



SUBMISSION TO

The Australian Law Reform Commission

Review of the National Classification Scheme

Response to Discussion Paper DP 77

November 2011

The Australian Council on Children and the Media (ACCM) welcomes the opportunity to provide comment to this Inquiry.

This submission has been prepared for the Australian Council on Children and the Media by Prof. Elizabeth Handsley (ACCM President and a specialist in media law as it relates to children), and Barbara Biggins OAM (CEO of ACCM and former Convenor of the Classification Review Board).

The ACCM would welcome the opportunity to expand on the issues raised, at a later date.

For further information, please contact Barbara Biggins at above address.

1. INTRODUCTION

The ACCM is a not-for-profit national community organisation whose mission is to support families, industry and decision makers in building and maintaining a media environment that fosters the health, safety and wellbeing of Australian children.

ACCM has a national Board representing the states and territories of Australia, and a broad membership of organisations and individuals who support its mission.

The ACCM's core activities include the collection and review of research and information about the impact of media on children's development, and advocacy for the needs and interests of children in relation to the media.

More about the ACCM can be found at Appendix 1.

2. THIS SUBMISSION REFLECTS THE FOLLOWING PRINCIPLES

2.1 The International Convention on the Rights of the Child Article 17, viz:

“States Parties recognise the important function performed by the mass media and shall ensure that the child has access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health. To this end, States Parties shall:

- (a) Encourage the mass media to disseminate information and material of social and cultural benefit to the child and in accordance with the spirit of article 29;
- (b) Encourage international co-operation in the production of, exchange and dissemination of such information and material from a diversity of cultural, national and international sources;
- (c) Encourage the production and dissemination of children's books;
- (d) Encourage the mass media to have particular regard to the linguistic needs of the child who belongs to a minority groups or who is indigenous;
- (e) Encourage the development of appropriate guidelines for the protection of the child from information and material injurious to his or her well-being, bearing in mind the provisions of Article 13 and 18."

2.2 The Code under the *Classification (Publications, Films and Computer Games) Act 2005* (Cth):

"Classification decisions are required to give effect to the following principles which are set out in the Code:

- (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, and
- (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."

2.3 Objectives h) and j) of the *Broadcasting Services Act 1992* (Cth), s 3.

- (h) to encourage providers of broadcasting services to respect community standards in the provision of program material; and
- (j) to ensure that providers of broadcasting services place a high priority on the protection of children from exposure to program material which may be harmful to them;

2.4 The Policy Guidelines on Children's Media of the Australian Council on Children and the Media.

3. IN THE PREPARATION OF THIS SUBMISSION, THE ACCM HAS:

- relied on its experience and active involvement in issues related to healthy and safe use of all media
- listened to community concerns about the content of TV, films, publications, games and the internet, and about current classification systems.
- drawn on its ongoing activity of reviewing the current research literature as it relates to the impact of media on children.

4. INTRODUCTION

Generally the ACCM is disappointed in the Discussion Paper and the proposals that it contains. There is very little in the proposals that would help children or parents/carers, and a great deal that detracts from the present system's ability to do so.

What is proposed is a massive deregulation that has not been adequately supported or justified. The justification based on there being too many things to classify is defeatist and shows insufficient recognition of the commission's own 'guiding principle' that 'Children need to be protected from material that is likely to harm or disturb them.'

The Discussion Paper is overly focussed on process (who classifies what) at the expense of substance (the criteria used in classification decisions). In so far as the commission has considered the criteria for classification, it appears to have overlooked the important issue of how one might establish risk of harm or disturbance. Rather its focus has been on 'offence'.

Nor does there appear to be any proposal for a means of ensuring the criteria start out evidence-based and keep up with emerging research on what is likely to harm or disturb children. The proposed regular reviews of community standards can provide an indication only of what is offensive, but not of what risks harming or disturbing children.

The proposals focus heavily on the higher levels of classification, where parents and carers are generally better equipped to protect children. In this respect, along with a number of others, the commission appears to have overlooked our earlier submission.

Other aspects of our submission which the commission appears to have overlooked are:

- classification by independent classifiers, and strengthening regulation where it is currently lacking in effectiveness (Questions 1, 16, 17)
- shifting away from self-regulation for television and addressing inconsistencies in classification time zones (Question 1)
- adjustments of regulation depending on accessibility of platform (Question 3)
- inclusion of art works, music and sound-recordings (Questions 7 and 8)
- ending the exemption for television news and current affairs (Question 11)
- markings required on media-related products (Question 15)
- different criteria for different platforms depending on the experience offered by the platform (Question 22)
- need for input from child development specialists (Question 29)
- mechanism for ongoing education and support for parents and carers (Question 29)
- shift towards restrictions on exploitative depictions of sexuality and gender roles (Question 29)

We note that the Discussion Paper does refer to our submission at para 7.30, and others opposing self-regulation under the same heading "Independence". The Commission concludes that "it is clear that a board or equivalent body with statutory independence from the government and financial independence from industry remains highly valued". However, it provides no reasons for essentially ignoring those points and proposing a large increase in the role of industry classifiers.

The commission's coverage of its 8 'Guiding Principles' is patchy and lopsided. For ease of reference we set them out here:

- (1) Australians should be able to read, hear, see and participate in media of their choice;
- (2) communications and media services available to Australians should broadly reflect community standards, while recognising a diversity of views, cultures and ideas in the community;

- (3) children should be protected from material likely to harm or disturb them;
- (4) consumers should be provided with information about media content in a timely and clear manner, and with a responsive and effective means of addressing their concerns, including through complaints;
- (5) the classification regulatory framework needs to be responsive to technological change and adaptive to new technologies, platforms and services;
- (6) the classification regulatory framework should not impede competition and innovation, and not disadvantage Australian media content and service providers in international markets;
- (7) classification regulation should be kept to the minimum needed to achieve a clear public purpose, and should be clear in its scope and application; and
- (8) classification regulation should be focused upon content rather than platform or means of delivery.

