eros the adults only association

Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

5 September 2018

EROS ASSOCIATION SUBMISSION TO INQUIRY INTO FREEDOM OF SPEECH

Scope of Submission

This submission is in relation to the *Freedom of Speech Legislation Amendment (Censorship) Bill 2018* (Cth), Eros is **not** making a comment or endorsement of the following proposals:

- *Freedom of Speech Legislation Amendment (Insult and Offend) Bill 2018* (Cth)
- *Freedom of Speech Legislation Amendment (Security) Bill 2018 (Cth)*

Overview

The Eros Association is Australia's leading adult industry body, with over 25 years of experience in dealing with industry specific issues. Eros supports a responsible and non-discriminatory legal framework for adults-only businesses.

Eros supports reform of Federal, State and Territory classification laws to clarify the legal status of production, distribution, exhibition and sale of adults-only media. As such Eros supports the *Freedom of Speech Legislation Amendment (Censorship) Bill 2018* (Cth) in its efforts to allow adults to produce, exhibit, sell and consume consensual adult erotica.

Status of Adult Media in Australia

The regulation Adult Media in Australia has traditionally been divided on the basis of publications, films and computer games.

Publications depicting nudity or strong adult themes are likely to be classified as Category 1 (restricted) whilst publications depicting actual sex are likely to be classified as Category 2 (restricted). Both Category 1 (restricted) and Category 2 (restricted) publications are able to be sold – subject to local laws – in each State and Territory in Australia except for Queensland.

Films depicting actual sex are classified, or likely to be classified, as X18+ in Australia and are subject to a confusing array of Federal, State and Territory regulation. The overall result of this red tape is that:

- X18+ films can only be sold or exhibited in the ACT or Northern Territory, although local laws and practical considerations make legally compliant sales untenable.[1]

- The broadcast or hosting online of X18+ films in Australia is subject to 'take-down notices' by the eSafety Commissioner, banning adults-only websites from being hosted locally and penalising the bourgeoning adult webcam industry.

- The production of X18+ films exists in a legal 'grey area' with performers and producers unclear of their rights or the legality of their work.

Many forms of adult media depicting consensual sex involving 'fetishes' or exploring diverse sexualities are unable to be classified as X18+ or Category 2 (Restricted). Such media is Refused Classification and is in effect banned in Australia.[2]

Comments on Bill

Eros broadly supports the amendments outlined in Schedule 1 and Schedule 2 of the Bill.

Schedule 1

Eros supports the removal of bans on adult publications and films in parts of the Northern Territory, where those publications, films and computer games are legally available in the rest of the country. Eros endorses the comments made in the Explanatory Memorandum that such a specific ban is nothing more than 'thinly-veiled racism'.[3]

Schedule 2

Eros does not believe there is a need to classify material produced for, marketed to and sold to adults. As such Eros supports the removal of bans on adults-only films as well as adults-only publications on broadcasting, datacasting and online content.

Current online content regulation incentivises adult media producers to host content overseas. This makes the job of the eSafety Commissioner more difficult in issuing take-down notices for child exploitation material and image-based abuse.

Eros also supports the distinction made between free-to-air television and subscription-based broadcasts in terms of risk of exposure to adult content by children. Subscription-based services have sufficient protections to ensure children are unable to access adult content and should be allowed to do so.

Further Considerations

[1] See Eros Submission to Red Tape Inquiry into Occupational Licensing, 27 April 2018
[2] Stardust, Z 'Fisting is not permitted: criminal intimacies, queer sexualities and feminist porn in the Australian legal context' (2014) 1(3) *Porn Studies* p242-259.
[3] Explanatory Memorandum, Freedom of Speech Legislation Amendment (Censorship) Bill 2018, p2.

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Eros supports the recommendations of the 2012 Australian Law Reform Commission Report on Content Regulation and Convergent Media,[4] which recommended the creation of a single federal media classification Act (subsuming all State and Territory classification laws) and the removal of the need to classify most adult content.

Appendix 1 outlines Eros' vision of classification reform in Australia and should be used as a reference guide for further law reform in this area.

Eros also recommends amending The National Classification Code for X18+, Category 1 (Restricted) and Category 2 (Restricted) media to allow for the depiction of 'fetishes' and diverse sexualities.

The National Classification Code begins with the principle that '*adults should be able to read, hear, see and play what they want*'. Eros believes that Australian laws and policies should reflect this principle.

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Please get in touch if you would like further comment from the Eros Association on these issues. We can be contacted as listed below.

Kind regards,

Rachel Payne
General Manager

| www.eros.org.au

[4] ALRC Report 118

The case for classification reform in Australia

January 2017

eros the adults only association

The changing landscape of classification in Australia

Figure 1: Classification in Australia 2013

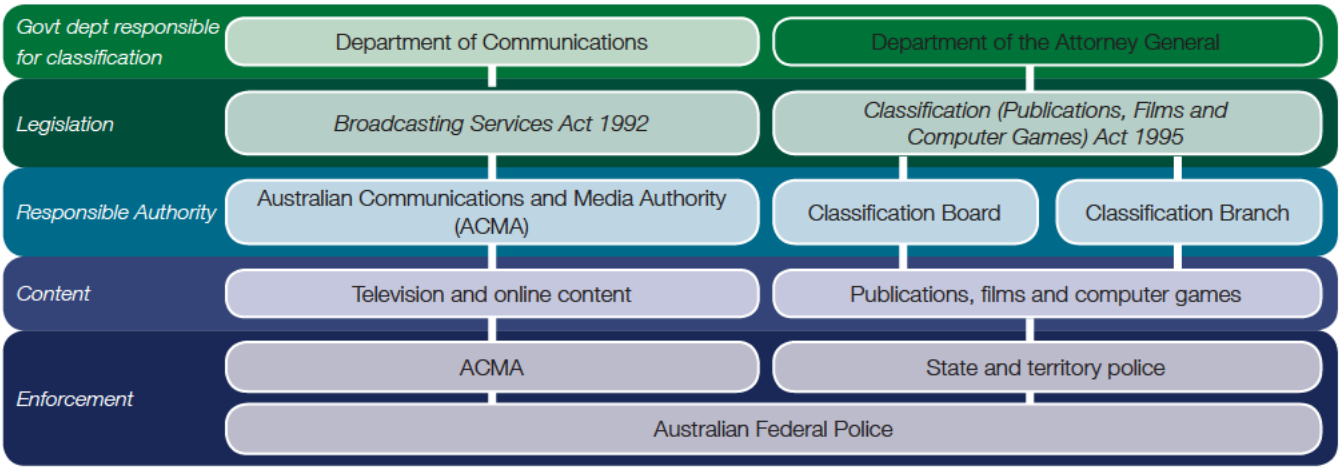


Figure 2: Current Classification in Australia

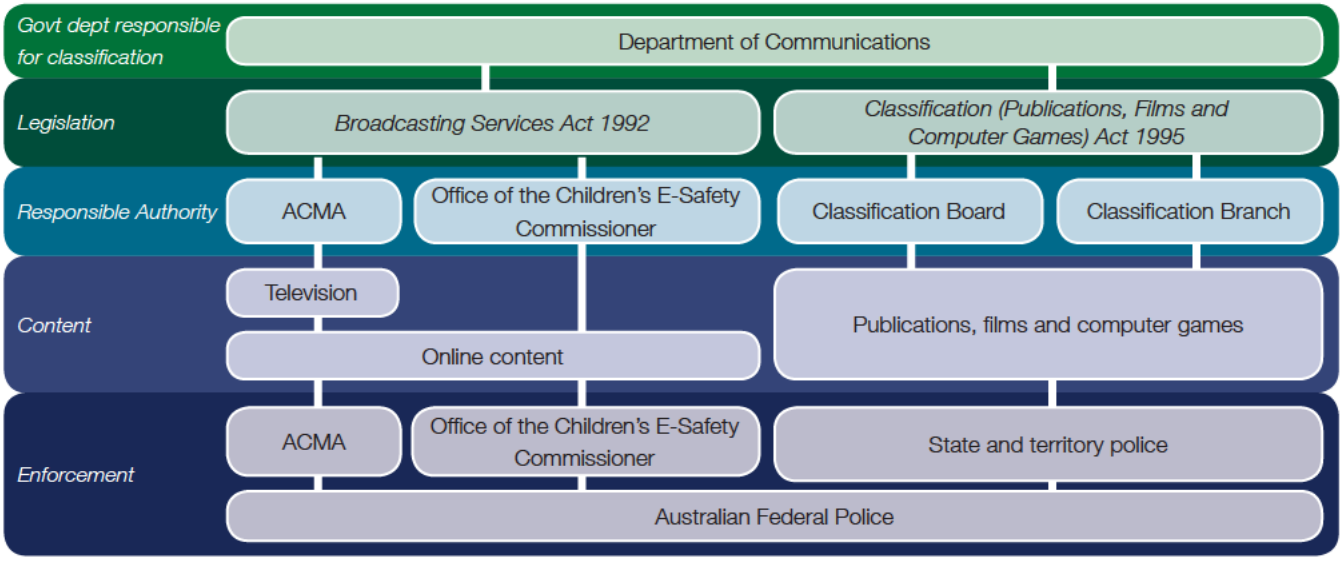
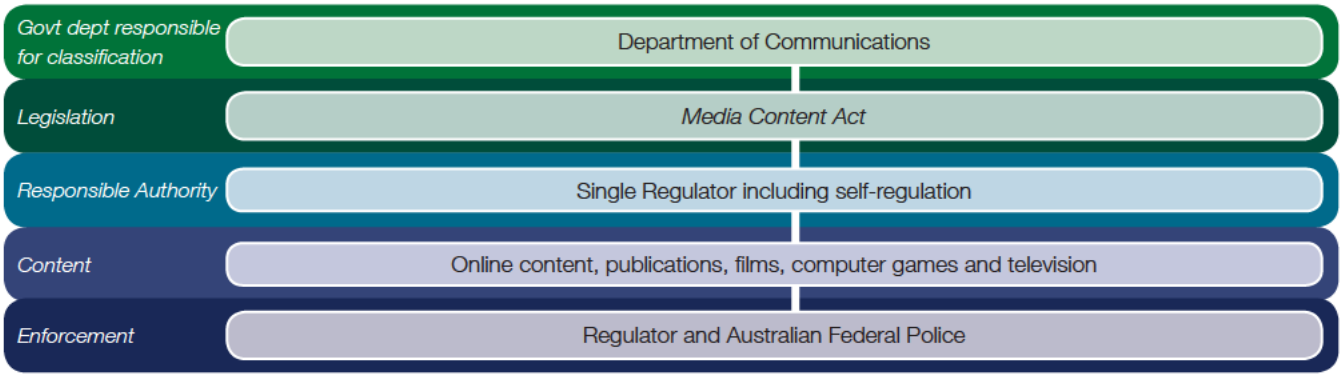


Figure 3: Classification in Australia recommended



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Eros submission to the Senate Standing Committee on Economics: Personal choice and community impacts inquiry: classification of publications, films and computer games

- tabled at committee hearing
22 April 2016

eros the adults only association

22 April 2016

CLASSIFICATION OF PUBLICATIONS, FILMS AND COMPUTER GAMES

SENATE STANDING COMMITTEE ON ECONOMICS: PERSONAL CHOICE AND COMMUNITY IMPACTS INQUIRY

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1 INTRODUCTION

Established in 1992, the Eros Association Inc is the industry association for the Australian adult retail and entertainment industry. The Australian adults-only industry is a growing force, expanding to a broader market of customers with a greater diversity of products. The modern Australian adults-only industry is a contemporary landscape of superstores, emporiums, industry suppliers and web stores. Our members include adult novelty stores, tobacconists, herbal shops, adult entertainment, tattoo parlours, body piercing studios, escort agencies, adult film makers, and industry wholesalers and distributors.

1.1 Definitions

This submission mostly concerns adult content that is likely to be classified X18+ if it is a film, or Category 1 or Category 2 restricted for publications. This can otherwise be described as 'sexually explicit adult content', 'pornography', 'adult media' or 'non-violent erotica' involving adults performing or modelling real or simulated consensual sex acts. The use of these terms is interchangeable for the purposes of this submission.

1.2 Background

The Australian classification scheme, insofar as it applies to adult and restricted media, has completely collapsed, leaving many people exposed to prosecution from outdated classification laws and with limited personal freedom to read, see or hear adult content. In addition, the Australian taxpayer is still being asked to fund an organisation and a scheme that delivers limited benefits and a lack of tangible results with respect to adult content.

