



CATEGORY 2 RESTRICTED
NOT AVAILABLE TO PERSONS UNDER 18 YEARS

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CATEGORY 1 RESTRICTED
NOT AVAILABLE TO PERSONS UNDER 18 YEARS

The case for classification reform in Australia

January 2017

eros the **adults only**
association

The changing landscape of classification in Australia

Figure 1: Classification in Australia 2013

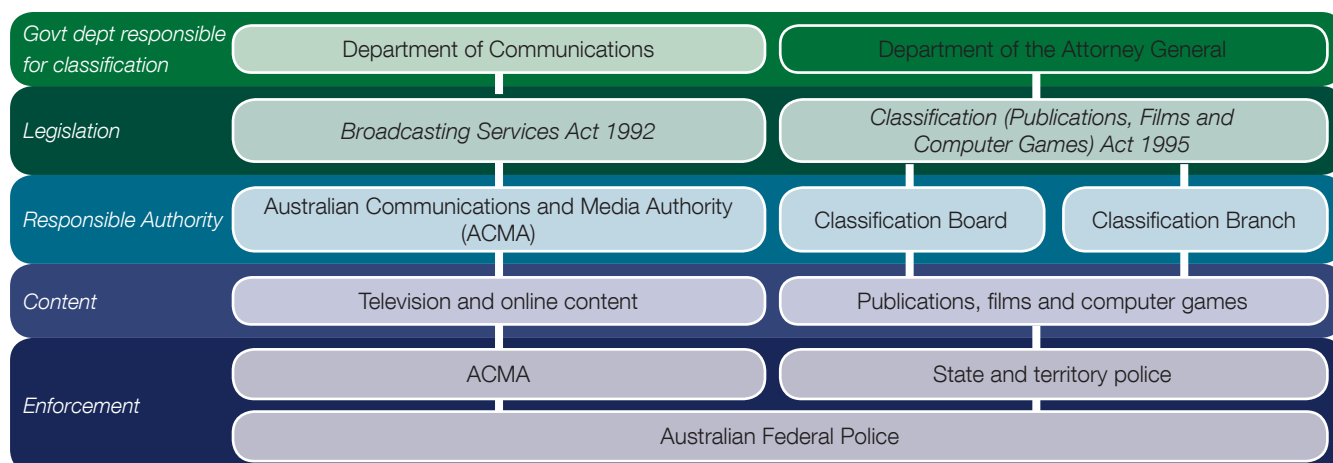


Figure 2: Current Classification in Australia

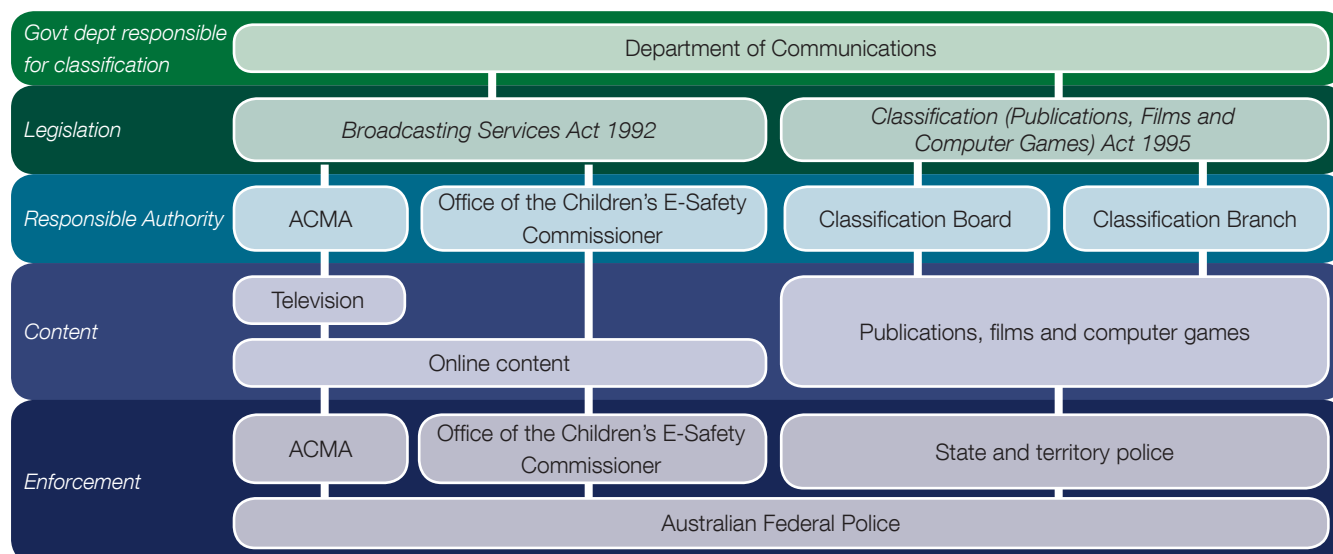
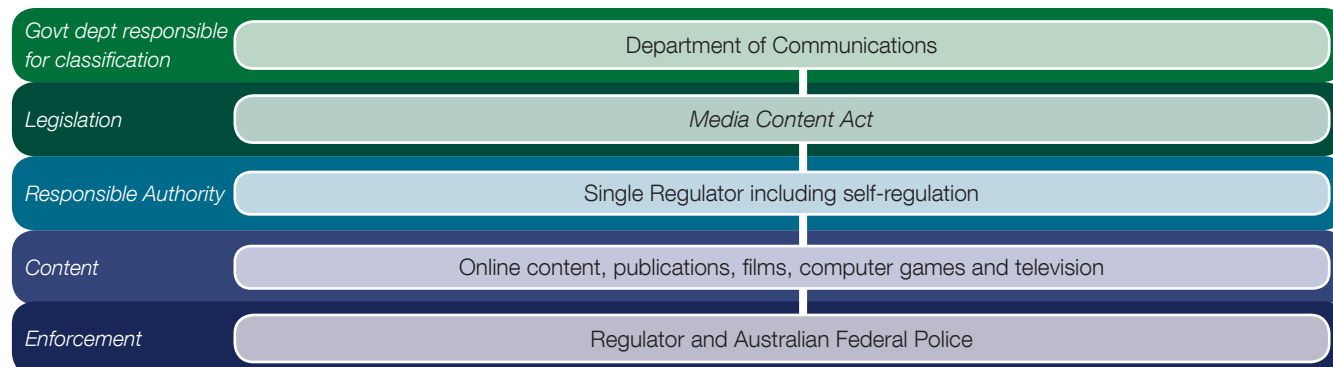