There is a credible attempt to balance Principles (1) and (2), but very little in the Discussion Paper to serve Principle (3); certainly nothing to improve on the current situation in that regard. Principle (4) is not served by a system as complex as the one being proposed, and arguably Principle (5) isn't, either. To the extent that the responsiveness to change is provided by placing decision-making in the hands of industry, it represents once again an abdication of the responsibility to children. The vast majority of the proposals appear to be aimed at serving Principles (6) and (7); though it might be added that the proposals do not create a system that is 'clear in its scope and application'; quite the contrary. Principle (8) does appear to be a recurring theme through the Discussion Paper, but we question how consistent the focus on content, rather than platform, really is.

ACCM finds it puzzling that the Discussion Paper should be so insistent on uniformity of both categories and criteria, but propose such a range of processes for applying them. In ACCM's view it would be more consistent with Principle (4) to have uniform categories and processes, but not necessarily uniform criteria. Criteria are of less concern to consumers.

As previously submitted, criteria should vary depending on the nature of the medium or platform, its accessibility and its capacity to have impact. All consumers really need to know is what the classification is and what the consequence is of that marking (eg that children under 15 can't see the material). It is implicit in this that the marking should be equally reliable at different levels and for different media – which means all classifications done by a single body, using a single process. However there is no need, from a consumer point of view, for the same criteria to lie behind a classification, wherever it appears.

In any case the commission has proposed that the criteria be elaborated on in industry codes for different platforms. In the ACCM's view, this is the same thing as saying that they will *not* be uniform across platforms. There is no functional difference between the criteria and the code-based guidelines, as both feed into the classification decision. If it is acceptable for such divergences to be introduced by industry, it should be acceptable for them to be introduced at the statutory level as well.

ACCM has sought details of the highly sophisticated and effective NICAM system from The Netherlands, and puts them forward here for the commission's consideration.

"In 2001, together with the media-industry (public and commercial broadcasters, the cinema industry, and the retail industry for dvd's –then still video) the Netherlands government decided that by law a new institute - that incorporated the media-industry - should realize a coherent uniform system. The institute

(Netherlands Institute for the Classification of Audiovisual Media) was paid on a fifty-fifty basis by the government and the industry.

“This is co-regulation, because the government partly is responsible for how the system works. Not only do they co-finance, the NICAM has to show every year how they work, how satisfied the public is with the system, and whether the industry has kept to the rules. This audit is done by another government institute: Commissariaat voor de Media (like ACMA in Australia).

“In addition, the classifications are done by the industry itself, but not ad hoc. Instead, an independent commission of scientists has made up a questionnaire by which trained coders in the industry can classify their own productions. The industry at all times is liable for the result of the classification. The questionnaire has been extensively tested and refined to make it highly valid and reliable. By means of this standard questionnaire with as much as possible objective questions about the production, all films (cinema or dvd) and all tv productions are classified in the same manner.

“A third safety-element is that the public can make complaints if they think a media production was not correctly classified. The complaints are handled by an independent complaint commission and they can fine a broadcaster or distributor if indeed they made a mistake.

“By (European) law every member state in Europe has to make sure minors are not confronted with harmful media content. NICAM/Kijkwijzer is a very good solution for the traditional media.

“In Europe for videogames there is the PEGI system (Pan-European Game Information). This system is Europe-wide, self-regulating, and very much based on the age and content classifiers that are used by NICAM/Kijkwijzer (www.pegi.info). PEGI also has a standard questionnaire for the classification process and an independent complaint board.

“The ratings for games sometimes do not fully correspond to the age ratings for film in the case of the same title. PEGI and Kijkwijzer both argue that their age classifications are right, but indeed sometimes the audience may feel that incorrect. Since both use their own classification system and since a game may be different from a movie or TV production it is logical that the age classifications may differ. The view is that effects may differ widely between films and games , for example because a game is experienced actively by the viewer and a movie passively. Therefore, different age classifications may exist.

“What is highly important in addition to transparent and reliable rating systems is

- that the public is well informed about these systems,
- that they have easy access to an independent complaint system, and
- that parents and children are supported to become mediawise.”

(Nikken, Peter 2011, Benders, Wim 2011)

5. THE ACCM'S RESPONSES TO THE ISSUES FOR COMMENT

ACCM uses the ALRC numbering system for its issues and questions.

5. The Proposed Classification Scheme

Proposal 5-1 *A new National Classification Scheme should be enacted regulating the classification of media content.*

Proposal 5-2 *The National Classification Scheme should be based on a new Classification of Media Content Act. The Act should provide, among other things, for:*

1. *what types of media content may, or must be classified;*
2. *who should classify different types of media content;*
3. *a single set of statutory classification categories and criteria applicable to all media content;*
4. *access restrictions on adult content;*
5. *the development and operation of industry classification codes consistent with the statutory classification criteria; and*
6. *the enforcement of the National Classification Scheme, including through criminal, civil and administrative penalties for breach of classification laws.*

The ACCM has no objection in principle, to the passage of an Act covering such matters.

We do not agree with the commission on the importance of uniformity of classifications and criteria for all media content, but then again we do not see any particular difficulty with uniformity, provided that both the classification categories and criteria are evidence-based, meaningful, effective, reflective of media form, and consistently applied.

Uniformity of category name can be justified by the lower potential for public confusion over the meaning of symbols and markings. However it does not follow that the *criteria* underlying every classification need to be the same for all media or platforms. Such uniformity can be justified only if the evidence is that the experience offered by all those media or platforms is the same. In ACCM's view there are sufficient relevant differences to justify a different approach to some different platforms, as the commission recognises in relation to cinema screenings and DVDs. These are quite different experiences, especially for a child, so we support the principle of treating films differently in the two contexts – though not the precise differences proposed by the commission (as to who should classify). Rather we could support different criteria being applied to the two.