The current system of official classification in Australia, is now a system of censorship. Adult content has a right to exist in society, free from the calls of those who feel offence at the fact that it exists. Rather than focusing on the prohibition of offline sexually-explicit adult content, the focus should be on ensuring that access to this content is restricted in order to protect minors. This should include providing education and resources to parents to assist them in supervising and monitoring their chil(ren)'s internet activity.

In 2012, the Australian Law Reform Commission (ALRC) published *Report No 118 Classification – Content Regulation and Convergent Media* after a significant public consultation into the effectiveness of the National Classification Scheme. This report acknowledged that the classification scheme as it currently stands has not kept pace with technology, which is unsurprising given that the previous review undertaken by ALRC was in 1991.

The report outlined a number of recommendations, including the creation of a new Media Content Act that would replace both the *Broadcasting Services Act 1992* (Cth) and the *Classification (Publications, Films and Computer Games) Act 1995* (Cth). Features of the proposed new act included:

- Dissolving states and territories responsibility for classification;
- The homogenisation of classification decision markers focusing on content rather than delivery platform including abolishing 'Refused Classification', allowing some fetish-related consensual sex acts to be included in X18+ classification and the establishment of a new marker called 'Prohibited' to reflect content that is already illegal such as child sexual abuse material;
- Expansion of the role for industry developed codes and the establishment of a single regulator; and
- Remove the mandatory requirement to classify most adult content and a shift in focus to taking reasonable steps to restrict content from minors.

Very few of these recommendations have since been adopted, with exception of the introduction of R18+ computer games. The adults-only industry has been eagerly awaiting legislative reform and a clear signal from government so as to inform business decisions and long-term planning. This includes the potential

for technologically driven innovation that could address, for example, the large amount of adult content that is pirated.

With the Classification Branch now residing within the Department of Communications (formally the Department of the Attorney-General) it is time for the government to implement a classification system for the 21st Century.

2 THE NATIONAL CLASSIFICATION CODE

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.

2.1 Adults should be able to read, see, hear and play what they want

The Australian Study of Health and Relationships states that over two-thirds of men and one-fifth of women viewed adult content in some form in the 12-month period leading up to the research survey.[1]

2.1.1 Contradictions between federal and state/territory classification statutes

The *Classification (Publications, Films and Computer Games) Act 1995* (Cth) allows for the classification of offline adult content, however, each state in Australia, through their respective classification enforcement statutes, have ensured that the legal status of adult content remains in a grey area.

Any adult can legally buy and possess X18+ rated films (with the exception of Western Australia)[2] but it is illegal for an adult retail store (an age-restricted premises) to sell such a film in all states. With respect to restricted publications (Category 1 or Category 2), however, all state and territories (except Queensland) allow for the sale, purchase and possession of these products. This presents a contradiction where still images of a consensual sex are treated differently to a moving image of the very same act.

In addition, the *Broadcasting Services Act 1992* (Cth) regulates online content, including the Restricted Access System (RAS) Declaration that requires sites with an "Australian connection" to provide age-verification systems for content that is likely to be classified MA15+ or R18+. Content that is likely to be classified as X18+ or RC (refused classification) is prohibited. This prohibition is arbitrary given that any adult content hosted overseas is not subject to classification nor the RAS Declaration.

2.1.2 X18+ licensing in the Australian Capital Territory

Part 6 of the *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* (ACT) allows for the sale of X18+ under an annual licence currently issued by Access Canberra. The prescribed annual fee ranges from $15,840 for sale only, to $31,681 for businesses wishing to copy and sell X18+ films. This does not include the cost of classifying the film, which is addition to the prescribed licence fee.

The cost of the X18+ licence is cost prohibitive for adult retail businesses operating in the ACT. It is highly unlikely that the cost of the X18+ licence would be recovered through the sale of adult DVDs due to the significant decline in these type of sales.

Actions of customs and the Classification Board caused the shut down of the only major classifier of adult titles which was operating out of the ACT (see section 1.2.3, below). This has left the market flourishing in

[1] Richters, J., de Visser, R., Badcock, P., et al, 'Masturbation, paying for sex, and other sexual activities: the Second Australian Study of Health and Relationships', *Sexual Health,* 2014, 11(5), pp. 461-471
[2] *Classification (Publications, Films and Computer Games) Enforcement Act 1996* (WA), s. 81 (2)(b)

unregulated and unclassified adult material or retailers relying on old titles that have already been classified to a market disadvantage. In doing so, the Classification Board undermined the ACT's regulatory scheme for X18+ films which completely relied on new classified products. This scheme, which once boasted 14 license holders, now has only three and is about to have none.

2.1.3 Australia's only wholesale adult film classifier no longer operates

Ninety-five per cent of Australia's legal X18+ films were supplied to the market place by one of our members until recently. They imported adult films from overseas to supply the Australian market. For 20 years they imported a single master film and edited it to meet the tough Australian standards required in the X18+ category and then destroyed the imported master.

This member was the major classifier of X18+ films in Australia between 1998 and 2006. From around 2007 they became the only significant trader classifying these films at all. In 2011 they were informed by customs that they could no longer import an original master of an overseas film for editing purposes without an import permit signed by the Director of the Classification Board.

Subsequent deliveries of master films (and even Australian-classified finished DVDs) to our member were seized and held by customs for indefinite periods for varying reasons - some of which bordered on irrational. For example, the music score on one particular adult title was alleged to have infringed a Disney title but was then later released with no comment.

After many months and correspondence from our member's legal team, the permit issue was then finally refused in writing by the Classification Board on various grounds including the reputation of the company, it's alleged inability to comply with the draft import permit and a fear that the Classification Board would become flooded with import permit applications from other parties.

Our member subsequently applied through the courts to have the ability to receive an import permit. After many months of legal proceedings and under appeal, the courts ruled that the Classification Board did have the jurisdiction to grant our member an import permit, subject to the parties agreeing on the terms. Despite efforts by our member and officers of the Eros Association to meet with Classification Board officials to discuss the terms of the permit, for various reasons, members of the Classification Board were never available and clearly undermined the court's decision.

Due to plunging sales of classified DVDs in Australia and the inability to receive an import permit, our member finally decided to cease importing masters and classifying new adult titles. In Dec 2013 they closed their DVD editing suite, retrenched 18 staff in all and closed the Canberra distribution warehouse. The Adult Industry Copyright Organisation (AICO), was disbanded and ceased pursuing copyright infringement and film piracy in Australia on adult films.

Our member is no longer releasing any new titles into the Australian market and ceased all adult film sales entirely from June 30, 2014. The market is now completely unregulated and dominated by unclassified original versions of overseas adult films of every genre and persuasion.

2.1.4 The restrictive nature of X18+ classification means that some consensual sexual acts between adults are Refused Classification

According to the *Guidelines for the Classification of Films (2012)* (a legislative instrument of the Classification Act), there are a number of consensual sexual acts between adults that are disallowed under the X18+ classification. Not only does this contradict the idea of consent between adults, but it also unfairly discriminates against people who participate in the BDSM (bondage and discipline; sadomasochism; and dominant and submissive) community, and members of the lesbian, gay, bisexual and trans community (LGBT).

"Fetishes such as body piercing, application of substances such as candle wax, 'golden showers', bondage, spanking or fisting are not permitted (in the X18+ restricted classification)*."*

"Films will be refused classification if they include or contain any of the following: …Gratuitous, exploitative or offensive depictions of:

a. activity accompanied by fetishes or practices which are offensive or abhorrent; …"

Guidelines for the Classification of Films 2012

The practice of these fetishes is not illegal, so why should the depiction of these consensual sexual acts be made illegal? Furthermore, for the guidelines to call these acts "offensive or abhorrent" is insulting to those people who engage in BDSM and other fetish play. It is estimated that at least three per cent of the Australian population engage in BDSM,[3,4,5] although this may be underestimated given that practice of this group of sexual fetishes is highly stigmatised.[6] The practice of these fetishes is known to be higher in the LGBT community, so in some ways the restriction of the depiction of these consensual sex acts is discriminatory.[7] The guidelines therefore establish a limited means through which adult media can be classified, allowing for punitive censorship of adult media and adding unnecessary constraints on legal, tax-paying adult retail businesses.

2.1.5 Assumptions of age based on appearance

Customs officials have contributed to the significant business disruption of many of our members. The requirement for adult content, whether that be a film or publication, to not be sold unless it has been classified contradicts customs officials' practices. Customs officers are not suitably educated nor qualified to be making decisions about the classification of content. This is in part due to the illogical specification that a person appearing to be a minor, even though they are an adult, is to be refused classification.

Officials have used discriminatory practices including using physical attributes such as small breasts, or in some cases the fact that the women are of Asian decent, to make a determination of the performers age (somewhat counter to section 5 of the *Sex Discrimination Act 1984* (Cth) and the *Racial Discrimination Act 1975* (Cth)). This is irrespective of the fact that a major adult content producer from the USA (such as Hustler Magazine) would never use an underage performer and that any adult content production company can produce records confirming that the performer is of legal age (2257 regulations)[8] which can be audited by the FBI. It begs to question the rationale behind such discriminatory practices and the fact that wholesalers and retailers of adult content have never and will never sell child sex abuse material and that the likely source of illegal content is via peer-to-peer networks, the Deep Web or sophisticated virtual private networks. This demonstrates a lack of understanding of the nature of this horrific and illegal content. To place it in the same category as legal consensual sexual activity is offensive.

Furthermore, when customs officials have questioned adult content entering the country, they choose to hold up the entire shipment, rather than just hold on to the 'questionable' content. The shipment is then 'quarantined' by a private company that essentially extorts our members at a considerable cost per day, whilst customs officials drag the matter out through the legal system, again at a significant cost to our members. The outcome has always resulted in favour of our members, but without explanation from customs officials. This constitutes an abuse of power and discriminatory moral-based practices against legal tax-paying adults-only businesses.

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[3] Ibid.
[4] Digital Quarter, 'The Great Australian Sex Census 2013-14', *Sex Census*, < http://sexcensus.com.au/wp-content/uploads/2015/09/results-13-14.pdf>, 2015, (accessed 1 March 2016), pp. 10
[5] Richters, J., de Visser, R., Rissel, C., 'Demographic and Psychological Features of Participants in Bondage and Discipline, "Sadomacochism", Dominance and Submission (BDSM): Data from a National Survey, *The Journal of Sexual Medicine,* 2008, 5(7), pp. 1660-1668
[6] Bezreh, T., Weinberg, T., Edgar, T., 'BDSM Disclosure and Stigma Management: Identifying Opportunities for Sex Education, *American Journal of Sexuality Education*, 2012, 7(1), pp. 37-61.
[7] Richters, J., et al, 2014, op cit.
[8] *United States Code of Regulation, Title 18, s.2257*

2.2 Minors should be protected from material likely to harm or disturb them

Our members take the issue of restricting access to their stores to adults-only very seriously. Offline adult content should not be able to be accessed by minors. Primarily through planning development codes at the state and local government level, age-restricted premises are a highly effective means of achieving intended aims. Our members adhere to a Code of Practice that specifically requires them to ensure ID checks are undertaken for anyone who appears under the age of 25.

2.2.1 Association of Sites Advocating Child Protection (ASACP)

ASACP is a US-based not-for-profit company that provides services to adults-only sites, government, parents and community on how to protect children from accessing adult content online. This organisation is also concerned with illegal online content, namely child sexual abuse material (or child exploitation). ASCAP provide reporting and investigation into the ownership of sites containing illegal material in partnership with international agencies, the Federal Bureau of Investigation (FBI) and the National Center for Missing & Exploited Children, and International Tiplines (USA).

ASACP have also developed the Restricted to Adults (RTA) coding for websites featuring adult content. RTA is an excellent example of a self-regulatory mechanism toward protecting minors from inappropriate content. The RTA code assists parents in filtering content they do not wish their children to access. The code is voluntary, free to use and universal. Eros encourages members to utilise the code in the development of online webstores and for businesses involved in the production of adult content.

