The Committee Secretary
Senate Legal & Constitutional Affairs Committee
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Canberra ACT 2600

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Inquiry into the Australian film and literature classification scheme

This submission responds to the Committee's public invitation to provide submissions regarding its inquiry into the Australian film and literature classification scheme, following the Senate reference of 16 November 2010.

The following paragraphs identify the basis of the submission, provide general comments regarding the Australian scheme and provide specific comments in relation to the Committee's Terms of Reference. The authors have provided an independent submission to the Australian government regarding the Terms of Reference for the 2011 Australian Law Reform Commission Review of Censorship and Classification.

The submission is made on an individual basis rather than on behalf of the University of Canberra.

Basis

The submission reflects work by the authors in government, industry and academia over the past twenty years.

It is informed by an awareness of local and overseas legal frameworks, on a current and historical basis, and an awareness of how those frameworks affect Australian content producers, consumers and intermediaries. It is founded on familiarity with the legal, commercial and psychological literature regarding impacts on minors and adults of offensive or other content, including for example concerns regarding trade practices, hate-speech, cyberbullying and obscenity. It also draws on familiarity with literature and practice regarding digital technologies, in particular the online dissemination of local/overseas content.

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Dr Sarah Ailwood is an Assistant Professor in the Faculty of Law at the University of Canberra. She has broad research interests in the fields of law and text, with a particular focus on literature, life writing and gender. She is particularly interested in intersections between law and culture. She has presented at conferences and been published in journals in Australia and internationally.

Dr Ailwood is also a member of gamer communities, playing both console and online games. She is particularly interested in advanced platform and role-playing games, including Massively Multiplayer Online Games (MMOGs).

Towards a coherent Australian Regime

The Australian film and literature classification regime reflects –

- Australia's colonial history (with inconsistent law and practice in states/territories)
- the impact of political opportunism and of civil society groups whose effectiveness in advocacy is not necessarily indicative of broad community support or of an understanding of law, technology, business and consumer practice
- media exceptionalism, with different rules (and inconsistent enforcement) for content delivered in a leather binding, via a newsagency, on free-to-air broadcast television and radio, on subscription/pay-per-view cable television, as video or networked computer games, as live performance and as film in cinemas or on tape/disk
- instances of 'gesture politics' such as restrictions on online distribution of bomb-making or suicide information in a world where such information is readily available in high school libraries, the primetime news or the daily soap opera
- disregard of empirical data in favour of unsubstantiated assertions and 'cherry-picking' by vested interests within the private and public sectors.

The Committee has an opportunity to look beyond supposed harms experienced by Australia's young people and others. We respectfully suggest the Committee should recognize that –

- media environments have changed since the 1950s
- a succession of dire warnings in past inquiries have not been substantiated
- classification is a tool rather than an outcome
- its report provides an opportunity to articulate a principle-based, culturally-sensitive and technologically-feasible scheme for the regulation of content accessed by all Australians, rather than tinkering with the existing scheme.

We therefore encourage the Committee to recommend development and national adoption of a forward-looking, empirically-based and technologically-neutral approach content regulation regime.

The continuing, albeit uneven, shift to online media has increasingly demonstrated that technological developments and the availability of infrastructure (ie the existence of networks and the cost of accessing those networks) require classification on a national rather than parochial (ie sector by sector and state by state) basis.

In 2011, as we look forward to –

- the convergence of devices (which for example vitiate traditional demarcations between books, newspapers, phones, free to air television, sound recordings, live performance and the cinema) and
- the convergence of content formats (eg the emergence of interactive books or interactive television and the merging of film with computer games)

it is appropriate to question both the desirability and day by day effectiveness of particular content regulation mechanisms.

An informed approach to Classification

As a general comment we strongly support adoption of an approach that is founded on –

- recognition that 'advisories' (ie classifications) are useful – particularly as aids toparents/ guardians – rather than a silver bullet

- strong empirical data (with questioning of claims made by some policy advocates and the use of information that is presented as authoritative but does not withstand rigorous scrutiny) and
- an awareness of the history of classification debates in Australia and overseas.

Public debate and policymaking regarding classification has typically featured emotive claims – often presented with ostensible academic, medical or scientific authority – about the supposed incidence and severity of harms or the efficacy of particular responses.

That history has featured –

- recurrent moral panics regarding media such as comics, paintings, the cinema, television and the internet. (The notion that access to comics will turn many children into homicidal delinquents or that exposure to a cast of Michelangelo's *David* will convert adolescents into devotees of the Sydney Mardi Gras is now recognized as problematical)[1]
- the suppression of innocuous works such as novels and paintings by Norman Lindsay and D H Lawrence on the basis that those works would result in harm to minors or widespread social unrest,
- on again off again access by consenting adults to works such as Pasolini's *Salo* and *LA Zombie* in a culture where non-sexualised violence is a largely unremarked feature of free-to-air television and the cinema
- highly publicised raids on galleries or other venues exhibiting work by figures such as Henson and Mapplethorpe, ironic given the prevalence of child images and violent images (scourging, crucifixion, beheading etc) in churches and cultural institutions.