A more topical example is the difference between films and interactive games. We are aware that many people believe that this evidence is contested, or inconclusive, but in our view this is the wrong question to ask. The question is whether the evidence is *sufficient* to justify a precautionary approach. Considering the increasing importance of media in children's lives, there is no doubt that such a sufficiency exists.

One practical way of responding to this evidence would be to have a lower minimum restrictive classification for games. For example, even if R18+ were the lowest restrictive classification for films, MA15+ could be made restrictive for games.

The most important and useful uniformity is *uniformity of process* – so that users of the system can be confident that a ‘G’ or an ‘R18+’ means the same thing wherever it appears within a given category of media. This is precisely what the proposals in the Discussion Paper fail to deliver.

Because the list of matters to be covered includes industry codes, we mention now our firm opposition to any increase in the role of industry in classifying material. We are opposed to this in principle, because of the inevitable loss of independence. We also believe that it will be confusing for consumers, and therefore reduce the effectiveness of the system, if the same symbols and markings can result from a variety of different processes (government classification, industry classification under the Act, industry classification under a code of practice).

There is a risk that the apparent uniformity of the system could provide a smokescreen for differences in the way the classification was arrived at.

Proposal 5–3 *The Classification of Media Content Act should provide for the establishment of a single agency (‘the Regulator’) responsible for the regulation of media content under the new National Classification Scheme.*

The ACCM supports the creation of a single agency, with the proviso that the quality quota classifications (C and P) should stay with ACMA. See below for our discussion on these classifications.

Proposal 5–4 *The Classification of Media Content Act should contain a definition of ‘media content’ and ‘media content provider’. The definitions should be platform-neutral and apply to online and offline content and to television content.*

ACCM has trouble understanding the use of this proposal. The definition of a term like ‘media content’ is not important when it appears that different kinds of media content are actually to be treated quite differently in practice –that is, that some will be statutorily classified and some does not have to be. Once again there is the danger that apparent uniformity will mask the reality of a profusion of processes and regulatory consequences.

It is difficult to comment further without knowing just what the definitions are to be.

6. What Content Should be Classified?

Proposal 6–1 *The Classification of Media Content Act should provide that feature-length films and television programs produced on a commercial basis must be classified before they are sold, hired, screened or distributed in Australia. The Act should provide examples of this content. Some content will be exempt: see Proposal 6–3.*

We presume that this proposal means to refer to feature length films and *all* television programs, etc. The concept of “produced on a commercial basis” needs clarification.

We are confused about this proposal, because elsewhere in the commission’s documentation it appears to indicate that the mandatory classification requirement is intended to apply only to films for cinema release and television programs when screened on television (as distinct from, say, sold on DVD).

If this is correct, there is a need to clarify whether such material would automatically carry the same classification (and be required to bear the markings) when released for home entertainment, or whether the distributors would benefit from the considerably greater freedom accorded to these platforms under other proposals.

If the former, this would mean a very patchy and unreliable system in relation to DVDs and similar, and a consequent reduction in its usefulness to consumers. If the latter, questions arise as to consumer confidence in a system where a film might, for example, be rated M in the cinema but not at all on DVD.

If indeed this proposal does extend to all feature films and television programs, the limitation to 'produced on a commercial basis' needs more justification. Non-commercial content can now reach a vast audience, and can be just as harmful. This can be expected to be even more the case in the future.

Proposal 6-2 *The Classification of Media Content Act should provide that computer games produced on a commercial basis, that are likely to be classified MA 15+ or higher, must be classified before they are sold, hired, screened or distributed in Australia. Some content will be exempt: see Proposal 6-3.*

The ACCM has grave reservations about any system that relies on an industry judgment as to the 'likely' classification of a piece of content. The industry decision-maker will have a vested interest in underplaying the impact of the elements.

Such a system might not cause so much concern if there could be a guarantee that the Board or the Regulator would have adequate resources to keep track of all the material released and ensure that industry guesstimates are accurate. Obviously there can be no such guarantee.

If there is to be some kind of threshold for industry to judge, to decide what action, if any, it needs to take, then this should be expressed in very simple and objective terms that do not introduce the circularity of 'likely be to classified'. For example, the threshold might be something like 'contains more than 5% violence'. This would be all the more preferable if, as appears to be the case, the call is to be made by people who are not necessarily authorised industry classifiers.

At the very least, the 'likelihood' criterion should cut in a classification below the restrictive classification – in this case, M. This provides a buffer to increase the likelihood that the material of concern is caught.

Proposal 6-3 *The Classification of Media Content Act should provide a definition of 'exempt content' that captures all media content that is exempt from the laws relating to what must be classified (Proposals 6-1 and 6-2). The definition of exempt content should capture the traditional exemptions, such as for news and current affairs programs. The definition should also provide that films and computer games shown at film festivals, art galleries and other cultural institutions are exempt. This content should not be exempt from the proposed law that provides that all content likely to be R 18+ must be restricted to adults: see Proposal 8-1.*

ACCM is opposed to the continuing exemption of news and current affairs programs. In this regard, our position has not changed since our previous submission on the Issues Paper. This is the content that is of most concern to parents and carers who call our Helpline as it is

frequently distressing for children to see. Especially considering the elasticity of the concept of 'current affairs' these days, such an exemption is unacceptably broad.

Once again, ACCM is opposed to any criterion that relies on an industry judgment as to a 'likely' classification.