2.2.2 Government mandated Internet filters

There have been a number of attempts in curbing the civil liberties of adults by arguing for a mandatory government-implemented internet filter to protect minors from inappropriate content and to tackle access to illegal content such as child sexual abuse material. Our members acknowledge that development of technology and faster internet speeds has resulted in greater access to to online adult content. However, contrary to popular belief, it is estimated that only four per cent of the internet is legal adult content.[9] Furthermore, it is unlikely that content featuring illegal activities can be found on the World Wide Web as it is more likely to be shared in sophisticated private peer-to-peer networks or found on the Deep Web (also known as the Dark Web or Hidden Web).

The Eros Association has previously stated publicly our opposition to mandatory internet filters for a number of reasons. The most pertinent issue is that there is too much potential for government censorship that extends beyond protecting minors from inappropriate content. Such a filter is also highly impractical and easy to get around for any technology savvy teenager. The government needs to pay close attention to the failure of the opt-out internet filter implemented in the United Kingdom.

The continued use of Restricted Access Systems, as is the case through the *Broadcasting Services Act 1992* (Cth) may no longer be an effective tool in managing online age verification. Some recommendations coming out of the ALRC review will be discussed later in this submission.

2.2.3 Abolition or prohibition of adult content as a means of protecting children

The Eros Association and our members do not believe that the abolition or prohibition of adult content will be effective at protecting minors from viewing inappropriate content. The majority of advocates for this position have a moral or ideological opposition to the existence of adult content and rarely are their views evidence-informed. Any claim that suggests that individuals who consume adult content are more likely to

[9] Ogas, O., Gaddam, S., 'A Billion Wicked Thoughts: What the World's Largest Experiment Reveals about Human Desire', Dutton, New York, 2011.

be sexually violent or sexually abuse minors is not grounded in fact, in much the same way that violent films or computer games do not cause individuals to perform violent acts.[10,11,12,13]

2.2.4 *The role of education*

Education for parents, children and the community about online safety is the most effective way at ensuring that minors are protected from inappropriate content.[14] Resources should be developed by the education and compliance team within the classification branch for parents and teachers on how to talk to teenagers about adult content. What should be emphasised is that adult content constitutes a fantasy and not reality. Furthermore, sexuality education that is compulsory, universal, age-appropriate and based on evidence should instead be a priority so that adult content is not left to be the unofficial sex educator. The reality is that sexuality and sexual desire develops considerably during a person's teenage years. Parents need to be aware that if sex education is left until their child reaches adulthood, the young person is less likely to be able to negotiate consent and safer sex and is more likely to be involved in sexual and physical violence (perpetrator and/or victim).

2.2.5 *Perceptions of the adult industry*

In 2001, the Eros Association published the *Hypocrites* report which identified and discussed convicted child sex abusers from the Catholic Church. At the time, around 20,000 people were employed by the church, similar in size to the adults-only industry. While over 200 convictions of paedophile priests were on the public record, not one single person employed in the adults-only industry has been convicted of a sex crime. While more incidence of child sexual abuse has been uncovered across multiple religious institutions, there remain no convictions of sex crimes in the adults-only industry. The Eros Association were the first organisation to call for a Royal Commission into Child Sexual Abuse, an issue that was later taken up by the Australian Sex Party when the party formed in 2009. The Australian adults-only industry maintains their commitment to reducing incidences of child sexual abuse.

2.3 Everyone should be protected from exposure to unsolicited material that they find offensive

General members of the public are protected from viewing offline adult content primarily through state and territory planning controls for age-restricted premises. That is, a person is not exposed to adult content unless they consent to entering an age-restricted premises. If an individual has an objection to such material, then they simple need not enter an adult retailer.

The use of classification markers and content warnings, in our opinion, achieves the aims of the above stated principle, including concealment of covers via the use of plastic wrapping around restricted publications.

For online adult content, an individual simply need not search for it. Any suggestion that adult content is unavoidable is completely false.

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[10] Richters, J., et al, 2008, op cit.
[11] Ley, D., Prause, N., Finn, P., 'The Emperor Has No Clothes: A review of the 'Pornography Addiction' model, *Current Sexual Health Reports,* 2014, 6(2), pp. 94-105.
[12] McNair, B,. 'Porn does not lead to rape culture', *The Conversation*, < http://theconversation.com/porn-doesnt-lead-to-rape-culture-10957>, 2012, (accessed 1 March 2016).
[13] Barker, M., 'Asking whether porn causes sexual violence is the wrong question – here's why', *The Conversation*, <http://theconversation.com/asking-whether-porn-causes-sexual-violence-is-the-wrong-question-heres-why-50685>, 2015, (accessed 1 March 2016).
[14] Nash, V,. Marston, C., Adler, J., Livingstone, S., 'A grown-up conversation about children and porn online starts here', *The Conversation,* < http://theconversation.com/a-grown-up-conversation-about-children-and-porn-online-starts-here-54848>, 2016, (accessed 1 March 2016).

2.4 The need to take account of community concerns about depictions that condone or incite violence, particularly sexual violence and the portrayal of persons in a demeaning manner

As previously discussed, the limited range of consensual sex acts that are currently allowed within an X18+ film or Category 1 and Category 2 restricted publication means that most adult content depicting fetishes is Refused Classification. New legislation needs to define what specific acts are determined as sexual violence or demeaning, such as portrayals of sexual assault or rape, as discussed in the next section of this submission.

3 ALRC RECOMMENDATIONS FROM REPORT NO. 118

The Eros Association commends the ALRC for their robust and evidence informed report that details a series of key recommendations. We support the following recommendations, as outlined in ALRC Report No. 118.

3.1 A new classification scheme

The creation of the Classification of Media Content Act would replace both the *Broadcasting Services Act 1992* (Cth) and the *Classification (Publications, Films and Computer Games) Act 1995* (Cth). States and territories would be absolved of their responsibilities in relation to classification enforcement. The federal government should consider developing a guidance note for states, territories and local government on appropriate planning development controls for age-restricted premises. Considerations such ground level access to comply with the Disability Discrimination Act and not requiring premises to operate in industrial areas should be made a priority so that legal adult businesses are not subjected to unnecessary regulation. This would also ensure that councils do not adopt quasi-prohibition of the sale of adult content through planning controls.

3.2 The regulation of online content should only include content hosted in Australia

The ALRC recommendation to include content directed at a significant Australian audience is too broad. Within the report there are conflicts between allowing for adult media to be voluntarily classified if it is likely to be classified X18+, whilst online content of this nature will be prohibited, or subject to a RAS or similar age-verification tool or warning. What constitutes a 'significant Australian audience' will need to be defined and may not be appropriate for adult content that is owned and/or hosted by an international provider. For example, it is hardly unlikely that the popular website www.pornhub.com will submit to any requirement for age-verification set by the Australian government, however, they may use warnings that require a person to click on a button confirming they are over the age of 18. It is unclear how the government will determine or measure the Australian audience of overseas sites, without monitoring and accessing metadata.

3.3 Classification of adult content

3.3.1 Development of an industry code by industry in partnership with the Classification Branch

The Eros Association would like to be able to develop industry codes to guide our members in determining what constitutes X18+ classification. This would be in partnership with the Classification Branch and Classification Board in a similar way that the computer games industry has developed an industry code for R18+ computer games. Such a code would also provide strong guidance to customs officials.

Classification should not be mandatory: wholesalers and retailers would not need to have content officially classified in order to sell, but would be required to submit content to be classified at the request of the Classification Board where a complaint about the content has been made. Therefore, content that is likely to be classified X18+ is legal to sell.

3.3.2 X18+ and Prohibited Content

The new scheme should homogenise all classification markers so that only one set of markers exist for all media irrespective of the type of media. For example, publications that are classified Category 1 Restricted and Category 2 Restricted would become X18+ to bring it in line with films with content of a similar nature. It should be noted however, that for this to process to be effective and not adversely affect our members, it would be essential that the X18+ classification be legal to sell.

As recommended by the ALRC, the X18+ classification should be expanded to include consensual sex acts between adults so that there is an alignment between what is legal to practice in real life is also legal to view. Refused Classification would be renamed 'Prohibited' and would reflect content that is already illegal such as child abuse material.

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Official Committee Hansard - Senate Standing Committee on Economics: Personal choice and community impacts inquiry: classification of publications, films and computer games

- public hearings 22 April 2016

COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

SENATE

ECONOMICS REFERENCES COMMITTEE

Personal choice and community impacts

FRIDAY, 22 APRIL 2016

CANBERRA

BY AUTHORITY OF THE SENATE

INTERNET

Hansard transcripts of public hearings are made available on the internet when authorised by the committee.

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http://parlinfo.aph.gov.au

SENATE

ECONOMICS REFERENCES COMMITTEE

Friday, 22 April 2016

Members in attendance: Senators Gallagher, Leyonhjelm.

Terms of Reference for the Inquiry:

To inquire into and report on:

The economic and social impact of legislation, policies or Commonwealth guidelines, with particular reference to:

a. the sale and use of tobacco, tobacco products, nicotine products, and e-cigarettes, including any impact on the health, enjoyment and finances of users and non-users;

b. the sale and service of alcohol, including any impact on crime and the health, enjoyment and finances of drinkers and non-drinkers;

c. the sale and use of marijuana and associated products, including any impact on the health, enjoyment and finances of users and non-users;

d. bicycle helmet laws, including any impact on the health, enjoyment and finances of cyclists and non-cyclists;

e. the classification of publications, films and computer games; and

f. any other measures introduced to restrict personal choice 'for the individual's own good'.

WITNESSES

AU, Mr Ben, Director, Policy and Research, Classification Branch, Department of Communications and the Arts

MURRAY, Mr Joel Anthony, Business Manager, Eros Association

PAYNE, Ms Rachel, General Manager, Eros Association

RAINSFORD, Ms Cathy, Assistant Secretary, Classification Branch, Department of Communications and the Arts

MURRAY, Mr Joel Anthony, Business Manager, Eros Association

PAYNE, Ms Rachel, General Manager, Eros Association

Subcommittee met at 10:01

Evidence was taken via teleconference—

CHAIR (Senator Leyonhjelm): I declare open this public hearing of the Senate Economics References Committee. The committee is hearing evidence on its inquiry into personal choice and community impacts. The committee has appointed a subcommittee for the purpose of the inquiry hearings. The Senate referred this inquiry to the committee on 25 June 2015 for report by 13 June 2016. I welcome everyone here today. The committee has received 486 submissions to date which are available on the committee's website. This is a public hearing and a *Hansard* transcript of proceedings is being made.

Before the committee starts taking evidence, I remind all witnesses that in giving evidence to the committee they are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of evidence given to a committee and such action may be treated by the Senate as a contempt. It is also a contempt to give false or misleading evidence to a committee. If a witness objects to answering a question, the witness should state the ground upon which the objection is taken. The committee will determine whether it will insist on an answer having regard to the ground which is claimed. If the committee determines to insist on an answer a witness may request that the answer be given in camera. Such a request may also be made at any other time. On behalf of the committee, I would like to thank all those who have made submissions and sent representatives here today for their cooperation with this inquiry.

I welcome representatives from the Eros Association. I invite you to make a brief opening statement, should you wish to do so, and then the committee will ask you questions. Do you wish to make an opening statement?

Ms Payne: Yes, please. Thank you very much for having us. Firstly, I would like to introduce the Eros Association. We are the industry association for the adult retail and entertainment industry. We have been in effect since 1992. The Australian adults-only industry is a growing force, expanding to a broader market of customers with a greater diversity of product. The modern Australian adults-only industry is a contemporary landscape of superstores, emporiums, industry suppliers and web stores. Our members include adult novelty stores, tobacconists, herbal shops, adult retail, entertainment, tattoo parlours, body-piercing studios, escort agencies, adult film makers, and industry wholesalers and distributors. We represent approximately 130 businesses, and they comprise over 250 age restricted premises.

What we would like to talk about today is, basically, the classification of X-rated film and the restriction of it being sold in adult retail outlets. As you can see from our submission—and we wish to table an extended version of the submission as well as the Eros code of ethics—we have gone into great detail about the background of the recommendations made by the Law Reform Commission. We also have gone into detail about our recommendations and how we are representing our members based on the fact that it is legal to buy X-rated material and legal to possess it but it is illegal to sell X-rated material in age restricted premises. I will pass over to Joel to add some details.