It has resulted in other anomalies such as positioning of the Australian Capital Territory as an entrepot of x-rated content that is consumed by ordinary people in other jurisdictions and in consumer uptake of adult programming on cable television.

The Committee should question the *bona fides* and authority of advocacy groups. Sound law and policy-making requires a wariness about assertions by groups – for or against regulation *per se* or regulation of specific content/media – whose vehemence is inversely proportional to their membership and the strength of the data that is claimed to substantiate their submissions.

The following paragraphs address specific matters in the Committee's Terms of Reference.

a) **the use of serial classifications for publications**

We broadly endorse serial classification, subject to initial classification being properly founded, timely and low cost mechanisms being available for the resolution of disputes, and spot-checking being undertaken on a strategic basis to ensure the meaningfulness of classification of publications of particular concern

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

Coherent national standards for classification are fundamental. A national approach would obviate problems associated with the parochial approach that involves inconsistencies in classification and enforcement on the basis of media and jurisdiction.

We suggest that the Committee articulate a national standard for the display of content in physical formats, including –

1 Familiarity with print, video and other representations of heterosexual people/activity does not appear to have 'converted' people with a same-sex affinity and claims that particularly media are particularly powerful or pernicious should be questioned.

magazines, videos and computer games in retail environments

- photographs and other content displayed in cultural institutions

That standard does not mean that offensive material will be made available in shopfronts, newsstands or other venues. Instead, it means that there is consistency across Australia.

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

There are recurrent anecdotal claims in the mass media and in online fora that state law enforcement agencies have been indifferent to the sale of unrated magazines, videos and computer games that feature prohibited content. As a basis for informed policy development and coherent enforcement the Committee may wish to encourage the collection, critical analysis and publication of data regarding such claims. Such activity might be undertaken by the Australian Institute of Criminology or the Australian Law Reform Commission (ALRC). We draw to the Committee's attention the impact of recent substantial cuts in funding of the ALRC, a body that has provided authoritative advice regarding content regulation and other matters of national interest. Reducing the capacity of the ALRC fosters inconsistency across the Australian jurisdictions and 'policy by media release' (often media release in response to headlines).

We also draw the Committee's attention to concerns regarding enforcement of content restrictions in cultural institutions. Those concerns are illustrated by police action regarding an exhibition of works by prominent photographer Bill Henson in a leading NSW commercial gallery. The media circus over that action was reflected in vetting of works by the artist in public collections across Australia. It fed misinformation among law enforcement personnel, the mass media, local government officials and other actors that photography of minors *per se* was offensive and even illegal. Some images of minors are abhorrent and should accordingly be interdicted. It is important, however, not to stigmatise all photography of minors, clothed or otherwise, because an overly broad net will catch most Australians (eg mum and dad taking happy snaps of the toddler in the family paddling pool) and because anxieties about associating with minors may be more deleterious than most photography.

d) **the interaction between the National Classification Scheme and customs regulations**

A preceding paragraph commented that the national scheme is a tool rather than a silver bullet. National involvement in content regulation has been founded on Commonwealth control of broadcasting/telecommunication services and on border control, eg the ability of Australia Post, the Australian Customs Service and other national government agencies to identify and seize prohibited content (from a copy of *Lady Chatterley's Lover* or naughty photos in the baggage of Eugene Goossens) as that content arrived at the border. In the digital era, in which prohibited content can be accessed on the internet or brought in on CD or USB, the Committee needs to consider the value and efficacy of customs attempting to enforce the National Classification Scheme with regard to digital content.

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

The Committee needs to clarify how it defines 'works of art'. Does this refer to visual arts, or to other media that would be considered artistic works, such as novels and other works of creative writing, films, music and video games, as examples.

Australian courts have, appropriately, been reluctant to act as arbiters of artistic merit. We suggest that the Committee should avoid the easy answer of recommending special classification or classification mechanisms based on artistic merit. Classification decisions should be based on content (eg the intensity and gratuitousness of violence) rather than on measures of artistic merit such as the deftness of the screenwriter or the brilliance of the cinematographer. It should not be the function of

the OFLC to articulate and implicitly enforce a particular aesthetic. The history of censorship decisions in Australia over the past 130 years demonstrates that censor perceptions of artistic merit are problematical and for example have frequently been inconsistent with the next generation's recognition of value.