Proposal 6-4 *If the Australian Government determines that X 18+ content should be legal in all states and territories, the Classification of Media Content Act should provide that media content that is likely to be classified X 18+ (and that, if classified, would be legal to sell and distribute) must be classified before being sold, hired, screened or distributed in Australia.*

Once again, ACCM is opposed to any criterion that relies on an industry judgment as to a 'likely' classification.

Proposal 6-5 *The Classification of Media Content Act should provide that all media content that may be RC must be classified. This content must be classified by the Classification Board: see Proposal 7-1.*

'May be RC' appears to be a variation on the 'likely to be classified' test to which we have expressed our opposition. We are even more deeply opposed to a proliferation of standards to be applied by those who are making the call as to whether material needs to be classified at all.

This is will only make the system more complex and confusing, and open the way for more mistakes.

The ACCM notes once again that the people making this call will not necessarily be authorised industry classifiers.

Proposal 6-6 *The Classification of Media Content Act should provide that the Regulator or other law enforcement body must apply for the classification of media content that is likely to be RC before:*

1. *charging a person with an offence under the new Act that relates to dealing with content that is likely to be RC;*
2. *issuing a person a notice under the new Act requiring the person to stop distributing the content, for example by taking it down from the internet; or*
3. *adding the content to the RC Content List (a list of content that the Australian Government proposes must be filtered by internet service providers).*

The ACCM has no difficulty with this in principle; indeed it seems to conform to basic requirements of procedural fairness. On the other hand we take it to be implicit in this that the normal procedures would apply for failing to submit the material for classification, if such submission was required.

Proposal 6-7 *The Classification of Media Content Act should provide that, if classified content is modified, the modified version shall be taken to be unclassified. The Act should define 'modify' to mean 'modifying content such that the modified content is likely to have a different classification from the original content'.*

This is yet another proposal that puts it in the hands of industry to judge the ‘likely’ classification, and once again we are opposed to this approach.

Proposal 6–8 *Industry bodies should develop codes of practice that encourage providers of certain content that is not required to be classified, to classify and mark content using the categories, criteria, and markings of the National Classification Scheme. This content may include computer games likely to be classified below MA 15+ and music with explicit lyrics.*

On the one hand this proposal appears innocuous because it does not coerce anybody or give significant power to anybody.

However, the ACCM is deeply concerned at the effect this proposal could have on the credibility of the NCS, if that scheme’s markings can be used by people and bodies who have no accountability at all under the scheme. Effectively, the commission’s proposals add up to a scheme where the markings could mean that the content has been classified by (1) an independent government classifier; (2) an authorised industry classifier; or (3) an unofficial and unaccountable person or group somewhere in the industry. This is simply too broad a range of users and processes to enable the public to feel confident in what the markings actually mean.

In addition, it would be difficult for the average consumer to work out where the classification came from, and therefore where to complain if there were grounds for dissatisfaction.

More generally, the ACCM is sceptical as to the value of fully self-regulatory systems. We have encountered these in other contexts and they generally operate more as public relations for the industry concerned than as genuine consumer protection. Industries simply do not have an interest in putting restrictions on their ability to make money – nor should they. Their job is to maximise their profit and the return to their shareholders. The attraction of self-regulation is that industries can operate under a ‘lighter regulatory burden’ while appearing to be accountable and therefore, in many cases, catching the public unawares, benefiting from a trust that they do not deserve. Representing, as we do, the interests of children as consumers of media, we cannot support any moves in this direction.

7. Who Should Classify Content?

Proposal 7–1 *The Classification of Media Content Act should provide that the following content must be classified by the Classification Board:*

1. *feature-length films produced on a commercial basis and for cinema release;*
2. *computer games produced on a commercial basis and likely to be classified MA 15+ or higher;*
3. *content that may be RC;*
4. *content that needs to be classified for the purpose of enforcing classification laws; and*
5. *content submitted for classification by the Minister, the Regulator or another government agency.*

The ACCM cannot see the justification for excluding games under MA15+ level from the above list.

Proposal 7-2 *The Classification of Media Content Act should provide that for all media content that must be classified—other than the content that must be classified by the Classification Board—content may be classified by the Classification Board or an authorised industry classifier.*

Once again, the ACCM is opposed to any move towards self-regulation. The commission appears to have ignored the warnings in our earlier submission about the loss of independence if industry were given the power to self-classify. Industry classifiers have a vested interest in keeping classifications low to maximise their audience, and cannot be trusted to be objective in their assessment of material.

There has been some experience to date of material being classified first by television broadcasters) and then by the Classification Board when the material is released on DVD. It is not uncommon for the official classification to show that the industry got it wrong. Examples are: children's series *Ben 10* and *Yu Gi Oh* (G on TV and PG on DVD) and series *Underbelly Razor*, and the movie *The Proposition* (both classified M for television and MA15+ on DVD). This does not bode well for the accuracy or reliability of industry classifications under the commission's proposed scheme.

The ACCM takes issue with the notion that the current NCS over-regulates. Classification decisions, when contested, are frequently based on whether the material can be 'accommodated' at the lower level; in other words, they err on the side of low classifications. The ACCM considers that this is justified, in a scheme that operates on the principle that adults should be able to see whatever material they choose.

Moreover, once again, there is a fundamental problem with a system where the consumer sees the same symbols and markings being used by at least 3 different types of classifiers. There is no hope of maintaining consistency and integrity in such a scheme.

Question 7-1 *Should the Classification of Media Content Act provide that all media content likely to be X 18+ may be classified by either the Classification Board or an authorised industry classifier? In Chapter 6, the ALRC proposes that all content likely to be X 18+ must be classified.*

ACCM does not have a major interest in the classification of this material, because it is the kind of material from which the vast majority of parents would be willing and able to protect them in any case. Apparently some abusive parents do show their children X18+ material and in these cases the classification system does not appear to help. On the other hand, we see no reason to believe that industry self-classification would improve matters. Therefore we do not have a strong view on this – other than our general opposition to industry classification.

