ALRC NATIONAL CLASSIFICATION SCHEME REVIEW

Discussion Paper 77 Submission

Executive Director Robyn Ayres

November 2011

THE ARTS LAW CENTRE OF AUSTRALIA

The Arts Law Centre of Australia (**Arts Law**) is the national community legal centre for the arts. It was established in 1983 with the support of the Australia Council for the Arts to provide specialist legal and business advice and referral services, professional development resources and advocacy for artists and arts organisations. Arts Law provides legal advice to over 2,500 Australian artists and arts organisations a year, operating across the arts and entertainment industries from literature and visual arts to music and film.

Arts Law envisages an arts community in which members understand their legal rights, have sufficient business and legal skills to achieve financial security, and carry out their arts practice in a non-exploitive and culturally aware environment. Over the years, we have made numerous submissions dealing with law and policy reform issues affecting the arts. Our submissions are informed through our unique role in bridging the worlds of both arts and law, and by working with clients' of varying profiles:

- earning limited incomes;
- both non-Indigenous and Indigenous, and remote and urban;
- limited in their ability to enforce their rights;
- dedicated to the creation of art across all disciplines;
- either established, new or emerging arts practitioners or arts organisations;
- operating arts businesses;
- working in both traditional and digital media,
- self-reliant in business;
- eager for accessible legal information, although they typically have limited legal education.

As an independent organisation giving legal advice to artists and arts organisations across Australia, Arts Law is well placed to comment on the legal and policy issues affecting the arts community from a national perspective. We welcome this opportunity to contribute to the Australian Law Reform Commission's National Classification Scheme Review Discussion Paper.

THE GUIDING PRINCIPLES FOR CLASSIFICATION REFORM

As one of the many voices criticising the current classification system in our submission of July 2011, Arts Law commends the ALRC discussion paper in calling for fundamental reform. We submit that this Inquiry, in combination with the current Convergence Review, provides a unique opportunity to modernise Australia's classification system in order to better accommodate the way content is consumed not only today but also in future.

Broadly, Arts Law supports the eight guiding principles identified by the ALRC to inform the development of a New Classification Scheme (**NCS**). In particular we commend the inclusion of the right of Australians to participate in the media, in addition to being able to read, hear and see the media of their choice. This is in line with basic human rights principles including the right to freedom of expression as set out in Article 19 of the Universal Declaration of Human Rights, and the International Covenant on Civil and Political Rights[1], to which Australia is a signatory.

Although the principles also provide that a broad community standard should be established, it is balanced by the second limb that requires recognition of the diversity of views, cultures and ideas in the Australian community (**Guiding Principle 2**). Furthermore, the express principle that children should be protected from material likely to harm or disturb them (**Guiding Principle 3**) is alongside the need for consumers for be provided with clear, timely information about media content as well as effective means for addressing their concerns (**Guiding Principle 4**). When taken together with the ideal that classification regulation should be kept to a minimum to be clear in its scope and application (**Guiding Principle 7**), such an approach empowers consumers to decide what media they wish to consume as well as what media is suitable for their own children.

The recognition that classification can have a significant impact on the business of artists and other content creators who earn income from their work (**Guiding Principle 6**) is extremely welcome. In a converged media environment, it is imperative that Australian artists and content creators are not disadvantaged by onerous regulation (**Guiding Principle 7**). Ideally, the principles that any classification framework be responsive and able to adapt to technological change (**Guiding Principle 5**) and focus on content rather than platform (**Guiding Principle 8**) should ensure a sound classification system well into the in future. The chance for the Australian government and stakeholders to create a modern, functional system of classification in Australia should not be missed.

[1] International Covenant on Civil and Political Rights Article 19(2): Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

PART ONE – INTRODUCTION

P5-1 A new classification scheme should be enacted regulating the classification of media content.

P5-2 The National Classification Scheme should be based on a new Classification of Media Content Act. The Act should provide, among other things, for:

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

P5-3 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 proposal for a new classification scheme rather than seeking to amend the current one recognises the need for fundamental comprehensive reform particularly for the digital environment. Arts Law supports **Proposal 5-1** as per its response to **Question 1** of its initial July submission, and also supports **Proposals 5-2** and **5-3** for a single piece of legislation as the basis for the National Classification Scheme with a single regulatory agency.

PART TWO – A NEW CLASSIFICATION SYSTEM

P6-1 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).

