Submission on Modernising Australia's Classification Scheme - Stage 2 Reforms

27 May 2024 – Dr Jeremy Malcolm

1. Executive summary

This submission advocates for crucial reforms to Australia's content classification scheme, prioritising evidence-based decision making, human rights compliance, and the protection of consenting adults' rights to access and engage with sexual content. Key recommendations include:

- Narrowing the scope of the Refused Classification category to focus on illegal content, rather than fantasy and fictional sexual materials (FSM) such as sexual fetish content depicting consenting adults, artwork, and fiction
- Empowering a Classification Advisory Panel to commission research into the potential harms and benefits of FSM
- Decriminalising the possession and importation of FSM for non-commercial purposes
- Conducting an independent human rights evaluation of the content classification Scheme
- Ensuring that the Scheme includes representation from diverse stakeholders, including victim survivors, LGBTQ+ individuals, and sex-positive communities
- Retaining the Classification Review Board as an independent review and appeal body
- Harmonising State and Territory laws to ensure a uniform national approach

By adopting these recommendations, Australia can modernise its classification scheme, aligning it with international human rights standards and prioritising the protection of children and non-consenting adults while safeguarding individual rights and freedoms.

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1.2. Summary of recommendations

1. "The potential harm to identifiable individuals or communities" should be added to the Code as a matter to be taken into account in making a classification decision. References to "the standards of morality, decency and propriety generally accepted by reasonable adults" and "likely to cause offence to a reasonable adult" should be removed.
2. The definition of a "submittable publication" should be changed to remove paragraphs (b) and (c), replacing them respectively with "are likely to cause the publication to be classified Category 1 - Restricted" and "are likely to cause the publication to be classified Category 2 - Restricted".
3. A Classification Advisory Panel should be empowered and resourced to commission empirical research into the possible harms and benefits of the availability in society of

fantasy and fictional sexual materials (FSM), including the possible impacts on rates of actual sexual abuse.

4. The Classification Advisory Panel should include representation from stakeholders who are negatively impacted when media content is Refused Classification, including victim survivors of trauma and child sexual abuse, LGBTQ+ people and women, young people, sex workers, and sex-positive communities.
5. The Code and Guidelines should be amended to distinguish between real child sexual abuse material (CSAM) and FSM, with only the former category being Refused Classification regardless of context.
6. The Criminal Code and the Customs Act should be amended to decriminalise the possession and the importation of FSM for non-commercial purposes.
7. Australia should conduct an independent human rights evaluation of the content classification scheme to ensure that it aligns with international human rights standards, including freedom of expression and privacy.
8. Under a single national regulator model, the Classification Review Board should be retained as an independent review and appeal body for classification decisions made under the Online Safety Act, Criminal Code, and Customs Act.
9. The single national regulator model should seek to harmonise the treatment of classifiable content under State and Territory laws, to ensure a uniform set of content classification and criminalisation standards applies nationwide.

2. Introduction

2.1. About the author

Jeremy Malcolm is a Trust & Safety consultant and lawyer who specialises in public health approaches to the reduction and prevention of harm online. Prior to becoming a consultant he spent 20 years in the not-for-profit sector working on child protection, digital rights, consumer rights, and global governance. He completed his PhD in Internet governance at Murdoch University and is admitted to practice law in New York and Australia.

2.2. Overview

The current modernisation review of the National Classification Scheme (the Scheme) is welcome and timely. It follows upon the equally welcome finding of the the 2020 Review of Australian classification regulation (the Stevens Review) that the Scheme should aim towards a more "objective, harms-based approach" in place of what has historically been an approach centred around "censorship and concerns for public morals" (Stevens 2020:9).

This submission applies that recommendation, and the existing Guiding Principles of the Scheme – essentially that adults should be able to read, hear, see and play what they want, while being protected from exposure to unsolicited material that they find offensive – to propose a series of reforms focused on the treatment of fictional and fantasy sexual content that is typically Refused Classification under the current classification guidelines.

Simply put, it will be argued that the wrong towards which the Scheme should be addressed occurs when persons are exposed to Refused Classification material without their consent – and conversely, that no wrong is committed when such material is viewed privately or shared

with consenting others. As such, offences applicable to dealing in such Refused Classification material, which are currently defined under State law and in the Customs Act, should be limited to cases where the material is or is intended to be exposed to the eyes of children or of non-consenting adults.

To criminalise dealings in Refused Classification material more broadly than this is to undermine the Guiding Principles, in that it fails to meaningfully protect the public, while causing significant auxiliary harms to a broad range of marginalised stakeholders including LGBTQ+ people and sexual abuse survivors. As such this submission will recommend how the scope of Refused Classification materials might be narrowed, while also avoiding the over-criminalisation of marginalised communities.

3. Case law context

To provide necessary context for the discussion that is to follow, a short legal history must be given of how Australia has sought to use the law to purge from society acts and materials often described as causing moral outrage, offence, disgust, or abhorrence – the same terms still used in the Scheme's classification guidelines. In particular, Australia has a dark history of police using these justifications to perpetrate official violence and censorship against sexual minorities.