At the same time, aspects of artistic *practice*, as opposed to artistic *merit*, may be relevant considerations in determining questions regarding content, particularly in relation to matters such as the sexualisation of children and the objectification of women (see k below). The techniques that an artist uses can impact how such subjects are rendered and perceived by the viewer. Such matters are, however, related to practice (how the work has been created) rather than merit (whether the work is 'art' or worthy).

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

The past seventy years have seen a large literature, much of which has been characterized as authoritative, regarding the supposed effects of film, television and electronic games on adults and children. Claims regarding the impact on children of depictions of violence, drug taking and sexual activity remain highly contentious. There is no agreement across the medical, criminological and scientific communities about the effect of isolated and recurrent exposure to X18 films on adults or children.

As in the past, the Committee may receive submissions claiming that those films traumatize minors or encourage the sexual abuse of minors by adults and young people. Such claims should be assessed rigorously, given the problematical nature of some research (eg conflation of correlation with causation), the agendas underlying particular claims and the history of past submissions to inquiries that were claimed to be authoritative but in retrospect (as in claims regarding links between comic consumption and delinquency or murder) are recognized as nonsensical.

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

It is appropriate that some content be classified as R18+, with that classification functioning as an advisory for parents/guardians and distributors (eg pay television providers and retailers). We have two comments regarding the rating.

The first is that it is inappropriate to conflate nudity with sexual violence or 'explicit sex'. Such a conflation trivializes sexualized violence.

The second is that the Committee should avoid media exceptionalism, ie should question inconsistency in the rating of content based on different types of media. We have elaborated on this matter later in the submission.

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

We note the separate Committee consideration of outdoor advertising, a communication activity that is pervasive and in practice often unavoidable (eg the consumer can turn off the television or avoid a website but cannot escape the oversized billboard for erectile dysfunction on a major road) and that features the objectification recognized by the Committee as deleterious to individuals and Australian society.

We suggest that on a national basis (through the Standing Committee of Attorneys-General) the states and territories be encouraged to develop a national outdoor advertising strategy in conjunction with industry.

Commitment to state support for a meaningful industry code might be encouraged by tying Commonwealth roads and urban development funding to that code. We note that the outdoor advertising industry, like the commercial broadcasting industry, is dominated by a handful of corporations, two of which are based overseas and operate globally.

i) **the application of the National Classification Scheme to music videos**

Preceding comments noted inconsistencies in the national classification regime at the level of principle and practice. There is no reason to exempt music videos from the regime.

A consistent approach is desirable given that music videos are a major feature of popular culture, are gaining increasing attention as a form of artistic expression, and on occasion involve content that is undesirable. Some music videos for example feature homophobic expression; many objectify young women.

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

In practice the labeling scheme, like most advisories, serves as a subversive recommendation for consumers: labeling as potentially offensive alerts some young buyers that the item has 'street cred' and is not 'vanilla'. That subversive reading is an inevitable consequence of rating in some markets. We endorse the rating of recorded music, noting the desirability of industry responsibility in relation to expression that features ethno-religious, homophobic or other vilification.

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

Overall the Scheme has failed in relation to the sexualisation of children, the objectification of women and the objectification of ethno-religious or sexual affinity groups. Objectification remains a standard feature of much advertising and entertainment, often in a 'soft' form that is so pervasive that it is unrecognised.

The remedies for that objectification essentially lie outside the classification regime: the Committee might encourage advertisers, broadcasters, print publishers and consumers to take greater responsibility about the images they disseminate and endorse. Increased rigour in industry codes, greater resourcing of human rights agencies and strengthening of human rights statutes are measures that are more likely to be effective than tweaking the classifications.

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

ACMA implementation of the Scheme in relation to broadcasters has been broadly effective.

We note perceptions that ACMA, in implementing a co-regulatory regime, is closely aligned with the commercial broadcasters and has been unable – or unwilling – to effectively address abuses such as 'cash for comment'. The capacity and willingness to rescind a licence would concentrate the minds of executives and the handful of individuals or private equity groups that control the industry.

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

We recommend that, in addition to the existing 'classifiable elements' of themes, violence, sex,

language, drug use and nudity set out in the *Guidelines*, the Committee consider the addition of a new element regarding the commercial exploitation of children.

Many games targeted at minors, particularly those downloadable onto mobile phones, iPods, iPads and similar hand-held devices, contain incentives and opportunities for children to spend money to increase gameplay and rewards. As these devices and the downloadable games are linked to mobile phone accounts, credit cards and other automated payment systems, the child can, either knowingly or more often unknowingly, spend large amounts of their own or their parents' money through the game. Many of these games are targeted at children as young as five and are clearly designed to commercially exploit them.

We recommend that the Committee consider the introduction of a classifiable element that would require the OFLC or similar body to evaluate the extent to which a game commercially exploits children. While this may not be a relevant consideration in determining the classification level, it should be included in the consumer advice associated with the game and games with high potential for children to be commercially exploited could be marked with a dollar sign or other symbol.