We think that the system should take as much care with the classification of material likely to be seen/ used by children as with these higher ratings. We are no less uncomfortable, because of our focus on the needs of children, with industry deciding whether a violent game is 'likely to be' classified MA15+ - or indeed with industry deciding the difference between G and PG, even if these classifications are only advisory. They still provide important information to parents, and it is therefore highly important to get them right.

Proposal 7-3 *The Classification of Media Content Act should provide that content providers may use an authorised classification instrument to classify media content, other than media content that must be classified.*

It is not clear to us what form this 'classified instrument' would take. However it is difficult to imagine a scheme allowing the use of its symbols and markings by untrained people who have simply used an 'instrument' having the requisite level of reliability, consistency or integrity.

ACCM is opposed to any suggestion that industries should develop their own instruments.

Proposal 7-4 *The Classification of Media Content Act should provide that an authorised industry classifier is a person who has been authorised to classify media content by the Regulator, having completed training approved by the Regulator.*

If industry classifiers are to be introduced, it would be preferable for them to work in panels of at least three, rather than as individuals.

Proposal 7-5 *The Classification of Media Content Act should provide that the Regulator will develop or authorise classification instruments that may be used to make certain classification decisions.*

ACCM considers that the criteria and the process by which they are applied and by whom are a critical part of a consistent and reliable classification process. These elements must be under control of the regulator, and not allowed to be fragmented among the range of media industries.

Question 7-2 *Should classification training be provided only by the Regulator, or should it become a part of the Australian Qualifications Framework? If the latter, what may be the best roles for the Board, higher education institutions, and private providers, and who may be best placed to accredit and audit such courses?*

ACCM does not have a firm view on this, but the question raises the spectre of there being a considerable number of authorised classifiers. The more there are, the greater the danger of inconsistency and of dilution of quality in the system.

Proposal 7-6 *The Classification of Media Content Act should provide that the functions and powers of the Classification Board include:*

- 1. reviewing industry and Board classification decisions; and*
- 2. auditing industry classification decisions.*

This means the Classification Review Board would cease to operate.

ACCM's view is that these proposals do not provide strong enough safeguards in the event that industry takes over some classification functions. From the Discussion Paper it appears that the only checks being proposed on industry regulators are 'routine post-classification audits' that would not correct decisions but rather enable the classification board to manage 'repeated and continuing problems'. In any case these would apply only to 'content that must be classified'. This envisages considerable damage being done, and considerable dereliction of the duty to protect children, before any action was taken. And even then, it is not guaranteed that 'routine' audits would take place.

Re the Classification Review Board's cessation of operation, ACCM is of the view that there still needs to be a body to review the decisions of the Classification Board.

Proposal 7–7 *The Classification of Media Content Act should provide that the Regulator has power to:*

1. *revoke authorisations of industry classifiers;*
2. *issue barring notices to industry classifiers; and*
3. *call-in unclassified media content for classification or classified media content for review.*

8. Markings, Advertising, Display and Restricting Access

Proposal 8–1 *The Classification of Media Content Act should provide that access to all media content that is likely to be R 18+ must be restricted to adults.*

Using the ‘likely to be’ test is even more problematic in the context of restrictions on access than in the context of deciding whether to seek classification. It means, in effect, that the call is down to every DVD hire store operator. It does not appear to be proposed that these people all become authorised classifiers.

Proposal 8–2 *The Classification of Media Content Act should provide that access to all media content that has been classified R 18+ or X 18+ must be restricted to adults.*

ACCM agrees with this proposal.

Proposal 8–3 *The Classification of Media Content Act should not provide for mandatory access restrictions on media content classified MA 15+ or likely to be classified MA 15+.*

The ACCM is surprised at this proposal. There has been no demonstrated difficulty with the current restrictions on MA15+ material. This proposal runs directly contrary to the guiding principle of protecting children from material likely to harm or disturb them.

Proposal 8–4 *The Classification of Media Content Act should provide that methods of restricting access to adult media content—both online and offline content—may be set out in industry codes, approved and enforced by the Regulator. These codes might be developed for different types of content and industries, but might usefully cover:*

1. *how to restrict online content to adults, for example by using restricted access technologies;*
2. *the promotion and distribution of parental locks and user-based computer filters; and*
3. *how and where to advertise, package and display hardcopy adult content.*

There is no evidence of a need to leave these things up to industry – especially the last one. A growing reliance on the community to protect themselves assumes all individuals to have sufficient understanding of the risks of harm and having the resources to take protective action. (See further argument at Livingstone 2011). Such an assumption cannot be supported in modern Australian society, especially where people get so much of their information from the very industries against which they need to protect themselves.

Question 8–1 *Should Australian content providers—particularly broadcast television—continue to be subject to time-zone restrictions that prohibit screening certain media content at*

particular times of the day? For example, should free-to-air television continue to be prohibited from broadcasting MA 15+ content before 9pm?

Yes. Television is still an important medium in children's lives, and is still the medium most used by young children. (ACMA 2011, Ofcom 2011, Commonsense Media 2011) and any system that is serious about protecting them will include just this kind of restrictions.

Proposal 8-5 *The Classification of Media Content Act should provide that, for media content that must be classified and has been classified, content providers must display a suitable classification marking. This marking should be shown, for example, before broadcasting the content, on packaging, on websites and programs from which the content may be streamed or downloaded, and on advertising for the content.*

Such "suitable" markings and their placement should be set by the regulator.

Proposal 8-6 *The Classification of Media Content Act should provide that an advertisement for media content that must be classified must be suitable for the audience likely to view the advertisement. The Act should provide that, in assessing suitability, regard must be had to:*

1. *the likely audience of the advertisement;*
2. *the impact of the content in the advertisement; and*
3. *the classification or likely classification of the advertised content.*

The ACCM is pleased to see a proposal that focusses on the actual audience and the content, rather than the intent of the maker or distributor of the content. The same principle should be applied throughout the new NCS.