Mr Murray: One of the most important things is that our retailers are responsible. They are legal, tax-paying businesses and they want to ensure that the content that they sell is not accessed by minors. There are age verification processes that our stores undertake in ensuring that they are protecting minors from adult content. In no way are we saying that minors should be able to access adult content. However, we need to look at the classification act and the Broadcasting Services Act and bring them up to date, in line with both technology and community expectations for the 21st century. These laws are very much stuck in the last century and it is clear that they are unworkable, due to the fact that the process of classifying adult content is now an unworkable business model. It is cost prohibitive and, essentially, the hurdles that retailers or distributors must go over are so onerous there has been something of a default prohibition by law. What happens in practice is that consumers want to access this content. In fact, consumers can access some of this content via the internet; however, it is in the interests of Australian businesses to ensure that those demands are met in Australia so that it can support our industry, which includes ensuring that people have jobs.

I also want to raise the fact that, although the final report was made in 2012, very few of the Australian Law Reform Commission recommendations have been implemented. That is very disappointing, and it makes for an ambiguous business environment. Our members are not aware of what the government's intentions are, so it would be good to have some reform implemented to send a clear message to legal adult businesses that they are able to plan for the future, and, indeed, they may even be able to start innovating around new technologies so that they can shift some of the online overseas purchasing of adult media back into retail stores.

CHAIR: Is that the conclusion of your statement?

Mr Murray: Just several more points. One of the major things that came out of the Australian Law Reform Commission review is the development of an industry code by industry. We fully support this method. It seems that the current relationship between the industry and the Classifications Branch is rather adversarial, and we would like to change that so that we are working together in partnership to ensure that adults can access adult content and to ensure that minors are protected from adult content.

One of the recommendations of the Australian Law Reform Commission review was that content that is likely to be classified X does not need to be classified X before it is sold. We fully support that. So it would be not mandatory to have adult media classified.

The other important note is the homogenisation of the classification markers so that there is no distinction between media types. What that means is that currently there are two sets of markers: one is for publications; one is for films and computer games. They should be homogenised. However, if that were to occur without allowing for the sale of X, that could be further restricting magazines that are currently legal to sell. What I mean by that is: if the federal government did not assume responsibility for the classification of all content as recommended by the ALRC, and they homogenised the classification markers, essentially category 1 and 2 restricted magazines that are now legal to sell in all states and territories except Queensland would, by default, become illegal if they were to be classified X. So we do not support homogenisation of the classification markers if X still remains illegal to sell.

The final point is that refused classification contains some depictions of consensual sex acts that are legal to practice in real life, but they are illegal or they do not meet an X requirement. The ALRC recommended that the X classification be expanded to include some conceptual, nonviolent fetish, and that the review classification be changed to 'prohibited' to reflect content that is already illegal to possess, such as child abuse material. This is an opportunity, with the Classification Branch now moving to the communications portfolio from the Attorney-General's portfolio, and a good time to be looking at the reform and to start implementing some change.

One final note: we are strongly opposed to an ISP filter or mandatory filtering of the internet. We have seen in the UK recently that their opt-out filter has not succeeded in achieving the aims of the program. Therefore, we do not support the mandatory filtering of the internet. It should be the responsibility of parents, not the government, to monitor their children's internet activity.

CHAIR: Thank you, Mr Murray. Can you describe the classification regime that applies to adult content, legal adult content? How does it work both in theory and in practice?

Mr Murray: In theory, for example, I am going to import materials—let us say a film. I will then send that film off to the Classification Branch to be classified at a cost of more than $1,000. Once that content has been classified, it is then allowed to be sold from the ACT if a retailer has an X licence.

In practice, content is no longer really being classified or submitted for classification. Let's say I am a small independent operator. If I want to have material classified it costs me $1,000 and then every other retailer in Australia could benefit from that X classification at my cost. Furthermore, there are very few premises in the ACT operating an X licence because the sheer price of that X licence is prohibitive. It does not allow them the ability to have the films classified, so they still have to get the films classified on top of that. So if you are looking at $1,000 per title plus anywhere between $15,000 and $30,000 per year for an X licence it is in no way possible to sell that many titles in order to reclaim that expenditure.

CHAIR: How did these costs get to be so high?

Mr Murray: I will have to get back to you on that one and take that question on notice. I do not know the history of that pricing.

CHAIR: Am I right in understanding that the same material, under a lower cost regime and perhaps a more responsive classification scheme, could still nonetheless be obtainable by download from the internet?

Mr Murray: Correct. That would technically be unclassified material. One other thing to note about the practice is that customs have been stopping shipments and saying they need to be classified before they enter the country. I am not really sure how you are supposed to classify material before it comes into the country.

Ms Payne: Especially when it has to be under our classification standards.

CHAIR: So where does the law apply? Suppose an individual downloaded something which in the past you would have sought classification for. What does the law prohibit? Replication and sale of it?

Mr Murray: That is correct. It is not illegal to possess it, except for in Western Australia, where it is illegal to possess material that is not classified and is likely to be classified X or Refused Classification. It is illegal to copy

and sell that, but I do not think there is anything really about sharing that content. So I could order a DVD from online or download a DVD, put that onto a USB stick and pass it on to my friends without breaking the law, so long as I am not copying it.

CHAIR: Presumably, with virtual private networks and BitTorrent, any kind of filter or any kind of attempt to prohibit that sort of thing would be bound to fail, wouldn't it?

Mr Murray: We completely agree with that.

Ms Payne: We do agree with that.

Mr Murray: Adult media is among the most pirated content of all copyrighted material. So it is interesting to see that, for example, Village Roadshow have been lobbying the government for copyright infringements. However, I do not know if the government realises that that may also open up to the adult industry calling on Australian law enforcement to start enforcing copyright of adult films. That in and of itself would be extremely laborious and probably not what the government intended.

CHAIR: The consequence of this is what? Your members, who are retailers in many cases, are in a position where they are increasingly unable to import and retail this material themselves. Is that right?

Mr Murray: Yes, that is correct.

Ms Payne: That is correct.

CHAIR: What about generating the material in Australia—is that possible?

Mr Murray: It depends on which state you are in. It is a bit of a grey area. In most states it is illegal to produce that material if you are going to make a DVD or a digital download, but it is not illegal if it is a live streaming service.

CHAIR: So you can stream it but you cannot download it?

Mr Murray: Yes. Then there are also restrictions around whether or not it is hosted in Australia or not. The Broadcasting Services Act then comes into play around restricted access declarations. It is illegal to host in Australia material that will be classified R, X or refused classification.

CHAIR: As a result of that, is there any adult film industry in Australia? Or is it too hard?

Mr Murray: There is.

Ms Payne: There is, yes. We believe they are producing their work internationally.

CHAIR: For international markets, not for the domestic market?

Mr Murray: Correct.

Ms Payne: That is right.

CHAIR: I understand. Your submission was interesting. You described one of your members as being essentially bankrupted by Customs seizing film deliveries. Could you just briefly take us through that. How did that occur?

Mr Murray: That member had an entire shipment of material coming in. It was not just media; it was also adult toys. I will note that our employers are not restricted. You can sell adult toys from a non-age-restricted premises—from a chemist or a lingerie store, for example. That does happen in Australia. The entire shipment was held up because one magazine was considered a questionable title. Customs officials believed that a person in a thumbnail ad in the back pages appeared to be under the age of 18. That was *Hustler* magazine. *Hustler* magazine are a very well-regarded company. They are also required by law in America to keep a record of age verifications for all of their actors indefinitely. That is under the US Code of Federal Regulations, section 2257.

The Customs officials made the determination that a person looked like they were under 18. Instead of just holding on to that title, they decided to hold up the entire shipment. It was not until Customs had transferred that shipment into a private compound that our member was made aware that the material was being questioned. There was an enforced cost. It was a considerable cost. I think it was about $400 a day for the quarantine of that material whilst Customs officials went through all the material to ensure that no other materials were questionable.

It is our opinion that Customs officials are not properly qualified or trained to make these determinations. Furthermore, there are inherently sexist and racist assumptions being made about some actors. For example, a woman with small breasts is assumed to be under 18. Women of Asian descent are also more likely to be considered to be under 18 than Caucasian women. They are not taking into consideration that, under law, the US has on file verification that people are not under the age of 18. That can be accessed by the FBI. So, then, what

happens with the shipment that is in the compound or in quarantine? Our members have to raise objections. Sometimes it gets taken to court, which is then further business in corruption, all the while having to pay $400 a day for the containment of their shipment. In all circumstances, in fact, shipments have been released without explanation from Customs or the Classification Board. Essentially, the court has said, 'This material is allowed into the country.' That is one reason Customs officials deny entry for some goods. The other reason, again what I mentioned earlier, is preclassification. So they are saying, 'Oh no, this material needs to be classified before it comes into the country', when the law states that the material needs to be classified before it is sold. They are not even adhering to the law.

CHAIR: Thank you. I want to pursue for a moment the X 18+ classification. What is the problem with the scope of it?

Mr Murray: It is very limited. It does not recognise adults consenting to sexual activities as the benchmark. It makes judgements around certain sexual practices, particularly those that are associated around BDSM—that is spanking, watersports and fisting, many of which are practiced by the LGBT community. So not only is it discriminating against those participants in the BDSM community but also it is discriminating against those in the LGBT community. In practice, many individuals within those communities own media and they simply download it or order it from overseas. In effect, that is money in the Australian economy that does not enter the Australian economy, so from an economic perspective it does not make sense. Also, what one person finds abhorrent about another person is really none of their business. What consenting adults do or watch within the privacy of their own homes, as long as it is consensual, should be the business of nobody else.

CHAIR: What we are talking about here is not illegal material. It is material that somebody—I am not sure who, but you might be able to explain—has decided is offensive. Is that right?

Mr Murray: That is correct. Some fetishes used to be allowed within the X classification. It is my understanding that under John Howard as Prime Minister the X classification was restricted, in particular, because the Prime Minister was deeply offended by the idea of watersports and female ejaculation. In fact, he claimed that female ejaculation was not a true thing; whereas, in fact, science says quite the opposite.

CHAIR: So what is actually illegal? Presumably, the involvement of children, but what else?

Mr Murray: Bestiality—that is, sex with animals.

CHAIR: So New Zealand sheep shagging is illegal?

Mr Murray: Say that again.

CHAIR: New Zealand sheep shagging is illegal?

Ms Payne: Yes, sheep shagging is illegal.

Mr Murray: Yes.

CHAIR: Just to clarify. Please go ahead. What else?

Mr Murray: There is illegal content that is clearly illegal, but then there is this grey area of refused classification, which then makes it illegal to sell as well.

CHAIR: Right.

Mr Murray: RC material cannot be sold in the ACT even with an X licence, for example, but there are so many practices that are included in RC that do not reflect the current sexual interests of the Australian community.

CHAIR: If I understand you correctly, I think what you are saying is that it is perfectly clear what is illegal.

Ms Payne: Exactly.

Mr Murray: There are other laws to stop child abuse material. In fact, I just want to note that it is very unlikely that child abuse material, for example, is available on the World Wide Web. It is shared between sophisticated private networks and peer to peer and in the deep web. Put in a WWW URL search for 'child abuse material' and you are very unlikely to find anything. Also, it has never happened in Australia that an adult retailer has sold such content. There is no way that any adult retailer would do so. In fact, there is no-one in the adult industry in Australia who has ever been convicted of a sexual offence in relation to a child.

Ms Payne: What we are trying to particularly highlight is that with this 'refused classification' structure there should be more of a distinction between what is illegal content which is child sexual abuse material and content which is actually legal but which may offend some community standards. That is where we need this real distinction between what the community is saying is acceptable and okay and what is part of that recommendation

of the commission compared to other material. We totally agree that illegal content should not be within this realm.

CHAIR: You are saying that the issue is not with the illegal material; the issue is how legal material is handled.

Ms Payne: That is right.

Mr Murray: Correct—legal sex acts. What is legal to do in person should also be legal to watch.

CHAIR: I understand your point.

Ms Payne: And what is legal on a federal level of X classification should not be contradicted by state legislation.

CHAIR: You are also saying that the LGBT community is particularly affected by restrictions on this legal material which is determined to be offensive or abhorrent. Is that right?

Mr Murray: Correct. Some legal sexual practices are more practiced by members of the LGBT community—that is, there is a great percentage of that community practicing those sexual practices. There is quite a lot of content that is restricted simply by the mere fact that other people are offended by it.

CHAIR: Let's suppose you were dictator for a day—you might need longer than a day—or a week or something. You are given a free hand to design and implement a classification scheme. Have you got any thoughts as to what it would look like?

