report:

> *The Classification of Media Content Act should enable the Regulator to develop and authorise classification decision-making instruments, such as online questionnaires.*[3]

The justification for this proposal has centred on the large volume of computer games being developed especially for mobile phones. These are not currently being submitted for classification in Australia and are therefore being sold illegally (as unclassified computer games) under most State laws.

The ALRC's original proposal was for online classification instruments to be used for material that did not need to be classified by the Regulator (in its proposed scheme only all full length feature films and the higher end commercial computer games (MA15+ and upwards) would be required to be classified by the Regulator).

However, the Bill would allow for the authorisation of classification tools for publications, films and computer games. It imposes no upper limit on the classification levels that such tools could be used to classify.

Potentially then the Minister could authorise a classification tool for the pornography industry to use to classify films as X18+ and publications as Restricted Category 1 or 2.

Given the high rate of breaches of existing rules by the pornography industry this would not be a prudent approach to protecting the community.

The pornography industry has shown itself to be untrustworthy in complying with the existing national classification scheme. This is illustrated by the failure by distributors of pornographic magazines and films to comply with call-in notices and the number of breaches of serial classifications.

Since 1 January 2008, 858 items mainly concerned with sex or sexualised nudity ('adult material') have been called in. Not a single distributor of adult material has submitted a film or publication for classification as a result of the call-ins.[4]

As of February 2010 the serial classification declarations of 55 publications had been revoked since the scheme began in December 2005. Forty-eight of these were originally classified Category 1 restricted.[5]

In the light of this track record it is naïve to propose that the pornography industry could be trusted to appropriately classify its own product.

We presume the current Minister is not intending to determine such an instrument. However, it would be unwise of the Senate to empower future Ministers to do so.

Indeed the provisions would allow for the whole classification task to be handed to industry simply by authorising instruments for each of the three types of material.

Recommendation 1:

Schedule 1 should be amended to limit the Classification Instruments that could be authorised to those used only to classify material at a lower classification level than MA15+ for films and computer games and Category 1 – Restricted for publications. Nor should Classification Instruments be able to be authorised for full length feature films, which should continue to be classified by the Board.

3. Schedule 2 – Referral of material to law enforcement agencies

Schedule 2 would give effect to decision (g) of the Standing Council and Recommendation 12–3 in the ALRC Report:

> *The Classification of Media Content Act should enable the Regulator to notify Australian or international law enforcement agencies or bodies about Prohibited content without having the content first classified by the Classification Board*.[6]

This provision would enable swifter removal by law enforcement of child pornography and other prohibited content without the delay of classification. Classification would still be required prior to prosecution.

Recommendation 2:

Schedule 2 should be supported.

4. Schedule 3 – Exemptions

Schedule 3 would give effect to decision (a) of the Standing Council and Recommendation 6-3 of the ALRC:

> *The Classification of Media Content Act should provide a definition of 'exempt content' that captures all media content that is exempt from the laws relating to what must be classified. The definition of exempt content should capture the traditional exemptions, such as for news and current affairs programs. The definition should also provide that films and computer games shown at film festivals, art galleries and other cultural institutions are exempt. Providers of this content should not be exempt from obligations to take reasonable steps to restrict access to adult content.*[7]

Schedule 3 would introduce two changes.

Firstly, it would expand the categories of films and computer games that would not be required to be classified. The main changes would be to introduce a new social sciences category, and to allow films to qualify that "mainly" rather than just "wholly" include certain content. This is said to allow, for example, films that are mainly a musical presentation to include backstage interviews.

These exemptions would not apply if content is likely to be classified M or higher.

This proposed change is sensible and should be supported.

Secondly, Schedule 3 would significantly change the processes for exemptions for film festivals and similar cultural events.

The Second reading speech summarises the proposed changes as follows:

> *The reforms will also simplify exemption arrangements for festivals by establishing a consolidated set of rules in the Commonwealth Classification Act—replacing the convoluted and inconsistent provisions that are currently set out in each state and territory's classification regime. Most importantly, the reforms will rationalise the administrative and regulatory requirements for festivals and cultural institutions by removing the mandatory requirement to apply to the director of the Classification Board for formal exemption. Instead, exemptions will continue to be available to support the arts and cultural sector but on a self-assessed, deregulated basis.*
>
> *Safeguards, similar to those currently in place for festivals, will ensure that the public is being protected—in particular, children. For example, exemption conditions will include restrictions on the screening, exhibition or demonstration of unclassified content to particular age groups if it is strong or high impact. It will require that patrons be provided with warnings about the content that they are about to see and prohibit content that is likely to be classified X 18+ or refused classification. Training and registration facilities will be established to support officers of the Classification Liaison Scheme, who will monitor the operation of the reformed arrangements as part of their routine compliance and educational activities.*[8]

It is reasonable that films and computer games shown at film festivals, art galleries and other cultural institutions be exempt from classification if their content is likely to be classified as lower than MA15+. However, if their content is likely to be MA15+ or R18+ then it is more appropriate to require that the film or computer game be classified.