Figure 3: Classification in Australia recommended





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- May 2016



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CLASSIFICATION OF PUBLICATIONS, FILMS AND COMPUTER GAMES

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

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1 INTRODUCTION

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

1.1 Definitions

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

1.2 Background

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

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

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

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

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

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

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

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

2 THE NATIONAL CLASSIFICATION CODE

Classification decisions are to give effect, as far as possible, to the following principles:

- a. adults should be able to read, hear and see what they want;
- b. minors should be protected from material likely to harm or disturb them;
- c. everyone should be protected from exposure to unsolicited material that they find offensive;
- d. the need to take account of community concerns about:
 - i. depictions that condone or incite violence, particularly sexual violence; and
 - ii. the portrayal of persons in a demeaning manner.

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

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

2.1.1 Contradictions between federal and state/territory classification statutes

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

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

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

2.1.2 X18+ licensing in the Australian Capital Territory

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

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

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

¹ Richters, J., de Visser, R., Badcock, P., et al, ‘Masturbation, paying for sex, and other sexual activities: the Second Australian Study of Health and Relationships’, *Sexual Health*, 2014, 11(5), pp. 461-471

² *Classification (Publications, Films and Computer Games) Enforcement Act 1996* (WA), s. 81 (2)(b)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Guidelines for the Classification of Films 2012

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

2.1.5 Assumptions of age based on appearance

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

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

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

· Ibid.

· Digital Quarter, ‘The Great Australian Sex Census 2013-14’, *Sex Census*, < <http://sexcensus.com.au/wp-content/uploads/2015/09/results-13-14.pdf>>, 2015, (accessed 1 March 2016), pp. 10

· Richters, J., de Visser, R., Rissel, C., ‘Demographic and Psychological Features of Participants in Bondage and Discipline, “Sadomacochism”, Dominance and Submission (BDSM): Data from a National Survey, *The Journal of Sexual Medicine*, 2008, 5(7), pp. 1660-1668

· Bezreh, T., Weinberg, T., Edgar, T., ‘BDSM Disclosure and Stigma Management: Identifying Opportunities for Sex Education, *American Journal of Sexuality Education*, 2012, 7(1), pp. 37-61.

· Richters, J., et al, 2014, op cit.

· *United States Code of Regulation, Title 18, s.2257*

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

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

2.2.1 Association of Sites Advocating Child Protection (ASACP)

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

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

2.2.2 Government mandated Internet filters

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

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

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

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

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

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

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

2.2.4 The role of education

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

2.2.5 Perceptions of the adult industry

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

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

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

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

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

¹⁰ Richters, J., et al, 2008, op cit.

¹¹ Ley, D., Prause, N., Finn, P., 'The Emperor Has No Clothes: A review of the 'Pornography Addiction' model, *Current Sexual Health Reports*, 2014, 6(2), pp. 94-105.

¹² McNair, B., 'Porn does not lead to rape culture', *The Conversation*, < <http://theconversation.com/porn-doesnt-lead-to-rape-culture-10957>>, 2012, (accessed 1 March 2016).

¹³ Barker, M., 'Asking whether porn causes sexual violence is the wrong question – here's why', *The Conversation*, <<http://theconversation.com/asking-whether-porn-causes-sexual-violence-is-the-wrong-question-heres-why-50685>>, 2015, (accessed 1 March 2016).

¹⁴ Nash, V., Marston, C., Adler, J., Livingstone, S., 'A grown-up conversation about children and porn online starts here', *The Conversation*, < <http://theconversation.com/a-grown-up-conversation-about-children-and-porn-online-starts-here-54848>>, 2016, (accessed 1 March 2016).

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

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

3 ALRC RECOMMENDATIONS FROM REPORT NO. 118

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

3.1 A new classification scheme

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

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

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

3.3 Classification of adult content

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

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

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

3.3.2 X18+ and Prohibited Content

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

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

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