Mr Murray: I have to refer back to the Australian Law Reform Commission recommendations. Many of them were well thought through. They responded to the significant community consultation. It would look like one scheme that incorporates both the Classification Act and the Broadcasting Services Act. It would make provisions to allow for the voluntary classification of adult media with an industry code that would guide retailers into determining whether the content is likely to be classified X and for the expansion of that classification.

Ms Payne: We basically feel that the X classification is quite clear in what is appropriate and what is inappropriate. What we would like to see is a greater role played by the industry association, which would be Eros, specifically, to work with the classification board to come to some sort of resolution and develop a set of guidelines or code of practice that we can use in our industry to self-regulate. I think that is what has gone on within the computer gaming industry.

Mr Murray: Particularly with R-rated computer games. I think there also needs to be a very defined role for our customs officials. If customs officials are concerned about child abuse material, it is not going to come in from a retailer of our content. They are not going to be shipping in clearly prohibited, illegal activities. It is not in their interest. There are a lot of assumptions made about the adult industry and adult retail owners and a lot of it is false. The Australian adult industry is one of the friendliest and most down to earth industries that I have worked with. Many of the owners of retail stores are owner-operators. They work in the small towns or in the suburbs and they own and operate their own business. They are just trying to get a fair wage for a fair day's work.

CHAIR: Given what we were talking about earlier with VPNs and BitTorrent and so forth—the fact that the internet is making what is available pretty much global—are you sure you would actually want a classification scheme of any description other than what is legal and what is not illegal? Why not focus on access? In other words, some stuff is only suitable for access by adults and some stuff is only suitable for access by adults under certain circumstances. Would that not be an option?

Mr Murray: That is certainly an option. Although sale of X-rated DVDs has declined over the years, there is still a market for it—particularly for people who may not be as tech-savvy. Say I am a parent. I might be confident to ask my child to download a movie for me, but I might not be comfortable asking them to download pornography for me. There are still a lot of customers for a X-rated material—there is demand. But I take your point about a less defined classification system. I think that is a very interesting idea, and we would certainly be interested in fleshing that out more.

Ms Payne: What we want to see for our members is for them to be able to sell this material legally within their businesses. If you can get it on the internet, you should be able to buy it at an age-restricted premises.

Mr Murray: One of our members is looking into a system where you might be able to come into a kiosk, bring in a USB, pay a certain amount of money and then download the title to that particular USB. There is potential, with technology innovation, for retail stores to encourage people not to pirate adult content and to make it more in line with today's technology.

Ms Payne: The supply and the demand is there. If there ever is to be an internet filter per se, I think that we are going to have to recognise that there is still going to be demand for X-rated material. Why not provide it in legal businesses to adults and age-restricted venues?

CHAIR: If you were to look 10 years ahead, some people suggest that DVD will have disappeared and there will be universal high-speed broadband and that sort of stuff. What do you anticipate the shape of your industry will look like? What are the scenarios you can anticipate?

Ms Payne: I think that is a point that Joel raised before. Our members are looking into the future and into how they can add value to their businesses and provide a service to their clients. I would think that the latest and greatest DVD release may actually just transfer over to being where you turn up with your USB stick or you have a specific account that you can download it to, bought via that adult retail business.

Mr Murray: Although online retail is expanding, it has not done so as fast with adult toys and novelties, particularly because customers still like that tangible experience of going in, talking to someone, getting their advice and feeling and looking at the product. So I think there is still going to be a role for bricks-and-mortar adult retail stores in 10 years time. That is not to say that there has not been an expansion of online stores; it is just that online shopping for adult related content has not really taken off, with the exception of pirating and torrents and that sort of thing. I think there is a role also for adult media content providers to look at new models, maybe similar to Netflix, where the content can be streamed for a reasonably low cost. But, if we had an internet filter, that content would potentially be blocked. Under the Broadcasting Services Act, if we continue with it, it is illegal to host that content in Australia. In 10 years time, I would hope there will be no restrictions on what content you are able to access on the internet, unless you chose personally to opt in to a filter or block sites and all that sort of thing.

CHAIR: That makes sense.

Senator GALLAGHER: We were having a discussion about refused classification. From your perspective, is there much transparency around the decision making for refused classification, when that occurs?

Mr Murray: In fact, we spoke in our submission about one of our members, who used to have operations in Canberra and whose sole purpose was classifying content. They would get a master from the production company and then they would sit down and edit that before it got on-sold to the Australian market. The industry was very good at knowing what constituted X and what would be refused classification, so content would be edited before it was submitted to the classification branch to be classified. The only time, really, that films are now being classified is if there is a raid by the police. More often than not, the police are not very clear about what they are looking for, because the instructions for the raid have come formally from the Attorney-General's Department federally to state law enforcement. Usually, police go into a member's store, look around and sort of say, 'There's no bestiality and no child abuse material here; the member's fine,' unless, of course, they are looking for a specific title.

I have not been involved in any recent decisions made to refuse classification to any film, but I will say that there is a bit of a discrepancy with the artistic merit of some R-rated films. The fact that there is real sex in a film does not necessarily mean that it is going to get an X classification. I could list probably half a dozen films that have been classified R for general release which do contain real sex but have not actually made it over to that X classification. In fact, there are also some non-adult films that may refer to subject matter that is generally refused classification but still pass with an MA or R rating. For example, references to euthanasia, terrorism and incest are under 'refuse classification'. However, it is not uncommon for those to get past within the context of a normal action or drama film. It seems that the classification board is only concerned with these particular themes if they are in the context of adult media.

Senator GALLAGHER: Going back to your submission and your reference to the licensing in the ACT in that final paragraph, can you talk to me about what is happening to the businesses here in the ACT?

Mr Murray: Basically, there are only two businesses now operating with an X licence. It is very likely that they will not continue their X licence. That will potentially mean that there is not a single business in Australia that is allowed to legally sell X-rated films. Through financial means and enforcement, governments have essentially prohibited the sale of X content by law. In practice, that is not the case.

Senator GALLAGHER: There used to be many more than two here in the ACT; I do not know what the peak number was. But that is certainly indicating a pretty sharp decline in the number of businesses operating.

Ms Payne: Yes.

Senator GALLAGHER: You say that those two are not long for operation?

Mr Murray: I believe that they will still continue to sell adult toys, smoking products and paraphernalia, but they will cease to—

Ms Payne: Or films that have already been classified.

Mr Murray: And they will sell films that have already been classified, but they will not get their X licence.

Senator GALLAGHER: You say that that is a combination of Commonwealth and ACT regulation?

Mr Murray: I would say that it was probably more ACT regulation, because they set the licence fee.

Senator GALLAGHER: That is the $15,000 to $31,000?

Mr Murray: Correct.

Senator GALLAGHER: It is not necessarily that they have increased a lot; it is more that the sales have declined to the point that it makes those licence fees uncompetitive?

Mr Murray: No. There is a decline in sales, but it is mostly that they can only sell films that have been classified, so then they have to pay over $1,000 per title to classify each film. It is $15,000, plus, if I want to sell 20 titles, that is $20,000. If one business has it classified, then every other business in Australia gets the classification for free.

Senator GALLAGHER: I understand that. The classification fee is from the Commonwealth, is that right?

Mr Murray: Correct.

Senator GALLAGHER: So it is the combination of Commonwealth regulation and local charges that is making this difficult?

Mr Murray: Correct. Any adult retailer across Australia could submit a film to be classified. Even though they cannot sell it, they could still submit it to get classified.

Senator GALLAGHER: Your final recommendation under paragraph 6 says:

The industry should be allowed to establish an industry code…

When you are referring to the industry, that is obviously you guys. Are there other industry players that are not members of Eros Foundation? Sorry, are you called the Eros Foundation?

Mr Murray: No, we used to be the Eros Foundation.

Senator GALLAGHER: That is right, when I used to deal with Eros.

Mr Murray: We represent all suppliers and wholesalers to the Australian market. It is very unlikely that a retailer would be interested in having their film classified. It is more likely that they wholesaler would do that. We are not talking about getting a clean slate and coming up with whatever we want; it is about working with the classification branch. In the Australian Law Reform Commission final report, there is quite a lot of detail about industry codes. Probably a good example is the computer games industry, where an industry code was developed around R-rated computer games. We would imagine a process would be similar. It would sort of just be sitting on the standards and the requirements of material that is likely to be classified as X so that a member may ensure that the material they are buying from a wholesaler or which the wholesaler is purchasing from overseas is likely to be classified X. It does not mean that they have to have it submitted for X, unless the classification branch required it to or if it was requested specifically for a questionable title.

CHAIR: Just one final question: to what extent are the circumstances of your members adversely affected by the fact that we have both the federal and state jurisdictions taking an interest in their activities?

Ms Payne: It affects their business greatly. There is such contradiction going on between legislation on the state level and federal level. I think it means that most adult retailers are really confused as to what they can and cannot do.

Mr Murray: At least once a week I still answer questions from a current retailer member, a new member wishing to join us or a new business starting up on what they can and cannot sell. It is not clear. Furthermore, these businesses—with the exception of the sale of X-rated films—are complying with the law. They want to be law-abiding citizens and they wish to be law-abiding businesses, but there is a disincentive for them not to stock that media. If there were to not stock adult media it would be likely to drive away customers that would buy their other products as well. There is a market disadvantage to not having adult media in your store as it is very in demand. So they comply with what their customers' demands are, but they are very conscious that it is on the wrong side of the law.

Ms Payne: I think ultimately they would just like to see the legislation match up with what is freely available online. It is just not current.

CHAIR: Yes, I have some sympathy for that position. Ms Payne and Mr Murray, thank you very much for your evidence.

Mr Murray: Thanks, Senator Leyonhjelm.

Ms Payne: Thank you.

AU, Mr Ben, Director, Policy and Research, Classification Branch, Department of Communications and the Arts

RAINSFORD, Ms Cathy, Assistant Secretary, Classification Branch, Department of Communications and the Arts

[10:54]

CHAIR: Welcome. I remind senators that the Senate has resolved that an officer of a department of the Commonwealth or of a state shall not be asked to give opinions on matters of policy and shall be given reasonable opportunity to refer questions asked of the officer to superior officers or to a minister. This resolution prohibits only questions asking for opinions on matters of policy and does not preclude questions asking for explanations of policies or factual questions about when and how policies were adopted. Officers of the department are also reminded that any claim that it would be contrary to the public interest to answer a question must be made by a minister and should be accompanied by a statement setting out the basis for the claim. Thank you for appearing today. I invite you to make a brief opening statement, if you wish to do so.

Ms Rainsford: Thank you for the invitation to attend today. I do not wish to make an opening statement. We are happy to answer any questions senators might have.

CHAIR: In that case, I better retrieve your submission and my questions. I was expecting you to have something to say. First of all, let me help both myself and Senator Gallagher on understanding jurisdiction here. There seems to be both Commonwealth and state involvement in this whole area, and I am unclear as to exactly how that works. Perhaps you could explain that to kick off with, please.

Ms Rainsford: Certainly. The National Classification Scheme is a cooperative scheme which is jointly owned by the Commonwealth, states and territories. To that end, it is underpinned by the 1995 Intergovernmental Agreement on Censorship, which sets out the respective responsibilities. Broadly, the Commonwealth is responsible for the classification of the films, publications and computer games in accordance with the Classification (Publications, Films and Computer Games) Act 1995. Within those arrangements, the states and territories are responsible for the enforcement of classification laws. In practice, that means that in each jurisdiction there is classification legislation which sets out, among other things, the offences and penalties for those in, for example, distributing refused classification material.

CHAIR: Constitutionally, where does it land? Does it come under communications and is therefore a Commonwealth thing? What limitations are there on Commonwealth power that allow the states to have some involvement in this area?

Mr Au: It is a cooperative scheme.

CHAIR: I understand that, but that is kind of an agreement that this is how we are going to do it. If it came to a High Court situation, where would the limits of Commonwealth power end?

Mr Au: I believe that the Commonwealth relies on the territories power. The classification act and the scheme relate to the making of classification decisions in the ACT. The states and territories kind of hang off what the Commonwealth does in how it sets out its classification enforcement legislation.

CHAIR: If the Commonwealth were to go to a COAG meeting of relevant people and say, as the Australian Law Reform Commission and Eros suggest, that the Commonwealth take over full responsibility for this area, would it have the power in the states?

