CHILDREN & MEDIA AUSTRALIA

Thriving in a digital world

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Director - Classification Reform
Online Safety, Media and Platforms Division
Department of Infrastructure, Transport, Regional Development, Communications and the Arts
GPO Box 594
CANBERRA ACT 2601

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SUBMISSION IN RESPONSE TO PUBLIC CONSULTATION PAPER: MODERNISING AUSTRALIA'S CLASSIFICATION SCHEME – STAGE 2 REFORMS

Thank you for the opportunity to provide input to the development of these very important reforms.

Children and Media Australia (CMA) has a long history of engaging with, analysing and critiquing the National Classification Scheme (NCS), and is pleased to see these very positive and substantive proposals. In our estimation they have the potential to bring about real improvements to the Scheme.

CMA 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. CMA membership includes ECA (Early Childhood Australia), ACSSO (Australian Council of State Schools Organisations), APPA (Australian Primary School Principals Association), AHISA (Association of Heads of Independent Schools Australia), the AEU (Australian Education Union), the Australian Children's Television Foundation, the Parenting Research Centre, the Council of Mothers' Union in Australia, SAPPA (South

Children and Media Australia
PO Box 1240, Glenelg South SA 5045
61 8 83762111 61 8 83762122
info@childrenandmedia.org.au
www.childrenandmedia.org.au

Australian Primary Principals Association), and other state-based organisations and individuals.

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

In its work, CMA is always guided by child development research and by the UN Convention on the Rights of the Child (CRC). The Convention has widespread acceptance throughout the international community, with more signatories than any other international agreement. Australia has obligations under the Convention in any case, but CMA submits that the strong acceptance of the norms it embraces should provide a further impetus for the Government to look closely at the provisions of the Convention and use them to shape the National Classification Scheme.

Research evidence can keep us mindful of important facts such as children's passage through different stages of development, with strengths and vulnerabilities evolving over time; and not coincidentally, the Convention, too, recognises children's evolving capacities as an important principle:

> States Parties shall respect the responsibilities, rights and duties of … persons legally responsible for the child, to provide, *in a manner consistent with the evolving capacities of the child*, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention. (article 5; emphasis added)

Regarding media use, article 17 is most obviously salient:

> States Parties recognize 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, 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 group 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 articles 13 and 18.

Article 13 lays down the child's right to freedom of expression, and to seek and impart information, subject to certain limits. Article 18 recognises the role of parents, and places an obligation on States to support them in their child-rearing:

2. For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall *render appropriate assistance* to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children. (emphasis added)

The provision of accurate classification information is an important aspect of this assistance, especially in modern times when the role of media consumption in children's lives is bigger than ever, and continuously growing.

CMA draws your attention particularly to the requirement in article 17 to encourage the development of guidelines to protect children from injurious content (para (e)). There is ample evidence to suggest that 'injurious' in this context should be read to include violent and scary content, and that which can be implicated in the grooming of children as future gamblers (for example games with loot boxes). It is also arguable that the term should be seen as encompassing content that is designed to maximise engagement, and make disengagement difficult – that is, what is known as 'persuasive design'.

Article 17 is known to have been the subject of a complicated negotiation process, where some states parties wanted stronger protection and some wanted weaker (Tobin and Handsley, 2019). CMA suggests that if the Convention had been negotiated in the 2020s instead of the 1980s, article 17 would have looked significantly different, due to the massive growth in significance of mass media activities over the intervening years. (For example, the concept of 'mass media' would have given way to one that more clearly includes user-generated content,

social media and online influencers.) In any case, the Committee on the Rights of the Child has recently gone some way towards filling the gap with its *General comment No. 25 on children's rights in relation to the digital environment* (GC25). CMA commends that document to you, and urges you to look closely at all that it has to say. We draw your attention, in particular, to:

- the need to have regard to up-to-date research from a range of disciplines in designing age-appropriate measures in keeping with the principle of evolving capacities;
- the discussion of the role of the business sector (especially significant given the way article 17 is phrased); and
- the link to other rights such as health and welfare, education, and leisure and play.

In short, the message, not just from GC25 but from many who have a profound understanding of children's rights, is that children have a right to access digital services, but to do so safely – that is, in ways which do not undermine their healthy development. The NCS should include measures to make this a reality, including legislation and regulation, but also the allocation of resources to support parents and carers in using the NCS recommendations in their own local context.