We believe the need for a classifiable element regarding the commercial exploitation of children is limited to games downloadable in connection with a mobile phone account, credit card or other payment system. Console games, such as those for the PlayStation 3, Wii or X-Box 360, are rarely if ever connected to payment systems, instead relying on a system of pre-paid, platform-specific credit. Similarly, MMOGs rarely facilitate online transactions within the games themselves.

The commercial exploitation of children through downloadable games may be another facet of the widespread targeting of children through telecommunications, which has been the subject of investigation by the Australian Competition & Consumer Commission among other government agencies and that has been effectively addressed through the 'premium service' scheme under telecommunications law. The Committee may wish to consider this dimension of gaming classification within this broader context of regulation and law enforcement.

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

We have no recommendations besides those relating to an R18+ classification for electronic games, the subject of our submission to the ALRC Reference.

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

We strongly recommend that the Committee should explicitly address the 'monster under the bed', ie the role and responsibilities of parents/guardians. Content classification is a blunt regulatory mechanism that should not be construed in isolation. Classification should be regarded as a signal rather than an outcome. If parents or guardians knowingly disregard those signals Australian law arguably provides scope for dealing with negligence that results in harms to minors. Rather than restricting content altogether, on the basis that it may be encountered by minors, it should be rated. It is our contention that parents can and should be held accountable for exposure that harms the people for whom they are responsible.

An enhanced classification system should be developed with regard to a range of factors pertaining to electronic games (aka video games or computer games) in Australia.

of video games as a form of entertainment in Australia is clear. The economic potential of

this industry is evident in the NSW Government's recent announcement of a $4.5 million fund to support innovative digital content projects. Any classification system should enable the industry to flourish, especially in regard to game futures and the possibilities of the National Broadband Network in particular.

- Despite the prevalence of electronic games as a form of entertainment and a form of art, they remain effectively marginalised by established media outlets, particularly print and television. Apart from magazines targeted at gamers and the ABC's *Good Game*, video games receive far less exposure through commercial media channels than other entertainment forms such as books, film, television series and sport. This lack of exposure can be attributed to the threat which video games pose to the market, audience and revenue of established media outlets.
- Consequently, electronic games are relatively absent from dominant cultural discourse within Australia. This has the effect of creating and reinforcing several myths about video games and those who play them.
    - First, there is a prevailing myth that video games are for children, and that adults who choose to play them lack maturity to appreciate other forms of entertainment such as novels or films.
    - Second, treatment of video games within the established media focuses on violence and to a lesser extent sex and drug use, generating popular myths that video games are dominated by these images rather than narrative, character or themes.
    - Consequently, the popular image of the video gamer is a twenty-something male who enjoys first-person shooter games dominated by violence, sex and drug use. In fact, the average age of gamers is 30, and well over 40% are women.
    - Furthermore, rather than being solely concerned with violence, sex and drugs, video games designed for adults involve sophisticated characterisation, an intellectually and emotionally engaged narrative and often moral decision-making. Scholars in textual and cultural studies fields are increasingly attentive to video games, not only as cultural phenomena but also as texts worthy of investigation and analysis in their own right. Video games are becoming recognised as an artform by critics and the academy.

We suggest that the Committee consider electronic games in Australia beyond the image in established media channels and consult widely with gamer communities in forming recommendations regarding the classification system.

Recommendations

In conducting its inquiry the Committee could be guided by the following objectives for content classification.

First, Australia should move towards a coherent regime – one that is consistent across Australiaand is readily understood by stakeholders (eg parents, educators, artists, police, publishers and internet service providers).

Second, Australia should move towards a technologically neutral regime, recognizing that digital media have blurred and will in future increasingly eliminate traditional demarcations between content and media platforms. Past announcements of media convergence were premature (and were indeed questioned by the authors of this submission) but consumer adoption of tools such as the iPad and the 3G mobile phone indicate that the traditional bases of content identification, restriction and enforcement (eg state rating schemes, shrinkwrap around 'adult' magazines and inspections by police of what's under the counter) are increasingly ineffective.

Thirdly, the Committee should emphasise rigorous empirical data rather than merely policy objectives.

Fourthly, the Committee's report should explicitly identify the role of parents/guardians and the significance of community education. In a globally networked environment, irrespective of technological fixes such as national broadband filters and geolocation restrictions, effective content regulation requires the participation of parents. It is not something that can or should be shrugged off as a matter for the state (especially for agencies that are beset by resource constraints and conflicting priorities and that have a punitive ethos). Parental responsibility should be underpinned through an express content regulation component in the national curriculum and its state/territory counterparts.

Yours sincerely

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