Arts Law supports this proposal. We further commend the ALRC for specifying that the description 'feature length film and television programs produced on a commercial basis' is intended to only capture content that is already and generally expected to be classified (films released in cinemas, television shows, and DVDs of both), and not user-generated content media created primarily for non-commercial purposes.

P6-2 The Classification of Media Content Act should provide that computer games produced on a commercial basis, that are likely to be classified MA15+ or higher, must be classified before they are sold, hired, screened or distributed in Australia. Some content will be exempt: see Proposal 6-3.

Arts Law supports and commends this proposal. Given the large number of games created and made available in Australia each year, it is sensible to focus the efforts of a government classifier on contentious content and require the classification of contentious content only. Such an approach removes cost and legal burden from small game developers and individuals and imposes it only where necessary, specifically for games that include contentious or adult content.

P6-3 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 R18+ must be restricted to adults: see Proposal 8-1

Arts Law is pleased to support this proposal as per its response to **Question 7** of its initial July submission. Film festivals, art galleries and other cultural institutions have a role in our society in creating a space to show unconventional and challenging content for those who wish to view it. An explicit exemption for these spaces will allow them to screen and display works with the certainty that there is no legal requirement to apply for classification, and recognises the already widespread self-regulation by galleries and cultural institutions notifying visitors of content so that individuals may decide for themselves and their children whether or not to view it.

P6-4 If the Australian Government determines that X18+ 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 X18+ (and that, if classified, would be legal to sell and distribute) must be classified before being sold, hired, screened or distributed in Australia.

Arts Law supports this proposal.

P6-5 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.

Arts Law's position is that the Refused Classification (**RC**) category should apply only to content that is illegal and not capture content that is simply 'offensive', for reasons set out in its initial July submission at **Q25** ('Does the current Refused Classification category reflect the content which should be prohibited online?'). The inclusion of 'offensive' material under RC, the level of which is measured by a community standard of morality, decency and propriety generally accepted by reasonable adults, is inherently subjective. This subjectiveness, together with the fact that it is not illegal to possess RC material in most Australian jurisdictions unless it is also illegal under a criminal law, leads to confusion amongst audiences and consumers of media. Further, it is inconsistent with **Guiding Principle 7** put forward by the ALRC that classification regulation should be kept to a minimum to achieve a clear public purpose and be clear in scope and application.

P6-6 The Classification of Media Content Act should provide that the Regulator or some other law enforcement body must apply for the classification of media content that is likely to be RC before:

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

Arts Law supports this proposal with reference to the response to **Proposal 6-5** above: prior to charging a person with any offence related to RC content, the content must be submitted for classification. Arts Law does not support the introduction of an internet filter based on RC content and refers to its response in its initial July submission at **Q12** ('What are the most effective methods of controlling access to online content, access to which would be restricted under the NCS?').

P6-7 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'.

Arts Law supports this proposal.

P6-8 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 MA15+ and music with explicit lyrics.

Arts Law supports this proposal as being in line with its initial submission at **Q16-18 Who Should Classify Content:** given the incredibly huge range of content being produced both online and offline, the government must rely and work with industry to develop suitable codes and guidelines to allow self-classification and regulation.

P7-1 The Classification of Media Content Act should provide that the following content must be classified by the Classification Board:

a) **Feature length films produced on a commercial basis and for cinema release;**
b) **Computer games produced on a commercial basis and likely to be classified MA15+ or higher;**
c) **Content that may be RC;**
d) **Content that needs to be classified for the purpose of enforcing classification laws; and**
e) **Content submitted for classification by the Minister, the Regulator, or another government agency.**

Arts Law supports this proposal, subject to the concerns raised in its responses to **Proposals 6-5** and **6-6** above.

P7-2 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.

Arts Law supports this proposal.

Q7-1 Should the Classification of Media Content Act provide that all media content likely to be X18+ 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 X18+ must be classified.

Arts Law's position is that all media content likely be X18+ must be classified. The classification may be done by either the Classification Board or an authorised industry classifier, with decisions of both open to review on application.

P7-3 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.

P7-4 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.

Arts Law supports the involvement of industry in classifying content and broadly supports **Proposals 7-3** and **7-4**. Arts Law, however, refers to the concerns raised in its initial July submission at **Q18:** many in the arts industry already struggle to make sufficient income; therefore, the cost of requiring members of the arts industry to undergo training and receive accreditation could be onerous for many.

P7-5 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.

Arts Law supports this proposal.

Q7-2 Should classification training be provided only by the Regulator, or should it become part of the Australian Qualifications Framework? If the latter, what may be the best way for the Board, higher education institutions, and private providers, and who may be best placed to accredit and audit such courses?