While the rights laid down by the Convention are binding on signatory governments, they are now coming to be recognised as general norms for appropriate behaviour by private corporations and individuals where children's interests are concerned. In particular, the *Children's Rights and Business Principles* provide that businesses should:

> 1. Meet their responsibility to respect children's rights and commit to supporting the human rights of children;
> 4. Ensure the safety and protection of children in all business activities and facilities; and
> 5. Ensure that products and services are safe, and seek to support children's rights through them.

As the NCS necessarily requires the compliance of a range of businesses for the protection of children's rights and interests, its further development should be

informed by these norms. This is particularly so considering the (relatively new, and likely to be expanded) role of businesses in classifying their own content.

This submission has been written by President, Professor Elizabeth Handsley, and Hon CEO, Barbara Biggins OAM. We would be happy to be consulted further on the views put forward here.

Preliminary comments on these proposals

As the Discussion paper rightly states: 'Australians need to have confidence in the classification system as a trusted source of information to guide their choices regardless of platform' (p 8). **This should be the key objective of these reforms.**

To achieve this objective, there needs to be systematic analysis to determine what sort of system, structure and components are required. The objective will not be achieved without such analysis.

1. If users, and parents and carers of children who are users, of screens, games and publications are to have confidence and trust in a classification system, it needs to:
   - be evidence-based, utilising the latest research on potential harm (especially to children, across their age-ranges), plus identifying the types of content likely to cause significant offence to adults;
   - produce outputs that are useful for all users;
   - enable outputs to be produced comprehensively and in a timely fashion;
   - be responsive to feedback on these outputs, and be able to act swiftly on such feedback; and
   - be a single system which is uniformly applied to all screen platforms and publications in Australia.

2. If the screen, game and publication industries are to be willing and able to apply such a classification system, it needs to:
   - produce information that consumers need, in a timely fashion;

- cope with large numbers of products needing to be classified;
- provide tools that enable, via a process based on evidence, objective assessments by trained classifiers;
- provide training to industry classifiers in the use of the tools;
- incorporate quality assurance processes;
- ensure that the tools are capable of application as an online process.

It is evident that the present Scheme lacks many of these components. Presently, classification in Australia:

- involves a range of codes, guides and tools for classification used by national and commercial broadcasters, pay TV, Clearads (for commercials), IARC and some streaming services and online stores;
- lacks a clear evidence base developed using current relevant research;
- lacks any components that could provide such a base;
- lacks a sufficient quality assurance process;
- is unable to respond to complaints, to new developments or to research in a timely fashion;
- allows some platforms to use their own classification scheme; and
- lacks a process for regular reviews of consumer satisfaction with the system.

Systematic analysis of the above objective, consumer needs and required outputs, along with a need for all the disparate components of such a system to work together to achieve the objective, leads to the conclusion that this is best achieved by the establishment of a single regulator.

The regulator needs to be advised by a scientific committee which:

- has the expertise to review the relevant research;
- is tasked with advising on the development and periodic review of a set of classification categories and criteria that reflect that research; and
- advises on the development and review of an online tool for each of films, games and publications. (Tool = a set of research-based factors for

consideration when establishing each classification category and the associated criteria, and which are incorporated into software used by trained assessors to produce the relevant classification for each product).

The regulator must also:

- be responsible for the facilitation of use (via training) and quality control of the application of the tool;
- be able to receive and rapidly review all complaints about classification decisions across all media platforms; and
- regularly review consumer satisfaction with the system.

CMA anticipates that such reform could open the way to great improvements to the present NCS as a system and as to the benefits it can deliver to the Australian people.

Responses to Questions

Purpose and scope of the National Classification Scheme

1. Are the guiding principles set out in the Code still relevant in today's media environment?

   CMA supports the retention of the current principles as these refer to basic values and needs which have not changed, even if the media environment has. Indeed, it may be more important than ever to provide this kind of firm foundation so that all concerned can keep their eye on the reason we want to classify content.

   CMA notes further that children's developmental needs have not changed, even if content and delivery mechanisms have. Therefore we would suggest including a statement to this effect in the NCS's official documents, again to ensure that decision-makers do not lose sight of the fact.

2. Do you support the proposed criteria that defines what material should be classified under the Scheme?

   CMA interprets the CP as indicating that the three criteria set out in dot points on p 9 are cumulative requirements, that is, that material will be classifiable only if it

satisfies all three. If this interpretation is correct, we see it as unfortunate and would prefer to see some flexibility regarding content that satisfies only two or even one of the criteria. There is a need to balance between principle (the content about which Australians *should* have information from our government, and the parties who *should* be expected to consider our interests in producing and disseminating their content) and pragmatism (the content we *can realistically* be informed about and the parties we *can realistically* regulate). All of this could be captured in the regulatory instruments with a statement of a general guiding principle that the regulator could fall back on when strict application of criteria risks leading to an unforeseen or undesired result.