9. Classification Categories and Criteria

Proposal 9-1 *The Classification of Media Content Act should provide that one set of classification categories applies to all classified media content as follows: C, G, PG 8+, T 13+, MA 15+, R 18+, X 18+ and RC. Each item of media content classified under the proposed National Classification Scheme must be assigned one of these statutory classification categories.*

The ACCM is pleased to see that in this regard the commission appears to have taken up our suggestion in our previous submission that the classifications follow developmental stages more closely.

However, the ACCM has strong reservations about the inclusion of 'C' in this list. The current 'C' classification is not really a classification, in the sense that G, PG and so on are. It is a guarantee of quality, devised for the purpose of enabling broadcasters to fill a quota. It is not a finely-tuned measure for saying whom the material is suitable for. C material can be PG, and is therefore not always suitable for all children.

It is not clear from the proposals whether the intention is to take over the ACMA's C classification, or to add a different C classification for the purposes of advising parents as to the suitability for children of a range of material. Noting the absence of 'P' (pre-school, the

other category from the Children's Television Standards) from the list, we infer that it is latter, but it is still not clear.

If the former, we are deeply concerned at the loss of the quality criteria. These may be imperfect but they still serve a useful function in ensuring that broadcasters fulfill their responsibility towards the child audience, and in assuring parents that the material is not just made for children but will enhance their children's experience.

If the latter, we see an unacceptable opening for confusion, where C means quality in some contexts, and simply 'made for children' in others. In any case, we see the advice that material is made for children as singularly lacking in usefulness for parents and carers. The subjective state of mind of the maker of the material is of little or no interest in determining the suitability of the material. This is particularly so if the classification is to be non-mandatory and self-administered by industry.

In our submission, the C classification should be omitted from this scheme altogether, and left for ACMA to administer in the same way it has always done. We note that the ACMA requirements have been in place for 30 years precisely because the industry has shown little interest in providing quality TV content "specifically made for children", without regulation.

As to the other classifications, we note that there is little in the Discussion Paper about what the criteria for these will be. Therefore we cannot comment on them. This is disappointing, because in our view the criteria for the different classifications, especially the lower classifications, are of prime importance in a system that aims to protect children from material likely to harm or disturb them.

In any case, we reiterate our view that the criteria need to be based on the best research evidence about what harms or disturbs children. This should not include research that is based on a premise that media experiences cannot harm or disturb children. If the system adopts the need to protect children from such experiences as a principle, and the public expects the system work in that way, it is inappropriate for those contributing to it to question the principle itself.

Reading the Discussion Paper as whole, we are left in some doubt as to whether the commission fully accepts the principle. Certainly it is disappointing to see the low representation on the Advisory Committee of people with expertise and a primary interest in children's well-being. We note that all of the government representatives are from agencies primarily concerned with media regulation, and not from health, or education, or anything to do with children's interests. There are no fewer than 6 members representing industry interests directly and two others whose credentials indicate expertise in the business of media production and distribution, but not in children's needs. Of the remaining two, one has strong ties to the computer games industry.

We do not mean to impugn the contribution that any of these people might make to the inquiry, but an inquiry with such a low representation of children's interests on its Advisory Committee does not appear to be putting much emphasis on those interests.

More generally we find that the Discussion Paper shows very little evidence of considering children's need for protection from harmful or disturbing material. Even where the potential for harm or disturbance is recognised, as for example in relation to MA15+ games, the commission backs away from making a proposal to provide protection. Instead, the commission cites the difficulty of preventing under-15s from accessing the material – as if the impossibility of a law being 100% effective is a reason not to have the law at all.

The fact is that no law is 100% effective. Yet in other areas we do the best we can to use law to improve the situation. Nobody argues that, just because some houses still get burgled, there should be no law against burglary. Media regulation is no different: just because MA15+ games will still be accessed by under-15 year olds is no reason to remove all restrictions.

We are perplexed by the statement in Chapter 8 that ‘In the ALRC’s view, some content providers should continue to refuse to sell or admit young unaccompanied minors to these films and computer games, even if they are not required by law to do so.’ If it is acceptable to expect ‘some’ people voluntarily to block access, then it must be acceptable for the regulatory system itself to block access.

In any case we cannot help but wonder who these content providers would be – who would make a decision that was so clearly against their commercial interests? – and why they ‘should’ refuse to sell to or admit part of what would otherwise be their legal client base. Once again the commission is recognising there is a problem here that needs to be addressed, but it has not made a credible proposal to address that problem.

Proposal 9–2 *The Classification of Media Content Act should provide for a C classification that may be used for media content classified under the scheme. The criteria for the C classification should incorporate the current G criteria, but also provide that C content must be made specifically for children.*

See our comments above about the C classification. Once again, the subjective intent of the maker of the material is not relevant information from the point of view of parents and carers when choosing material for children.

We are aware that some ‘G’ material is of no interest to children, but we suggest that producers and consumers are well able to convey messages about the intended audience through marketing, packaging and so on. In any case, if a parent erroneously chooses for a child G material that is of no interest to children, there is no risk of harm or disturbance to the child. This should be the system’s primary concern.

Moreover, we need more information about how this classification would relate to the existing C classification under the Children’s Television Standards and we see a risk of dilution of quality and/or confusion.

Proposal 9–3 *The Classification of Media Content Act should provide that all content that must be classified, other than content classified C, G or RC, must also be accompanied by consumer advice.*

In the Discussion Paper, the commission indicates that consumer advice would still be encouraged on G items, ‘whenever content may raise issues for young children’. In ACCM’s view, no material that raises such issues should qualify for the G classification. Rather the G classification should be reserved for material where no consumer advice is *needed*.