This will ensure that material exceeding the highest classification for each category is not exhibited at all and that material that is MA15+ or R18+ is subject to appropriate legal restrictions.

> ***Recommendation 3:***
>
> ***Schedule 3 should be amended so that the exemption scheme for film festivals and similar cultural events would not apply to films or computer games that would be classified MA15+ or higher or to publications that would be classified Category 1 - Restricted or higher.***

5. Schedule 4 – Modifications

Schedule 4 would give effect to decision (d) of the Standing Council. It would not fully reflect Recommendation 8-2 of the ALRC that:

> *The Classification of Media Content Act should provide that if classified media content is modified, so that the modified content is likely to have a different classification from the original content, the modified content becomes unclassified. The Act should not prescribe specific types of modifications that operate to declassify content.*[9]

Rather, Schedule 4 of the Bill would specify the kinds of modification, including from 2-D to 3-D, that would not require submitting the modified version for classification unless it was likely to cause it to have a different classification. Additionally, the Bill would provide for the addition by way of legislative instrument, of new categories of modification to which this rule would apply.

There is merit in the broader approach which would take account of the variety of ways in which in a convergent media environment content could be modified. Defining the conditions under which such content needs to be reclassified based on whether the classification is likely to change is a sensible approach.

Schedule 4 of the Bill is more prescriptive, while including the general provision that any modification that is likely to change the classification would require that the modified version be classified.

Recommendation 4:

Schedule 4 should be supported. However, it could usefully be amended to better reflect Recommendation 8-2 of the ALRC report.

6. Schedule 5 – Determined markings and consumer advice

Schedule 5 would give effect to decision (c) of the Standing Council.

The ALRC recommended (Recommendation 9-2) that:

> *The Classification of Media Content Act should provide that classification decisions for content that must be classified, other than G content, must also be assigned consumer advice. The Classification Board should publish consumer advice guidelines as a reference for all industry classifiers.*[10]

Consumer advice plays a useful role in alerting individuals and parents to the classifiable elements in media content that have led to it being assigned a particular category.

Item 5 of Schedule 5 of the Bill would require that the Board give consumer advice for films and computer games classified G. The current Act leaves it to the Board to decide whether or not to give consumer advice for a G classified film or computer game.

The provision seems unnecessary and may lead to an expectation that G classified films and computer games will still have some level of classifiable elements (sex, nudity, language etc.).

It would be better if consumer advice was only added to a G classification when considered necessary by the Board.

Recommendation 5:

Schedule 5 should be supported. However, it could usefully be amended to better reflect Recommendation 9-2 of the ALRC by not mandating consumer advice for G classified films and computer games.

7. References

1 Australian Law Reform Commission, *Classification—Content Regulation and Convergent Media*, 2012:
http://www.alrc.gov.au/sites/default/files/pdfs/publications/final_report_118_for_web.pdf

2 Standing Council on Law and Justice, *Communique*, 4 April 2013, p 1:
http://www.sclj.gov.au/agdbasev7wr/sclj/documents/pdf/sclj%20communique%20april%202013%20final.pdf

3 Australian Law Reform Commission, *Classification—Content Regulation and Convergent Media*, 2012, p 170:
http://www.alrc.gov.au/sites/default/files/pdfs/publications/final_report_118_for_web.pdf

4 Senate Standing Committee On Legal And Constitutional Affairs, *Attorney-General's Department : Answers to questions on notice*, Supplementary Budget estimates, October 2010, Program 1.1, Question 2:
http://www.aph.gov.au/senate/committee/legcon_ctte/estimates/sup_1011/ag/002_CLD.pdf

5 Senate Standing Committee On Legal And Constitutional Affairs, *Classification Board : Answers to questions on notice*, Additional Budget estimates, February 2010, Question 11:
http://www.aph.gov.au/senate/committee/legcon_ctte/estimates/add_0910/ag/011_Classification_Board.pdf

6 Australian Law Reform Commission, *Classification—Content Regulation and Convergent Media*, 2012, p 289:
http://www.alrc.gov.au/sites/default/files/pdfs/publications/final_report_118_for_web.pdf

7 Ibid., p 142.

8 House of Representatives, Hansard, 19 March 2014, p 20–21:
http://parlinfo.aph.gov.au/parlInfo/download/chamber/hansardr/fc34435e-5f7a-4507-bac8-a38614e5fd1e/toc_pdf/House%20of%20Representatives_2014_03_19_2302.pdf;fileType=application%2Fpdf

9 Australian Law Reform Commission, *Classification—Content Regulation and Convergent Media*, 2012, p 190:
http://www.alrc.gov.au/sites/default/files/pdfs/publications/final_report_118_for_web.pdf

10 Ibid., p 217.