The need for flexibility and reference to underlying principles is all the greater because the proposed criteria could be easily circumvented or gamed by distributors, especially the third one (directed at an Australian audience). We have seen similarly worded criteria in other contexts (eg advertising regulation) used in a way that introduces a severe restriction into the scheme in question, for example where an ad that will catch the attention of children is not seen as 'directed at' them because it would also appeal to adults. It would be very simple for a distributor to set up a business model to take advantage of this kind of logic (where content is directed at Australia, but also at other countries).

We understand the potential difficulties associated with being seen as the 'world's police', especially following recent events involving the eSafety Commissioner and a major social media platform. However, if material meets the other two criteria and it is available in Australia, then a requirement to classify it may well be justifiable.

Similarly, we foresee the development of practices or business models to enable professional creators or commercial distributors plausibly to claim that content is not 'professionally produced' or 'distributed on a commercial basis'. The new regulations should include a way of heading these off.

The CP refers a few times to 'user-generated content', which we take to mean the opposite of 'professionally produced' content. We suggest avoiding the former expression as it could mislead. For example, there may be (and are) professional producers of content who are 'users' of platforms in the sense that

they disseminate their content there in the same way as private individuals would. If our understanding of the point of the expression 'user-generated' is correct, it may be more accurate and helpful to refer to 'amateur' or even 'non-professionally produced'.

Regarding graphic novels, CMA supports in principle the idea of bringing these under greater scrutiny by the NCS as they do have an inherent appeal to children and young people. However it is not clear from the CP what kinds of reforms are being considered. We would welcome the opportunity to comment on any specific proposals.

3. Are there any other issues with the current purpose and scope of the Scheme that should be considered?

CMA has been unable to locate any issues raised in the CP regarding the purpose of the Scheme.

Broadly, taking the statement of Principles in s 1 of the National Classification Code as the clearest indication of the Scheme's purpose, CMA is satisfied with the way it lists a number of different matters, some of which might pull in different directions at times. However, we can suggest four ways of improving that statement.

First, there should be a clear statement of the overall objective for which we argued above, namely to provide Australians with a trusted source of information in which they can have confidence to guide their content choices regardless of platform.

Second, to gain the full benefit of the introduction of research evidence under these reforms, that evidence should be explicitly mentioned in s 1. Therefore, we would favour a rewording of paragraph (b) to say, for example, 'minors should have the benefit of evidence-based protections from material likely to harm or disturb them'.

Third, the statement should directly confront the likely tensions between the different principles, and spell out a way for decision-makers to address that tension. Ideally, from our perspective, this would involve giving greater weight to the protection of children, but even a general statement of the need to balance the principles against each other to achieve the overall objective mentioned above would go some way towards clarifying the role of the different principles listed in s 1.

Fourth, there is some evidence that decision-makers under the Scheme take other matters into account in reaching classifications, for example the interests of industry (Handsley and Warburton, 2021). CMA submits that s 1 should make it clear that the list there is exhaustive.

4. Do you support changes to the definition of a 'submittable publication' to provide clarity on publications requiring classification under the Scheme?

Greater clarity would be welcome, especially in a Scheme that is designed to protect and empower consumers. Unfortunately we have been unable to locate any details in the CP regarding the changes that are proposed.

As we are in favour of greater calibration to cater to the needs of children and young people, we support the proposal to introduce a new level of restriction to publications for the protection of under-15s. This could be an appropriate way of addressing the issues raised by graphic novels. However we would also counsel waiting for the findings of the Classification Advisory Panel (CAP) before determining the details of such a restriction, for example the age cutoff of 15 might not be well supported by child development research, and another age might be more appropriate.

A framework for evidence-based classification guidelines

CMA has outlined above its recommendations for an appropriate framework.

CMA supports the introduction of a clear framework which embodies current research and child development knowledge, with the application of such research and knowledge advised by a body such as the proposed CAP. We support these

developments primarily because we expect they would, if properly implemented, result in the addition of new classification categories with new criteria and elements for assessment of each format (films, games etc) that indicate the ages for which each product is appropriate.

These are the basic components of a scheme that would best help parents and families.

The reason separate tools are needed for films, games and publications is that each of these formats involves the user in a different experience. While films have risks of their own (violent, scary, sexualised and drug related content and themes), games with their inherent activity can have links to gambling, invasions of privacy, targeted advertising and more. As not all risks are germane to all formats, having separate tools will streamline the process and enhance clarity.