Proposal 9–4 *The Classification of Media Content Act should provide for one set of statutory classification criteria and that classification decisions must be made applying these criteria.*

ACCM agrees that one set of categories is desirable to reduce public confusion, but does not agree that the same set of criteria is adequate to assess all forms of media experience.

Proposal 9–5 *A comprehensive review of community standards in Australia towards media content should be commissioned, combining both quantitative and qualitative methodologies, with a broad reach across the Australian community. This review should be undertaken at least every five years.*

The ACCM has no difficulty with this, but wonders why there is no similar proposal in relation to keeping up to date with research evidence on the implications of media for the health, development and well-being of children. In our view, community standards should have only a minor role in the shaping of the classification system and its criteria. This is because they can only be informative as to matters such as what is ‘offensive’ and this will always be at least partially subjective. In addition, the community is diverse and amorphous and we wonder how meaningful the concept of it holding ‘standards’ can ever be.

Moreover, community standards are of necessity shaped by the material that has been available. The community might become inured to certain kinds of material without there being any change to that material’s potential to harm or disturb children.

10. Refused Classification Category

Proposal 10–1 *The Classification of Media Content Act should provide that, if content is classified RC, the classification decision should state whether the content comprises real depictions of actual child sexual abuse or actual sexual violence. This content could be added to any blacklist of content that must be filtered at the internet service provider level.*

As a children’s advocacy organisation, the ACCM is primarily concerned with the lower classifications, but at the same time we recognise that there is some risk to children of exposure to material that might be considered for the RC category and that in such cases the risk of harm or disturbance is high.

The ACCM does not believe that the commission has justified the singling-out of child sexual abuse and sexual violence for addition to the blacklist. Surely, in principle, any material that is judged to be RC should be on the blacklist. Material that incites or instructs in matters of crime or violence (especially terrorism) is another category that meets many of the criteria listed.

11. Codes and Co-regulation

Proposal 11–1 *The new Classification of Media Content Act should provide for the development of industry classification codes of practice by sections of industry involved in the production and distribution of media content.*

It is difficult to comment on this without having access to further detail about what the role of the industry codes of practice would be and how they would interact with the statutory regulations. However it sounds like what is being proposed is a co-regulatory system similar to that which is currently in place for commercial broadcasting. In that case the ACCM would like to make the following observations about that system.

First it is horribly complicated. Because responsibility is spread over so many different agencies and participants, it is practically impossible for an aggrieved consumer to work out to

whom any complaint should be addressed. This is especially disappointing in a system that relies so heavily on consumer complaints for its functioning. Yet the broadcasting industry relies on the absence of complaints as evidence that the system is working well and nobody has any concerns.

Second, the Code of Practice itself is difficult to follow and make sense of, considering, for example, its frequent cross-references. This is not surprising, considering it is not drafted by professional legislative draftspersons. In the most recent review, the ACCM raised with Free TV Australia a difficulty relating to the promotion of M and MA15+ programs, and we were assured that it was a simple drafting problem and would be rectified. It was not.

Third, the system has an inbuilt tendency to liberalise itself. The last two reviews of the Free TV Code of Practice have included major relaxations of the rules relating to things such as the G and PG time zones and the promotion of material outside its time zone. The ACMA has been unwilling or unable to disallow these changes.

On the other hand, Free TV Australia had the opportunity in the Code's last review to respond to community concerns about the highly sexualised content in video clips by reviewing the way they are classified. This was a recommendation of the Senate Standing Committee on Environment, Communication and the Arts following its 2008 inquiry into sexualisation of children in the media. Free TV Australia made no change at all in response to this recommendation; and again, this does not appear to have been questioned by the ACMA when making the decision whether to register the Code.

Overall our experience of industry codes is that they operate mostly as public relations for the industry in question. They make it look like they are doing something, but in fact their main function is to make the industry look better. Industries do not voluntarily stop doing things they otherwise want to do – especially things that make them money. Nor should they be expected to do so. They are businesses and they need to maximise their profits. What they are willing to do is to engage clever consultants who can finesse the rules in the codes to look impressive while not preventing the industry from doing the things it wants to do.

If limits are needed on industry in the public interest, those limits should be imposed by public institutions.

Proposal 11–2 *Industry classification codes of practice may include provisions relating to:*

- 1. guidance on the application of statutory classification obligations and criteria to media content covered by the code;*
- 2. methods of classifying media content covered by the code, including through the engagement of accredited industry classifiers;*
- 3. duties and responsibilities of organisations and individuals covered by the code with respect to maintaining records and reporting of classification decisions and quality assurance;*
- 4. the use of classification markings;*
- 5. methods of restricting access to certain content;*
- 6. protecting children from material likely to harm or disturb them;*
- 7. providing consumer information in a timely and clear manner;*
- 8. providing a responsive and effective means of addressing community concerns, including complaints about content and compliance with the code; and*

9. *reporting to the Regulator, including on the handling of complaints.*

The ACCM is a little perplexed as to the point of legislation providing what codes of conduct 'may' include. Does this mean that the relevant industry bodies would not be allowed to include any other matter?

In any case, if an industry code contained any or all of this, presumably the provisions would be different from what guides the government classifiers. This would simply make for a more inconsistent and confusing system.

Proposal 11-3 *The Regulator should be empowered to approve an industry classification code of practice if satisfied that:*

1. *the code is consistent with the statutory classification obligations, categories and criteria applicable to media content covered by the code;*
2. *the body or association developing the code represents a particular section of the relevant media content industry; and*
3. *there has been adequate public and industry consultation on the code.*

Once again this echoes the co-regulatory system for commercial broadcasting. As indicated above, we have been disappointed at the level of scrutiny provided by the ACMA in the last two reviews of that code. In particular, it seems that 'adequate public and industry consultation' consists of inviting and receiving comments, but not necessarily taking notice of them. We were particularly concerned at the way the last review presented the public with a draft revised code and invited comment on that. This method tends to shut down any broader public discussion on what the code should contain.