Ms Rainsford: I think that is a difficult question to answer, in the sense that, without details of what the Commonwealth would be seeking to do in terms of the structure and design of a scheme, it is difficult to determine where constitutional power for the Commonwealth might end.

CHAIR: You said that classifications are done by the Commonwealth, but then the states enforce them. The states are enforcing state law, are they?

Ms Rainsford: Yes, that is correct.

CHAIR: If the Commonwealth legislated mirror legislation that already existed in the states, would that be constitutionally valid?

Ms Rainsford: Again, it is a bit difficult to answer that. The legislation varies from state to state. If the Commonwealth were seeking to take over those powers, an essential part of that process would be assessing whether or not it had constitutional power to legislate to take over that enforcement aspect of the scheme, which currently sits with the states and territories.

CHAIR: I will not harass you anymore on that point. If we can now come to the question of the National Classification Code. You have said, 'minor amendments to the scheme and any changes to the code, to the guidelines, must be considered and unanimously agreed to by all classification ministers.' In practical terms, how does that occur? Are the actual changes unanimously agreed? When was the last time that changes were agreed?

Ms Rainsford: I believe the last time that changes were unanimously agreed was to introduce the R rating for computer games under the scheme, which happened in 2013.

Mr Au: It was 1 January 2013.

CHAIR: How often has this unanimous agreement situation occurred?

Mr Au: It is very rare. I could not tell you how often off the top of my head, but I suspect it will be a very low number.

CHAIR: Is there any process occurring in the department looking at implementation of the ALRC recommendations? What is your understanding of the fact that so few have been implemented?

Ms Rainsford: Since the ALRC's report was tabled back in 2012, there has been some reform undertaken. A bill went through the parliament, I think, the year before last, which reformed three areas of the scheme. In an ongoing policy reform manner, we now continue to look at the remainder of those recommendations and how the scheme is currently working to develop advice for government on potential reform into the future. Reflecting on your earlier comments, part of that necessarily involves liaising with our state and territory colleagues. In the same way that the intergovernmental agreement requires the unanimous agreement of classification ministers around the country in order to update the code or the guidelines, it also requires that there is the same agreement for substantive changes to the National Classification Scheme.

Senator GALLAGHER: I recall this being on the SCAG agenda—permanently, it seems. Is it? How long has it been. Certainly, there have been ongoing discussions through the ministerial council.

Ms Rainsford: There have been ongoing discussions at officials' level. I think the last group of discussions at a ministerial level were in the lead-up to the reform agenda that was given effect by that bill the year before last.

Senator GALLAGHER: In 2014?

Ms Rainsford: Yes.

Mr Au: In 2013, I believe.

CHAIR: I am still a little bit mystified as to why so few of the recommendations of the ALRC have seen the light of day. Is there a log jam in your department? Are you doing too many things? Are any of the states being obstructive about it? What is the source of the slow progress?

Ms Rainsford: I would say that the requirement that there needs to be unanimous agreement to reform across all classification ministers in the states and territories as well as in the Commonwealth is a challenge in the scheme. Classification of content—film, computer games and publications—can be a sensitive and controversial area and different jurisdictions take different views on what reform is necessary and how to progress that.

CHAIR: That brings me to an issue that I was pursuing with the Eros folks. Their complaint is that there is a set of criteria applied in relation to classification that prohibits the selling of material that depicts activities that are illegal. So they are not prohibited and it is not illegal to possess them; it is just illegal to sell them, which is a strange situation in some respects. What sorts of discussions have there been in the departments and at the COAG body where the staff and the secretaries of the department—the head sherangs—all get together and talk before they tell their ministers what they should agree on? What sort of consideration has been given to that issue, if anything?

I know I was a bit vague there, but I am interested in how much consideration has been given to this factor, right from the people that do the work up to the people who just sign off on the piece of paper. There is a difference between what is illegal and what is not permitted.

Ms Rainsford: Perhaps if I can explain the role of the classification board, that might assist in providing an answer to that. The Commonwealth act establishes the classification board which, on application, classifies the products that are put to it. In making those decisions it is bound by the requirements of the act and the classification code and to apply the guidelines which set out broadly what fits into each category.

The act also sets out a range of things that the board needs to take into account in making those decisions. One of those is commonly referred to as the community standards test. As part of our role, both in supporting the National Classification Scheme from a policy and administrative front, and also supporting the board in its duties, there are a range of things that are done in order to enable the board to inform itself about where community

standards currently sit. Some of that comes from a research program that is conducted in my branch, which, from time to time, will undertake research about current community standards. That research is shared with the board, and, generally, with the public through our website. In addition, there are a range of procedures that the director of the classification board has in place to inform herself and board members about where community standards might change over time. That includes taking into account feedback from stakeholders and members of the community.

CHAIR: I can understand that. That would affect what goes into what classification. That is fine, as far as it goes. But we have an X18+ category which is quite restricted in terms of access, and yet, there is stuff in there which is not permitted which is legal. What I am interested in is to what extent has that question come up in the context of your considerations?

Ms Rainsford: It is certainly something that we are mindful of in terms of whether or not the guidelines are still appropriate in support of the objectives of the scheme. I have not been involved in any specific discussions about the specifics of the X18+ category in recent months.

CHAIR: What do you think the appetite of the group that meets those states and your people would be for 'refused classification', which is prohibited to sell, being concurrent or identical to what is actually illegal? So if it is legal, it can be classified in some way or another and is not prohibited. What is your thinking? Has there been any consideration of that issue?

Ms Rainsford: I have not specifically discussed that topic with my state and territory colleagues, so I do not feel like I am in a position to—

CHAIR: To speculate. I read your submission and I find words in it that are entirely subjective. The 'refused classification' category includes content that:

- contains gratuitous, exploitative or offensive depictions of activity accompanied by fetishes or practices which are offensive or abhorrent

What is the definition of 'offensive or abhorrent'? How do you arrive at those things? Is this part of your community standards test?

Ms Rainsford: That is a direct quote from the guidelines for the classification of film.

CHAIR: I know, but it is so subjective. How do you deal with it?

Ms Rainsford: Effectively, it is a matter for the board to determine what that means and how it applies to content in front of them. For example, I think Mr Murray, in his earlier evidence, referred to the fact that there is some material in films at an MA or R rating which will cover certain fetishes, incest or bestiality. The board comes to that looking at a range of things. In making its decision it needs to look at the classifiable elements as well as the context and the impact. In terms of films, the narrative in which that content is shown is an important part of its decision-making process such that in context and with appropriate guidance about age appropriateness certain content might be available or appropriate for a rating at an MA or R level. But in a different context, where its impact is higher or where there is no narrative or context which justifies it, it might meet the definition of 'gratuitous, exploitative or offensive'.

CHAIR: I read quite a number of the submissions that followed on from the ALRC recommendations. There is some very sensible stuff in amongst it all. One of the things that struck me was the possibility that rather than classify stuff you can in fact limit access of certain types of material in cases where you are trying to ensure it does not come to the attention of minors and also so that people who do not want to have anything to do with violent or sexual material are not unwittingly exposed to it. Has that been a subject of discussion amongst your group? It is simply an access issue rather than a classification issue. Could you do that without classification or do you think classification would be integral to that?

Ms Rainsford: I think some of that depends on the definition of classification. There are already aspects of the National Classification Scheme which are about access.

CHAIR: Yes, you are right—restricted premises and things.

Ms Rainsford: Certainly the MA15+ rating is about—

CHAIR: Hours of viewing.

Ms Rainsford: restricting access to people under 15 unless they are accompanied by a parent or guardian. That means different things in different states and territories. Likewise, the R and X categories are restricted to people who are adults—18 or over. So there are already elements of that. Likewise, there are already a range of advisory elements that sit within the scheme. So, in addition to the rating category that the board allocates, it also

allocates consumer advice which is designed to give consumers some additional information, in particular about the highest impact elements of the content, so that they can make a decision about what is made.

In relation to the publications, there are some elements around restriction of where certain category 2 publications can be made or how lower impact category 1 publications need to be displayed in premises. Part of that is designed around making sure that people, including adults, are not exposed to material that they might find offensive, recognising that, in the spirit of the principle, adults should be able to see, read, hear and play what they want. Some members of society will find some material offensive and not what they would choose to consume, whereas it should be available to other members. I think moving to an access regime necessarily presupposes some assessment is done somewhere about where those restrictions should kick in. At the moment, that assessment is made by the Classification Board under our legislation. There are other ways that can be done. The ALRC recommended moving more to an industry based co-regulation model, which is a bit like how the broadcasters do their classification at the moment. There are different ways that could play out in terms of achieving those objectives.

CHAIR: You are right, in practical terms. Theoretically, you could nominate criteria and say, 'If it meets these criteria, access is only permitted of this kind.' You could probably do that—have access restricted based on nominated criteria—or you could do it based on classification. I presume one would be pretty much substitutable by the other anyway. I am just thinking of who would do the classification, but that is another issue.

Senator GALLAGHER: Eros—I keep wanting to call them the Eros Foundation, which shows my age in dealing with these things—talked about establishing an industry code and self-regulation of the X18+ films. What is your response to that?

Ms Rainsford: That is consistent with the direction the ALRC was heading in terms of a more co-regulatory or industry based classification model. It would require legislative change to the Commonwealth classification act to achieve that.

Senator GALLAGHER: That would not be allowed under current laws?

Ms Rainsford: No.

Senator GALLAGHER: But the government does not have a view on that yet?

Ms Rainsford: I am not aware that it does, no.

CHAIR: You have changed now from Attorney-General's to Communications, is that right?

Ms Rainsford: Yes, that is correct.

CHAIR: So we are talking to Mitch instead of George.

Senator GALLAGHER: I would imagine it is a different environment—from Attorney's into the arts.

CHAIR: I think we might have exhausted our questions on that. There are a few issues, but you addressed them anyway in answers to other questions. Can I get you to take on notice this question of jurisdiction, in response to Senator Gallagher's question about adopting the ALRC suggestion in relation to an industry code? If that industry code said that X18+ or something equivalent will include anything that is legal, which is what Eros is arguing for, so Refused Classification is only the material which is prohibited or illegal, whose agreement to that would be required?

Ms Rainsford: It would be the Commonwealth and each state and territory classification minister.

CHAIR: They would all have to agree, would they?

Ms Rainsford: They would all have to agree.

CHAIR: That implies that the Commonwealth does not have a constitutional head of power in this area.

Ms Rainsford: The basis for needing that agreement is that the Commonwealth is a party to that intergovernmental agreement from 1995, which sets out the basis for decision making like that.

CHAIR: Is that intergovernmental agreement legislated?

Ms Rainsford: No, it is not legislated; it is an agreement between the Commonwealth, states and territories.

CHAIR: Ignoring the politics of it, if the Commonwealth government said to the states, 'We're going to change the intergovernmental agreement and our tied grants are dependent upon your agreement to it,' they could get agreement fairly smartly, I would have thought.

Ms Rainsford: I am not in a position to comment on that.

CHAIR: You do not have to answer that. So you do not need to take it on notice. There is no constitutional barrier; it would only be the intergovernmental agreement that would be the issue.

Ms Rainsford: Yes, that is my understanding.

CHAIR: That concludes today's hearing. Thank you to all witnesses who appeared.

Subcommittee adjourned at 11:21

The Senate - Economics References Committee - Personal choice and community impacts - Interim report: the classification of publications, films and computer games (term of reference e)

- May 2016

The Senate

Economics
References Committee

Personal choice and community impacts

Interim report: the classification of publications, films and computer games (term of reference e)

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Chapter 1

Introduction and overview

Referral and conduct of the inquiry

1.1 On 25 June 2015, the Senate referred an inquiry into personal choice and community impacts to the Senate Economics References Committee (committee) for inquiry and report by 13 June 2016.[1]

1.2 The committee's terms of reference require it to report on:

> The economic and social impact of legislation, policies or Commonwealth guidelines, with particular reference to:
>
> a. the sale and use of tobacco, tobacco products, nicotine products, and e-cigarettes, including any impact on the health, enjoyment and finances of users and non-users;
>
> b. the sale and service of alcohol, including any impact on crime and the health, enjoyment and finances of drinkers and non-drinkers;
>
> c. the sale and use of marijuana and associated products, including any impact on the health, enjoyment and finances of users and non-users;
>
> d. bicycle helmet laws, including any impact on the health, enjoyment and finances of cyclists and non-cyclists;
>
> e. the classification of publications, films and computer games; and
>
> f. any other measures introduced to restrict personal choice 'for the individual's own good'.