Whilst Arts Law supports the proposal for greater reliance on industries to classify their content, care must be taken so that the accreditation of 'authorised classifiers' is not so great or costly to make it prohibitive for those in the arts industry to establish and manage affordable industry classifiers.

P7-6 The Classification of Media Content Act should provide that the functions and powers of the Classification Board include:

a) **Reviewing industry and Board classification decisions; and**
b) **Auditing industry classification decisions.**

This would mean the Classification Review Board would cease to operate.

Arts Law supports this proposal but is concerned that allowing the Board to review its own classification decisions could create the perception of a conflict of interest. To avoid this perception, Arts Law suggests that the Board's classification review process could operate similar to that of the Federal Court where appeals of judgments of a single Federal Court judge are heard by the Full Court of the Federal Court.

P7-7 The Classification of Media Content Act should provide that the Regulator has power to:

a) **Revoke authorisations of industry classifiers;**
b) **Issue barring notices to industry classifiers; and**
c) **Call-in unclassified media content for classification or classified media content for review.**

Arts Law supports this proposal.

P8-1 The Classification of Media Content Act should provide that access to all media content that is likely to be R18+ must be restricted to adults.

Arts Law supports this proposal.

P8-2 The Classification of Media Content Act should provide that access to all media content that has been classified R18+ or X18+ must be restricted to adults.

Arts Law supports this proposal.

P8-3 The Classification of Media Content Act should not provide for mandatory access restrictions on media content classified MA15+ or likely to be classified MA15+.

Arts Law supports this proposal.

P8-4 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:

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

Arts Law broadly supports this proposal but does not support mandatory installation of website-based age verification systems. Although many websites already implement some kind of notice or verification system for age, the form and function of such a system differs greatly depending on the type of website and the resources available to the website operator. For example, a large media content site such as YouTube may require users to log into a user account in order to view content, whereas the website of an individual artist may simply display a notice informing the site visitor that the content should not be viewed by minors. Arts Law acknowledges that these age verification systems can be circumvented. However, legally requiring Australian internet media creators – particularly small ones – to install stringent age verification systems such as digital 'gates' requiring the input of some form of identification (eg., credit card, driver's licence) in order to access and view the content is overly onerous. Such systems raise serious questions about online privacy of users and data security concerns. The costs of effectively managing those concerns would be a significant burden on small website operators, and potentially bar new ones from entering the market. With 1 in 3 people researching, viewing and creating art online, the internet is a vital tool for professional artists to engage audiences and promote themselves.[2] In a global marketplace, Australia should avoid creating barriers that reduce the competitiveness of its local content providers, a concern applying not just to the arts community but more broadly to Australian media.

Other issues arise relating to content beyond the jurisdiction of Australian law. Over the internet Australians can, and regularly do, seek access to legal content that is outside Australia and therefore created and disseminated in accordance with different laws that may not require an age verification system or, if they do, to standards different to those applying in Australia. If Australian law requires that all adult or potentially offensive material be placed behind an age verification system, the lack of which would result in penalties or the addition of the website to a filter list, valuable content produced and regulated in other countries where there is no legal requirement to classify or age-restrict material would be completely blocked to Australian users. The benefits of global connectivity depend on a free flow of ideas; as such, any plan to filter online content possesses tremendous potential to restrict access to content that, while not to everyone's taste, is completely legal and recognised by many individuals and the community as legitimate.

---

[2] *More than Bums on Seats: Australian Participation in the Arts*, Australia Council for the Arts, 2011, http://www.australiacouncil.gov.au/__data/assets/pdf_file/0004/71257/Full_report_More_than_bums_on_seats_Australian_participation_in_the_arts2.pdf

P8-5 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 content.

Arts Law supports this proposal.

P8-6 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:

a) **the likely audience of the advertisement;**
b) **the impact of the content in the advertisement; and**
c) **the classification or likely classification of the advertised content.**

Arts Law supports this proposal.

P9-1 The Classification of Media Content Act should provide that one set of classification categories applies to all classified media content as follows: C, G, PG8+, T13+, MA15+, R18+, X18+ and RC. Each item of media content classified under the proposed National Classification Scheme must be assigned one of these statutory classification categories.

Arts Law supports and commends the proposal that there be one set of classification markings for all content instead of the current system of having separate markings for film/television/games, publications and music.

P9-2 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.

Arts Law supports this proposal.

P9-3 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.

Arts Law supports this proposal.

P9-5 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.