Regarding the position of the CAP and the power of the regulator, CMA understands that in the normal course of events, the regulator would have the final say over the content of the guidelines. However we can see a risk that the CAP's advice could be overlooked, with potentially significant consequences for children and families throughout the country and indeed the integrity of the Scheme itself. We therefore submit that the legislation underpinning the Scheme should limit the power of the regulator to depart from the advice that the CAP provides. One means of doing so would be to require the regulator to publish a written statement of its reasoning on any occasion where it so departs, which can then be openly discussed and debated among stakeholders.

CMA is puzzled by the statement in the CP that 'matters which fall within the remit of the *Online Safety Act*' are out of scope for this process. As the *Online Safety Act* provides powers to regulate online content based on its classification, it is necessary clearly to demarcate those powers from the ones to be created under these reforms to the NCS. Perhaps it will be a matter of the classifications being overseen by the new regulator, whereas the eSafety Commissioner will enforce those classifications against online content; the new regulator will enforce them against broadcast and streaming content; and the States will continue to enforce them in other contexts eg cinemas. Such a vision could be functional, but it would not be consistent with the idea of a single national regulator. In particular, having a demarcation between

online content on the one hand and broadcast/streaming content on the other seems to defeat a large part of the purpose of these reforms.

Matters are further complicated by the fact that the eSafety Commissioner currently only has regard to the higher classifications for online content: would her powers then be extended to lower classifications? Or would online content be spread across two regulators depending on its classification?

Another general comment at this stage is that CMA urges all concerned to avoid the language of 'accommodation' as it is used on p 11 of the CP ('kinds of content accommodated within each classification category'). Such language has been used persistently by classification authorities in explaining their decisions, and it gives rise to a strong impression that they are erring on the side of a lower classification each time (Handsley and Warburton, 2021). This is inconsistent with the overall purpose of the NCS, even now but certainly under these reforms. The Scheme should make it clear that the aim is to find the correct classification, and not to find the lowest category within which material can be 'accommodated'.

1. Do you support the establishment of an independent Classification Advisory Panel or similar body?

   CMA very much supports this proposal, subject of course to the details of how the Panel is constituted and resourced. Moreover, we have made recommendations above as to the role of the CAP and the regulator's powers in relation to its advice. We recommend that those developing these reforms look to the Netherlands Kijkwijzer scheme for a model as to these matters.

2. What issues or expertise relevant to the classification environment would you like to see represented in a Classification Advisory Panel or similar body?

   As the role of the Panel will be to ensure that the guidelines are informed by up-to-date research, in order to protect children from material likely to harm or disturb them, there is no ground for any representation from industry. Rather the panel should be made up of independent researchers and professionals with expertise in child development, social psychology and the role of media in family life.

On this basis we would expect that the panel would include, for example, educators, paediatricians, child psychologists and media studies scholars who specialise in relevant matters such as family dynamics and parental practices. We draw attention once again to the Committee on the Rights of the Child's statement in GC25 that the development of age-appropriate measures should be informed by research from a range of disciplines.

There may also be a case for including representatives of parent bodies on the CAP; or setting up a separate body where parents and caregivers can feed their views into decision-making processes under the reformed NCS. We note there has been scant reference in the CP to parents and we hope that this does not presage an overall disregard of their views and interests. As noted above, Australia has an international obligation under the Convention on the Rights of the Child to support parents, and the NCS is arguably one of the most important means by which the Commonwealth government does so, certainly in the field of media use.

3. Are there any aspects of the current Guidelines that you would like the Classification Advisory Panel or similar body to consider?

The present Guidelines and categories may be well recognised, but they offer no practical guidance to parents of children under 15 years as to age-appropriateness.

Nor do the current Guidelines have any basis in research evidence, and consequently assessments under them become subjective. The concept of 'impact' on its own cannot ameliorate this position.

As argued above, the initial role of the CAP should be to advise on the overhaul of the current Guidelines so that they provide a clear framework which embodies current research and child development knowledge. This may result in the addition of new categories with new elements for assessment.

As part of this process, either the concept of 'impact' should be removed completely, or the redrafting of the Guidelines should make it clear that the evidence-based criteria are central, and impact is used only as shorthand for applying those.