Proposal 11-4 *Where an industry classification code of practice relates to media content that must be classified or to which access must be restricted, the Regulator should have power to enforce compliance with the code against any participant in the relevant part of the media content industry.*

In the ACCM's submission, if it is acceptable for the government to enforce compliance with the rules, it should be acceptable for the government to make the rules.

12. The New Regulator

Question 12-1 *How should the complaints-handling function of the Regulator be framed in the new Classification of Media Content Act? For example, should complaints be able to be made directly to the Regulator where an industry complaints-handling scheme exists? What discretion should the Regulator have to decline to investigate complaints?*

The ACCM supports anything that can streamline the system and make it consistent and easy for the public to understand. This applies particularly to knowing where to complain. For this reason we support provision for direct complaint to the regulator.

More generally, our opposition to industry self-regulation extends to industry complaint-handling. While such procedures can on occasion have an educational benefit for industry, generally they are carried out with a defensive frame of mind – as is only to be expected considering the industry is needing to rule on a decision that it, itself, has made.

Generally these systems are a waste of time and money, and the resources would be better channelled towards a proper, independent government regulator.

Proposal 12–1 *A single agency ('the Regulator') should be responsible for the regulation of media content under the new National Classification Scheme. The Regulator's functions should include:*

1. *encouraging, monitoring and enforcing compliance with classification laws;*
2. *handling complaints about the classification of media content;*
3. *authorising industry classifiers, providing classification training or approving classification training courses provided by others;*
4. *promoting the development of industry classification codes of practice and approving and maintaining a register of such codes; and*
5. *liaising with relevant Australian and overseas media content regulators and law enforcement agencies.*

In addition, the Regulator's functions may include:

6. *providing administrative support to the Classification Board;*
7. *assisting with the development of classification policy and legislation;*
8. *conducting or commissioning research relevant to classification; and*
9. *educating the public about the new National Classification Scheme and promoting media literacy.*

13. Enacting the New National Classification Scheme

Proposal 13–1 *The new Classification of Media Content Act should be enacted pursuant to the legislative powers of the Parliament of Australia.*

Proposal 13–2 *State referrals of power under s 51(xxxvii) of the Australian Constitution should be used to supplement fully the Parliament of Australia's other powers, by referring matters to the extent to which they are not otherwise included in Commonwealth legislative powers.*

14. Enforcing Classification Laws

Proposal 14–1 *The new Classification of Media Content Act should provide for enforcement of classification laws under Commonwealth law.*

Proposal 14–2 *If the Australian Government determines that the states and territories should retain powers in relation to the enforcement of classification laws, a new intergovernmental agreement should be entered into under which the states and territories agree to enact legislation to provide for the enforcement of classification laws with respect to publications, films and computer games.*

Proposal 14–3 *The new Classification of Media Content Act should provide for offences relating to selling, screening, distributing or advertising unclassified material, and failing to comply with:*

1. *restrictions on the sale, screening, distribution and advertising of classified material;*
2. *statutory obligations to classify media content;*
3. *statutory obligations to restrict access to media content;*
4. *an industry-based classification code; and*
5. *directions of the Regulator.*

Proposal 14–4 *Offences under the new Classification of Media Content Act should be subject to criminal, civil and administrative penalties similar to those currently in place in relation to online and mobile content under sch 7 of the Broadcasting Services Act 1992 (Cth).*

Proposal 14–5 *The Australian Government should consider whether the Classification of Media Content Act should provide for an infringement notice scheme in relation to more minor breaches of classification laws.*

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APPENDIX 1

ABOUT US: THE AUSTRALIAN COUNCIL ON CHILDREN AND THE MEDIA

The ACCM is a peak not-for-profit national community organisation whose mission is to support families, industry and decision makers in building and maintaining a media environment that fosters the health, safety and wellbeing of Australian children.

Its patrons are Baroness Susan Greenfield and Steve Biddulph.

The ACCM has a national Board representing the states and territories of Australia, and a broad membership of organisations and individuals who support its mission.

ACCM membership includes ECA (Early Childhood Australia), ACSSO (Australian Council of State Schools Organisations), AHISA (Association of Heads of Independent Schools of Australia), AEU (Australian Education Union), APPA (Australian Primary school Principals Association), Parenting Research Centre, SAPPA (South Australian Primary Principals Association), Federation of NSW P&C (Parents & Citizens), and the Council of Mothers' Union in Australia.

The ACCM's core activities include the collection and review of research and information about the impact of media on children's development, and advocacy for the needs and interests of children in relation to the media.

The ACCM's core services include:

- the national freecall 24/7 Children and Media Helpline (1800 700 357);
- the ACCM website www.childrenandmedia.org.au containing evidence based information about media and children (attracting over 1000 visits per day);
- the award-winning, popular *Know before you go* child-friendly movie review service (now with more than 600 movie reviews);
- the development of parent media awareness materials,
- making submissions and participating in media interviews related to media regulation.

The ACCM's current issues include the efficacy of classification systems in the protection of children; early s*xualisation of children in and by the media; the impacts of media violence; the marketing of violent entertainment and junk foods to the young; management of screen time and content by the very young, quality of programs for children.

The ACCM's programs are lead by a team of expert volunteers, supported by a small paid staff. Its programs are supported by project grants and much volunteer input.

The ACCM's awards include National Community Crime Prevention awards 2009, 2006; 2001; National Child Protection 2005.

The ACCM is a structured as a company limited by guarantee. Its ABN is 16 005 214 531. The organisation is registered for GST, and has DGR and ITEC status.