Arts Law accepts that a regular review into community standards could be useful to provide information about the suitability of content for different age groups and classification categories. However, we are concerned that such a review, particularly by a government agency, could have the effect of setting an 'official' community standard by which all media is measured, and industry and artists will measure themselves against. A defined community standard, even a broad one, has the potential of marginalising minority voices and communities already struggling for wider recognition and acceptance. If such a review is to be done, care should be taken that it is used only to assist with classification markings, not be used for or relied on for the purposes of classification decisions by the Board, particularly with regards to potential RC content that is 'offensive' but not illegal.

P10-1 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.

Arts Law supports this proposal with reference to concerns in responses at **Proposals 6-5** and **6-6**. The proposed filtering plan to automatically block material that is refused classification has the real potential to significantly impede access to creative works and information.

PART THREE – ADMINISTERING AND ENFORCING THE NEW SCHEME

P11-1 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.

Arts Law supports this proposal.

P11–2 Industry classification codes of practice may include provisions relating to:

a) **guidance on the application of statutory classification obligations and criteria to media content covered by the code;**
b) **methods of classifying media content covered by the code, including through the engagement of accredited industry classifiers;**
c) **duties and responsibilities of organisations and individuals covered by the code with respect to maintaining records and reporting of classification decisions and quality assurance;**
d) **the use of classification markings;**
e) **methods of restricting access to certain content;**
f) **protecting children from material likely to harm or disturb them;**
g) **providing consumer information in a timely and clear manner;**
h) **providing a responsive and effective means of addressing community concerns, including complaints about content and compliance with the code; and**
i) **reporting to the Regulator, including on the handling of complaints.**

Arts Law supports this proposal.

P11–3 The Regulator should be empowered to approve an industry classification code of practice if satisfied that:

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

Arts Law supports this proposal.

P11–4 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.

Arts Law supports this proposal.

Q12-1 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?

Arts Law submits that complaints should be handled within industry as much as possible. This would be in keeping with the approach of allowing industry to self-classify, and should ideally be less costly and more efficient than going to the Regulator. Conversely, allowing industry to handle complaints minimises the financial and administrative burden on the Regulator allowing it to focus resources elsewhere.

The Regulator should, however, operate as a means of appeal to review decisions and complaint outcomes where necessary. This may require an investigation into the original complaint and/or an examination of the response of the industry classifier to the complaint. The Regulator should also have the discretion to decline to hear or investigate complaint appeals where it deems appropriate.

P12–1 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:

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

In addition, the Regulator's functions may include:

f) **providing administrative support to the Classification Board;**
g) **assisting with the development of classification policy and legislation;**
h) **conducting or commissioning research relevant to classification; and**

i) **educating the public about the new National Classification Scheme and promoting media literacy.**

Arts Law supports this proposal.

P13–1 The new Classification of Media Content Act should be enacted pursuant to the legislative powers of the Parliament of Australia.

P13–2 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.

P14–1 The new Classification of Media Content Act should provide for enforcement of classification laws under Commonwealth law.

Arts Law supports **Proposals 13-1, 13-2** and **14-1**. As per our response to **Q28** in our initial July submission, the standardisation of classification laws and streamlined, consistent enforcement is necessary to avoid confusion, and will foster certainty and confidence in the classification system.

P14–2 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.

Arts Law submits that it does not support any proposal that the states and territories should retain powers in relation to the enforcement of classification law. If, however, the states and territories did so, any intergovernmental agreement should provide for classification enforcement laws that are uniform across the states and territories, similar to the current uniform defamation laws.

P14–3 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:

a) **restrictions on the sale, screening, distribution and advertising of classified material;**
b) **statutory obligations to classify media content;**
c) **statutory obligations to restrict access to media content;**
d) **an industry-based classification code; and**
e) **directions of the Regulator.**

Arts Law supports this proposal.

P14–4 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 Schedule 7 of the *Broadcasting Services Act 1992* (Cth).

Arts Law supports the proposal that penalties relating to content offences be consistent, whether the material is distributed online or offline.

P14–5 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.

Arts Law supports this proposal, with a strong preference for an infringement notice scheme, particularly for media made available online.

FURTHER INFORMATION

Please contact Robyn Ayres or Jo Teng if you would like us to expand on any aspect of this submission, verbally or in writing. Arts Law can be contacted at artslaw@artslaw.com.au or on (02) 9356 2566.

Yours faithfully,

Robyn Ayres
Executive Director

Arts Law Centre of Australia

Jo Teng
Solicitor

Arts Law Centre of Australia