1.3 In accordance with usual process, the committee advertised the inquiry on its website and wrote to relevant persons and organisations inviting submissions to the inquiry.

1.4 To date, the committee has received 485 public submissions and two confidential submissions. The public submissions are available on the committee webpage.

1.5 The committee has held seven public hearings. At its first public hearing, on 11 September 2015 in Canberra, the committee heard evidence on decision making generally. The other public hearings focused on specific matters in relation to the inquiry terms of reference as follows:

- on 3 November 2015, in Parramatta, the committee heard evidence on proposed restrictions on the activities of fans of the Western Sydney Wanderers Football Club;

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1 *Journals of the Senate* No. 102, 25 June 2015, p. 2832.

- on 16 November 2015, in Melbourne, the committee heard evidence on mandatory bicycle helmet laws in accordance with inquiry term of reference (d);
- on 20 November 2015, in Sydney, the committee heard evidence relating to inquiry term of reference (b) concerning the sale and service of alcohol with focus on Sydney's lockout laws;
- on 9 March 2016, in Sydney, the committee heard evidence regarding inquiry term of reference (a) concerning tobacco, nicotine and e-cigarettes;
- on 11 March 2016, in Sydney, the committee heard evidence regarding the sale and service of marijuana in accordance with inquiry term of reference (c); and
- on 22 April 2016, in Canberra, the committee heard evidence in relation to the classification of publications, films and computer games in accordance with inquiry term of reference (e).

1.6 This report focuses on the evidence in relation to the term of reference (e) concerning classification of publications, films and computer games.

1.7 The committee thanks all those who have participated in the inquiry so far.

Classification under Australian law

1.8 The classification of publications, films and computer games is regulated predominantly by the National Classification Scheme, but is administered differently in each state and territory.[2]

1.9 The Commonwealth, states and territories are bound to the *Intergovernmental Agreement on Censorship* (Intergovernmental Agreement), first agreed to in 1996. The aim of the 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'.[3]

1.10 The Department of Communications and the Arts (the department) outlined the division of regulatory responsibilities:

> Broadly, the Commonwealth is responsible for the classification of the films, publications and computer games in accordance with the *Classification (Publications, Films and Computer Games) Act 1995*. Within those arrangements, the states and territories are responsible for the enforcement of classification laws. In practice, that means that in each jurisdiction there is classification legislation which sets out, among other

2 The inconsistency in this approach was highlighted in the Senate Legal and Constitutional Affairs Committee's 2011 report into classification titled *Review of the National Classification Scheme: achieving the right balance*, June 2011.

3 *Intergovernmental Agreement on Censorship*, item B.

> things, the offences and penalties for those in, for example, distributing refused classification material.[4]

1.11 The Australian Classification Board (ACB) is a statutory board established under the Commonwealth *Classification (Publications, Films and Computer Games) Act 1995* (Classification Act). Its role is to classify 'films, computer games and publications for exhibition, sale or hire in Australia'.[5] The ACB is required to provide advice accompanying each classification to inform consumers 'which classifiable elements (that is themes, violence, sex, language, drug use and nudity) have led to the classification decision'.[6]

1.12 The Commonwealth and the states and territories have agreed to the National Classification Code (the Code) and the Classification Guidelines for publications, films and computer games (the Guidelines), which are tools to be used by the ACB and Review Board in making their decisions. The Intergovernmental Agreement requires that all non-minor amendments to the Scheme and any changes to the Code or the Guidelines must be considered and unanimously agreed to by all classification ministers.[7]

1.13 It would appear that the Intergovernmental Agreement serves as a challenge to establishing national consistency and to instituting reform. The Eros Association (Eros) informed the committee that there were contradictions between federal and state and territory classification statutes:

> The sale of X18+ films are made legal through the *Classification (Publications, Films and Computer Games) Act 1995* (Cth). However, each state in Australia, through their respective classification enforcement statutes, have ensured that the legal status of X18+ rated films remains in a grey area. Any adult can legally buy and possess X18+ rated films (with the exception of Western Australia) but it is illegal for an adult retail store (an age-restricted premises) to sell such a film in all states. This is all despite the fact that an adult is able to access via the internet or mail order material that is not classified but would likely to be classified X18+ or indeed RC given the relatively narrow scope of consensual sex acts between adults that is allowed within an X18+ classification.[8]

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4 Ms Cathy Rainsford, Assistant Secretary, Classification Branch, Department of Communications and the Arts, *Committee Hansard*, 22 April 2016, p. 9.

5 Australian Classification, Classification Board, http://www.classification.gov.au/About/Pages/Classification-Board.aspx (accessed 4 May 2016).

6 Australian Classification, Classification Board, http://www.classification.gov.au/About/Pages/Classification-Board.aspx (accessed 4 May 2016).

7 Department of Communications and the Arts, *Submission 471*, p. 2.

8 The Eros Association, *Submission 443*, p. 2.

Classification process

1.14 Under state and territory classification laws, all films and computer games must generally be classified before they can be exhibited, demonstrated, sold or hired in Australia. There are a number of categories of films and a smaller number of categories of computer games that are exempt from classification, such as educational, business, professional and scientific films and games (as long as they would otherwise be classified G or PG).[9]

1.15 In contrast to films and computer games, only submittable publications need to be classified. Submittable publications are defined in the Classification Act as publications that contain depictions (ie. images) or descriptions (ie. text) that are:

- likely to be classified Refused Classification;
- 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
- unsuitable for a minor to see or read.[10]

1.16 Publications, films and computer games are generally classified against six classifiable elements: themes, violence, sex, language, drug use and nudity. The ACB's classification decisions consider the impact of each of these elements, including their frequency, intensity and level of detail, and their cumulative effect. The ACB also considers the context of these elements, including the purpose and tone of the material and how it is treated.[11]

1.17 The classification categories for films and computer games are set out below.

Table 1.1: Classification for films and computer games[12]

Advisory categories for films and computer games	G – General PG – Parental Guidance M – Mature
Restricted categories for films and computer games	MA 15+ – Mature Accompanied R 18+ – Restricted
Restricted categories of adult films	X 18+ – Restricted RC – Refused Classification

9 Department of Communications and the Arts, *Submission 471*, p. 2.

10 Department of Communications and the Arts, *Submission 471*, p. 2.

11 Department of Communications and the Arts, *Submission 471*, p. 3.

12 Australian Classification, Classification categories explained, http://www.classification.gov.au/Guidelines/Pages/Guidelines.aspx (accessed 4 May 2016).

Classification standards

1.18 The department explained that when classifying content, certain matters must be considered in accordance with the Classification Act, such as:

- the standards of morality, decency and propriety generally accepted by reasonable adults;
- the literary, artistic or educational merit (if any) of the content;
- the general character of the content, including whether it is of a medical, legal or scientific character; and
- the persons or class of persons to whom it is published or is intended or likely to be published (i.e. the audience).[13]

1.19 In addition to the requirements of the Classification Act and the Code, the Guidelines set out broadly what fits into each classification category. The requirements are assessed in accordance with a scale of 'classifiable elements' such as themes, violence and sex.[14] As a case in point, the ACB has to determine the definition of 'offensive or abhorrent' practices in accordance with the requirements and how the definition applies to the content before it.[15]

Review of the National Classification Scheme

1.20 In February 2012, the Australian Law Reform Commission (ALRC) released its report into classification under the present legal framework. The ALRC found that there were a number of significant issues with the current regulatory framework that created confusion within the industry and for viewers, in addition to failing to meet the intended goals of the system. These issues included the:

- inadequate regulatory response to changes in technology and community expectations;
- lack of clarity about whether films and computer games distributed online must be classified;
- 'double handling' of media content, with films and television programs being classified twice for different formats (e.g., 2D and 3D) and different platforms (e.g., broadcast television and DVD);
- content prohibited online, including some content that may not be prohibited in other formats, such as magazines;
- inconsistent state and territory laws concerning restrictions and prohibitions on the sale of certain media content, such as sexually explicit films and magazines;

13 Department of Communications and the Arts, *Submission 471*, p. 3.

14 Department of Communications and the Arts, *Submission 471*, p. 3.

15 Ms Cathy Rainsford, Assistant Secretary, Classification Branch, Department of Communications and the Arts, *Committee Hansard*, 22 April 2016, p. 11.

- low compliance with classification laws in some industries, particularly the adult industry, and correspondingly low enforcement; and
- a need to clarify the responsibilities of the Classification Board, the Australian Communications and Media Authority (ACMA) and other Australian Government agencies and departments involved with classification and media content regulation.[16]

1.21 The ALRC recommended that a new classification scheme be designed to address both the changing media landscape and the current problems in the classification regulatory scheme. The key recommendations emanating from the review included the following:

- Platform-neutral regulation—one legislative regime establishing obligations to classify or restrict access to content across media platforms.
- Clear scope of what must be classified—that is feature films, television programs and certain computer games that are both made and distributed on a commercial basis and have a significant Australian audience.
- A shift in regulatory focus to restricting access to adult content—imposing new obligations on content providers to take reasonable steps to restrict access to adult content and to promote cyber-safety.
- Co-regulation and industry classification—more industry classification of content and industry development of classification codes, subject to regulatory oversight.
- Classification Board benchmarking and community standards—a clear role for the Classification Board in making independent classification decisions using classification categories and criteria that reflect community standards.
- An Australian Government scheme—replacing the current classification cooperative scheme with enforcement of classification laws under Commonwealth law.
- A single regulator—with primary responsibility for regulating the new scheme.[17]

Government response to the ALRC review

1.22 Following the release of the ALRC report in 2012, the Australian Government clarified that it would seek the views of all the states and territories on the report. Once those views were gathered, the intention was to use them to develop a

16 Australian Law Reform Commission, *Classification Content Regulation and Convergent Media*, Report 118, February 2012, Executive Summary, pp 22–23.

17 Australian Law Reform Commission, *Classification Content Regulation and Convergent Media*, Report 118, February 2012, pp 13–14.

Commonwealth position on the ALRC recommendations and thereafter finalise the Government response to the ALRC report.[18]

1.23 Some of the recommendations of the ALRC were implemented in 2014 by way of legislation introduced by the government which amended the Classification Act.[19]

1.24 However, in relation to the ALRC's recommendation on the establishment of a more co-regulatory or industry-based classification model, this change still requires the agreement of the Commonwealth, states and territories in accordance with the Intergovernmental Agreement. When questioned about a Commonwealth response to the ALRC report and possible implementation of the remainder of its recommendations, Ms Cathy Rainsford, Assistant Secretary at the Classification Branch, Department of Communications and the Arts explained the challenges relating to the 1995 accord:

> I would say that the requirement that there needs to be unanimous agreement to reform across all classification ministers in the states and territories as well as in the Commonwealth is a challenge in the scheme. Classification of content—film, computer games and publications—can be a sensitive and controversial area and different jurisdictions take different views on what reform is necessary and how to progress that.[20]

Personal choice and classification

1.25 Under the Code, one of the primary guiding principles of Australian classification is that 'adults should be able to read, hear, see and play what they want'.[21] However, according to the department, this principle is to be equally weighed against three other key principles:

- the protection of underage viewers from material that is likely to harm or disturb them;
- that everyone should be protected from exposure to unsolicited material that they find offensive; and

18 Government response to the Senate Legal and Constitutional Affairs Committee Inquiry into the National Classification Scheme, 16 August 2012.

19 The *Classification (Publications, Films and Computer Games) Amendment (Classification Tools and Other Measures) Act 2014* made amendments to the Classification Act in line with ALRC recommendations 6-3, 7-8, 8-1, 8-2 and 12-3. Australian Law Reform Commission, National Classification Scheme Review, Implementation, http://www.alrc.gov.au/inquiries/classification/implementation (accessed 3 May 2016).

20 Ms Cathy Rainsford, Assistant Secretary, Classification Branch, Department of Communications and the Arts, *Committee Hansard*, 22 April 2016, p. 10.

21 Department of Communications and the Arts, *Submission 471*, p. 3.

- the need to take account of community concerns about depictions that condone or incite violence, particularly sexual violence, and the portrayal of persons in a demeaning manner.[22]

1.26 Evidence to the inquiry was divided into two main schools of thought - those who were supportive of the classification of media content, and those who argued that the classification regulations amounted to an infringement on the personal choice of consumers to access entertainment freely.