Fit-for-purpose regulatory and governance arrangements for classification

Before considering the specific possibilities put forward in the CP, CMA would like to comment on the use of the term 'co-regulation' in this context. As you would be aware, co-regulation as currently known in Australian media law typically involves industries in (1) drawing up their own codes, which are endorsed by a government regulator; (2) applying those codes in their day-to-day activities; and (3) handling complaints under those codes, where they make their own (initial) decisions about whether they have committed any breach. We understand that the intention under the reformed NCS (and we hope we are correct in this) is that the code equivalents, or classification guidelines, will be drawn up and regularly reviewed under processes that are independent of industry, and that one or more regulators will enforce those guidelines, as to the appropriate or legal audiences for different categories of content etc. The role of industry will be limited to the equivalent of (2) above, in that it will apply the guidelines in classifying the content it puts out, subject to the overall supervision of the regulator. In other words, the role of content creators and distributors in the reformed NCS will be considerably more limited than those of broadcasting licensees and online service providers at present under their respective regimes.

For these reasons we would sound a caution as to the use of the term 'co-regulation' simply on account of self-classification by industry, as this is apt to mislead, and/or to raise unrealistic expectations on the part of industry as to the degree of influence it can exert under the Scheme.

As argued above, the system administering classification needs to be:

- capable of delivering accurate, evidence-based classifications in a timely manner;
- responsive to public feedback;
- nimble in handling complaints about individual decisions; and
- capable of conducting regular reviews of consistency of the tools, categories and criteria with the latest evidence and of public satisfaction with the Scheme.

CMA has set out above the optimum arrangements to meet the above requirements.

CMA recommends the establishment of a small Classification Commission (building on the Classification Board, and Review Board, and supported by the CAP) as a way to achieve the above aims. This body should be independent but government funded, and have oversight of all classification in Australia and for all platforms.

The 'two primary models' described in the CP seem to overlook the current Classification Board arrangement. CMA believes it may be appropriate (and prudent) to simply to make that body independent and build on its existing functions rather than reallocating them to a new regulator. The new policies and the regulator's new functions and responsibilities will require a new headset and sense of direction, but a sensitive change management process should make this possible. CMA cannot think of a reason why a whole new body is necessary.

Regarding the ACMA model, CMA notes that it would be difficult to apply to the NCS as, unlike with broadcasting, there is no licensing nexus to provide the regulatory levers. We could beg to differ with the CP's statement about the effectiveness of the ACMA model for broadcasting, noting, for example, the ACMA's rolling average time of 9 months to resolve complaints in 2023. On the other hand, in response to the CP's comment about it being 'unclear how effective this model would be for higher impact material,' we do not think this is likely to make any difference. (Rather we find it telling that the CP goes on to refer to lower-classified content as 'not considered harmful': if content is age-inappropriate, it is harmful to at least some children.)

The eSafety Commissioner model might appear to be a better starting point than the ACMA, but from CMA's perspective a major flaw of both models is that they involve the kind of 3-stage co-regulation described above. We have long experience with this structure in the broadcasting context and find that it is conducive to a degeneration of practical protection of consumer interests. At the level of code development, we note the history of the Commercial Television Industry Code of Practice providing, with the ACMA's acquiescence, successively less protection to child viewers with every iteration (though we are heartened the see that the eSafety Commissioner in recent times has rejected some proposed industry codes), and there being a 9-year gap since its last review. At the level of complaints, our experience has been that the

ACMA is very reluctant to second-guess a licensee that has found itself not to be in breach of its code.

As we understand that 3-stage co-regulation is not intended under these reforms, there is no reason to look to either the ACMA or the eSafety Commissioner as a model; and once again, CMA would be concerned that the use of such a model would raise industry expectations about added autonomy at the stages of formulating the rules and deciding whether they have been breached.

1. Do you support the consolidation of classification functions under a single national regulator at the Commonwealth level?

   CMA does support the establishment of a single national regulator, but as explained above, we do not see the proposals in the CP as entailing such, as long as there remains some function for the eSafety Commissioner.

2. What key considerations should inform the design of fit-for-purpose regulatory arrangements under a single national regulator model?

   CMA would suggest independence, rigour, expertise, and the ability to act quickly, as key considerations. For further recommendations see above.

3. Is there a role for the Classification Board and the Classification Review Board under a single national regulator model?

   As explained above, CMA would support bringing new functions into these existing organisations, rather than reinventing the wheel by creating a whole new body from scratch.

4. Are there any gaps or unintended consequences that may be caused by consolidating classification functions under a single national regulator at the Commonwealth level?

   The answer to this question depends on the nature of the regulator. CMA has suggested a body that builds on the existing Classification Board and Classification

Review Board, in part because this is least likely to open up any gap. However such a regulator would have a need for training and support to develop expertise in the fields of streaming and advertising.

Perhaps most importantly, whatever kind of body is set up, it must be briefed and resourced to support and listen to the concerns of the parents and caregivers who are responsible for protecting children from media-related harms in and outside the home.

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Contact: President@childrenandmedia.org.au