1.27 The primary argument against the current classification regulation scheme insofar as it applies to adult and restricted media was that it 'has completely collapsed, leaving many people exposed to prosecution from outdated official censorship laws and with limited personal freedom to read, see or hear, harmless erotic material'.[23]

1.28 Another concern related to a central tenet of the Code which is to ensure that adults can exercise personal choice in what kind of content they access. It was suggested to the committee that the current classification regime can potentially conflict with this concept by restricting the ability of people to freely access some types of content. The view was put that there remains an inherent tension in finding an appropriate and desirable balance between ensuring that adults can access content freely, while protecting those who may be negatively impacted by the content. This balance was at the core of the debate regarding personal choice in relation to classification.

1.29 The Arts Law Centre of Australia (Arts Law Centre) noted the importance of maintaining a 'balance between allowing adults to read, hear and see what they want, protecting minors from unsuitable material, and taking into account community views'.[24] However, they also argued that it was critically important to maintain freedom of speech and expression through the means of artistic mediums, which is impacted by classification.[25] The Arts Law Centre continued:

> The *Classification (Publications, Films and Computer Games) Act 1995* (Cth) has the potential to conflict with the common law freedom of speech. A well-tailored classification system, the purpose of which is primarily to enable adults to make an informed choice as to what they want to see, hear and read, and what to allow their children to have access to, is an effective mechanism to regulate freedom of expression provided it is not used as a means to censor material that is otherwise legal.[26]

1.30 The Australian Council on Children and the Media (ACCM) provided a contrasting view, particularly with regard to children. It argued that classification is a

22 Department of Communications and the Arts, *Submission 471*, p. 3.

23 The Eros Association, *Submission 443*, p. 1.

24 The Arts Law Centre of Australia, *Submission 151*, p. 3.

25 The Arts Law Centre of Australia, *Submission 151*, p. 3.

26 The Arts Law Centre of Australia, *Submission 151*, p. 3.

social good carried out by government to ensure the community's safety and protection from harm.[27] ACCM held the view that:

> Questioning the appropriateness of government intervention for people's 'own good' is based on a view that, we submit, tends to overlook the social nature of our species; our interconnectedness; and the pain we feel when others are hurt-even if they hurt themselves.[28]

1.31 The ACCM related this issue to that of the relationship between children and classification, arguing that a societal approach to classification is required to ensure that parents are able to appropriately monitor and manage their children's consumption of media.[29]

Impact of refusing classification

1.32 In accordance with the Guidelines, under the Refused Classification (RC) category, material that is refused classification is commonly referred to as being 'banned'. Classified RC material contains content that is 'very high in impact and falls outside generally accepted community standards'.[30]

1.33 When the ACB assess whether content should be refused classification, the benchmark is set according to the Code. For example, films classified RC are defined under the Code as:

> Films that:
>
> (a) 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
>
> (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.[31]

1.34 Other types of content are similarly defined under the Code. Further advice is contained in the Guidelines, which suggest that content classified as RC will generally include material such as child abuse, sexual violence, extreme forms of violence, practices such as bestiality, and instructional or promotional content relating to crime

27 The Australian Council on Children and the Media, *Submission 169*, p. 2.

28 The Australian Council on Children and the Media, *Submission 169*, p. 2.

29 The Australian Council on Children and the Media, *Submission 169*, p. 2.

30 Australian Government, Australian Classification, Refused Classification (RC), http://www.classification.gov.au/Guidelines/Pages/RC.aspx (accessed 4 May 2016).

31 National Classification Code (May 2005).

or drug use.[32] Content that advocates committing a terrorist attack must be classified RC under section 9A of the Act.[33]

1.35 Films, computer games and publications that are classified RC cannot be sold, hired, advertised or legally imported into Australia. According to one submitter, a refusal to classify material 'effectively censors' that material because of the fact that it can't be bought, hired or sold.[34]

1.36 Eros similarly argued that the 'current system of official classification in Australia, is now a system of censorship'.[35] It suggested that sexually explicit non-violent material should have a 'right to exist in society, free from the calls of those who feel offence at the fact that it exists'.[36]

1.37 Eros put the view that the first principle of the Code-to ensure that adults should be permitted to read, hear, see and play what they want to-is 'not being upheld', particularly in relation to sexually explicit content.[37] It gave the following reasons to support its claim:

- the contradiction between federal and state classification legislation;
- the X18+ Licence in the ACT is no longer cost effective;
- the only wholesale business classifying X18+ films withdrew from the market due to the cost prohibitive nature of classifying such films, compounded by frequent abuse of power by customs and customs officials, as well as unfair market advantage when other businesses imported films that had been classified at the expense of the wholesaler; and
- the restrictive nature of X18+ classification and the number of consensual sex acts between adults that are refused classification (RC).[38]

1.38 Additionally, it was noted that under current regulations, content can be refused classification when it depicts activities largely accepted in the community. Eros noted that certain sexual acts are prohibited and will not be granted classification under the 2012 Guidelines, which includes otherwise legal and consensual behaviour.[39] It claimed that this discriminates against those who participate in these acts, including members of the lesbian, gay, bisexual, transsexual and intersex community (LGBTI community).[40]

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32 Department of Communications and the Arts, *Submission 471*, pp 5–6.

33 Department of Communications and the Arts, *Submission 471*, p. 6.

34 Mr Michael Noack, *Submission 5*, p. 1.

35 The Eros Association, *Submission 443*, p. 1.

36 The Eros Association, *Submission 443*, p. 1.

37 The Eros Association, *Submission 443*, p. 1

38 The Eros Association, *Submission 443*, p. 1

39 The Eros Association, *Submission 443*, p. 3.

40 The Eros Association, *Submission 443*, p. 3.

1.39 The National LGBTI Health Alliance (Alliance) also raised concerns regarding the classification regime. It suggested that the 'discriminatory classification' of publications, films and computer games has adversely impacted the health of members of the LGBTI community.[41]

1.40 It argued that evidence has indicated that media exposure to realistic depictions of LGBTI populations can lead to 'improved understanding and prejudice reduction, by offering alternatives to stereotypical, negative and pathologising representations'.[42] This factor and the lack of positive portrayals of the LGBTI community in classified media negatively impacts young people struggling with sexual identity, and can result in further alienation and negative mental health effects.[43]

Technological change

1.41 Free TV argued that the rate of technological change was outpacing the classification regime, creating inconsistencies in how classification is applied.[44] It suggested that recent developments in media, such as the introduction of online streaming services, have significantly impacted the classification regime, as they do not adhere to the 'traditional' forms of media which underpin the current classification system.[45] Free TV made the point that this situation has resulted in an inconsistent approach to classification which creates confusion for both consumers and content providers. In fact, in 2012, the ALRC noted in its report on classification that technological innovation has taken place at such a rate that it has reduced the relevance of traditional distinctions between the types of content and the times or ways it can be accessed.[46]

1.42 Free TV demonstrated this point with the example of classification zones on commercial free-to-air television programming. It argued that classification time zones, where programs under a certain classification can be shown within a certain timeframe, were originally designed to protect children from viewing 'inappropriate content'.[47] However, it suggested that this requirement was no longer applicable for two reasons. Firstly, children do not require protection in the same way as in the past, due to technological advances such as parental locks and children-specific television channels such as ABC2 and ABC3.[48]

41 National LGBTI Health Alliance, *Submission 460*, p. 2.

42 National LGBTI Health Alliance, *Submission 460*, p. 2.

43 National LGBTI Health Alliance, *Submission 460*, p. 3.

44 Free TV Australia, *Submission 448.*

45 Free TV Australia, *Submission 448*, p. 2.

46 Australian Law Reform Commission, *Classification Content Regulation and Convergent Media*, Report 118, February 2012, p. 14.

47 Free TV Australia, *Submission 448*, p. 2.

48 Free TV Australia, *Submission 448*, p. 4.

1.43 Secondly, Free TV argued that the growth of on-demand streaming services has given rise to an expectation that content will be available at a time of one's choosing, without restrictions such as classification zones.[49] This effectively places different rules on content depending on the means by which it is accessed.

1.44 Furthermore, it was noted by Eros that the same content can be classified differently depending on the type of technology used to access it. Eros argued that content that is otherwise refused classification can easily be accessed online or via mail order.[50] Eros continued:

> The current [Act] is outdated and does not reflect the reality of the decline in sales of DVDs generally, due to digital delivery and consumption models made possible by fast speed internet and the fact that adults can access content on the internet that has not been classified.[51]

1.45 In response, Eros and Free TV argued for the need for the consistent application of classification standards across all forms of media.[52] Furthermore, Eros indicated that implementation of the ALRC recommendations would go some way to addressing their concerns.[53]

Committee view

1.46 The committee recognises that there have been substantial technological and other changes across the media landscape which have brought the adequacy of the current classification regulatory framework into question.

1.47 Submitters to the committee argued that the pace of innovation, particularly in relation to personal entertainment such as on-demand streaming, has fundamentally challenged the nature of classification laws. Questions were also raised about the role of classification in an environment where content is widely accessible regardless of the restrictions placed on it by regulatory bodies.

1.48 The committee recognises the need for government attention to this issue, particularly in light of current policy challenges such as online piracy. As highlighted in evidence to the committee, a regulatory system that meets community standards and effectively responds to current and future challenges regarding the control of content in Australia is fundamentally important.

Senator Chris Ketter

Committee Chair

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49 Free TV Australia, *Submission 448*, p. 5.

50 The Eros Association, *Submission 443*, p. 2.

51 The Eros Association, *Submission 443*, p. 2.

52 Free TV Australia, *Submission 448*, p. 2; The Eros Association, *Submission 443*, p. 2.

53 The Eros Association, *Submission 443*.

Additional Comments

Senator Sean Edwards – Liberal Party of Australia

1.1 Senator Edwards recognises the constant need for Australia's classification system to adequately respond to changes in the technological and media landscape. Senator Edwards also notes the cooperation of the states and territories is vital in the development and enforcement of these policies.

1.2 Senator Edwards draws the committee's attention to the significant reforms to the communications sector being pursued by the Turnbull government, including a review of the Australian Communications and Media Authority, to ensure the regulator remains fit-for-purpose in a rapidly changing environment.

Senator Sean Edwards

Liberal Party of Australia

Additional Comments

Senator David Leyonhjelm – Liberal Democratic Party

1.1 I broadly endorse the Committee's interim report and wish to add a few additional observations.

1.2 During the course of the hearing it became clear to me that Australia's classification scheme has been rendered increasingly nugatory.

1.3 There is the basic reality that any such regime must accept its reach is limited. Such is the pace of change and global content availability that anything short of North Korean or Chinese-style censorship can simply be bypassed using technological means (VPNs, for example).

1.4 At present, we have a system that not only does not work, but is expensive to maintain.

1.5 It seems to me that for any system of classification to 'work', it must recognise that the only scope for enforcement lies in drawing a clear distinction between illegality and immorality. It is neither reasonable nor practical to expect law enforcement to enforce morals, as occurs now.

1.6 The current depiction of otherwise legal acts, made illegal simply by virtue of their depiction, should not be a matter for criminal prosecution. Police and courts have better things to do than wag fingers at people who engage in consensual sexual fetishes and then make the mistake of taking photographs or shooting video for wider distribution.

1.7 As an interim measure, the ALRC recommendations that are still technologically feasible to implement - most of which have gathered dust since 2012 - should be enacted as a matter of urgency. I realise this requires cooperation between the States and the Commonwealth, but the current system cannot be allowed to persist unchanged.

1.8 The ALRC recommendations include thoughtful policy proposals for keeping material clearly unsuitable for children away from them, while acknowledging technological limitations and the importance of parental decision-making.

1.9 More generally, the principles upon which a policy can be based irrespective of technological change are:

- Prosecute those who depict matters that are illegal.
- Warn adults of content so they have the option of avoiding exposure to it.
- Restore responsibility to parents to protect their children.

Senator David Leyonhjelm

Liberal Democratic Party

Appendix 1

Public hearings and witnesses

CANBERRA, 22 APRIL 2016

PAYNE, Ms Rachel, General Manager, Eros Association

MURRAY, Mr Joel, Business Manager, Eros Association

RAINSFORD, Ms Cathy, Assistant Secretary, Classification Branch, Department of Communications and the Arts

AU, Mr Ben, Director, Policy & Research, Classification Branch, Department of Communications and the Arts