3.1. Private sexual acts

John Stuart Mill (1869) famously wrote, "The only purpose for which power can be rightfully exercised over any member of a civilised community against his will, is to prevent harm to others." Yet at the time he wrote and for over a century afterwards, a legal moralist approach was far more prevalent throughout the British Commonwealth. Indeed, elements of that approach persist in the Scheme today.

Legal moralism refers to the use of criminal law to enforce moral standards and prohibit behaviours considered immoral, even if they do not directly harm others. The rise of legal moralism can be traced back to the Victorian era, when social purity movements advocated for strict moral codes and the criminalization of perceived vices. British colonial authorities exported these moral values to their colonies, leading to the enactment of laws prohibiting activities like homosexuality, sex work, the sale of alcohol, and gambling.

In enforcing these colonial laws, Australian police notoriously persecuted homosexual Australians. In one incident, a gay couple were tossed into the river whereupon one of them drowned; in another, a cohabiting couple were ordered out of the State; and in multiple cases individuals were harassed and arrested for trivial offences such as loitering (Carbery 2014:6, 10–11, 22, 37). It was as recently as 1997 that the last anti-gay law was finally repealed in Tasmania – but not until it was challenged in the High Court in *Croome v Tasmania* (1997) 191 CLR 119 as a violation of Australia's international human rights obligations (see further 7.2 below).

As for sex work, its decriminalisation remains incomplete in Australia. Meanwhile, sex workers continue to complain of being harassed, entrapped, and even raped by police with impunity. The criminalisation of their livelihood leaves sex workers feeling unsafe to take

recourse to the legal system for these and other workplace abuses that they suffer (Stardust et al. 2021).

A third community whose behaviour has been targeted by legal moralistic impositions is the consensual BDSM community. Widely misunderstood, mischaracterised and stigmatised, the organised BDSM community has in fact been a trailblazer in its promotion of informed consent as the foundation of sexual ethics. But once again the law has lagged behind, leaving many in the BDSM community fearful of admitting to their consensual sexual practices for fear of prosecution (Galilee-Belfer 2020).

Early British authority such as *R v Donovan* [1934] 2 KB 498 followed a legal moralistic approach, establishing that a person is unable to consent to a sexualised assault such as spanking, because this is classed as a "perverted desire" – in contrast to healthy, manly activities such as boxing in which such an injured party's consent is recognised by the law. Largely following this authority, a group of homosexual men were arrested and convicted over consensual BDSM play in the notorious case of *R v Brown* [1994] 1 AC 212. "Pleasure derived from the infliction of pain is an evil thing," declared Lord Templeman in that case (at 237).

While failing to fully honour the autonomy of sex partners engaging in kink/BDSM activities, Australia has at least taken a somewhat more harms-based approach, now recognising the ability of a sexual partner to consent to sexual acts that would otherwise be classed as assaults, provided that they are not intended to nor actually cause serious (*R v Stein* [2007] VSCA 300) or significant (*R v Macintosh* [1999] VSC 358) physical injury.

3.2. Obscenity

If the enforcement of moral norms against private sexual behaviour is one side of the coin of legal moralism, the flip-side is obscenity law, which seeks to enforce moral norms against those who publish written, visual, or cinematographic works.

Australia's obscenity laws have roots in British colonial-era laws aimed at suppressing "obscene libel". Early cases like *R v Hicklin* (1868) 3 QB 360 established the "Hicklin test", which deemed material obscene if it had a "tendency to deprave and corrupt" those who encountered it.

This vague standard led to widespread censorship and prosecution of authors, publishers, and artists. In a 1963 interview, defending bans on classic works of literature such as *Lady Chatterley's Lover* and *Tropic of Cancer*, Senator Henty, then Minister for Customs, opined that "normal healthy Australians would not be interested in the works of D. H. Lawrence and Henry Miller anyway" (Whitmore 1964). Despite some reforms, Australia's obscenity laws remain broad and ambiguous, encompassing a wide range of material deemed "offensive" or "obscene".

One point worthy of particular note here – because it will become relevant later – is that the question of whether a work has a "tendency to deprave and corrupt" is not one that the court will actually ever investigate factually. Rather, once a finding that a work is "obscene" has already been made, this raises an irrebuttable presumption that it will have a corrupting influence on the mind of its reader or viewer. In *Crowe v Graham* (1968) 121 CLR 375, Windeyer J wrote of this presumption at 392-3:

> it has only survived really because, although constantly mentioned, it and its implications have been ignored. Courts have not in fact asked first whether the tendency of a publication is to deprave and corrupt. They have asked simply whether it transgresses the bounds of decency and is properly called obscene. If so, its evil tendency and intent is taken to be apparent.

In that sense, a finding of obscenity is simply legal moralism, whereby a determination of the tribunal that certain content is subjectively indecent is dressed up in objective harms-based language as an *ex post facto* justification for its criminalisation.

With that said – and, somewhat inconsistently – the breadth of circulation of a work and the class of persons to whom it was published can be taken into account in determining whether a publication is obscene. Windeyer J expressed this at 397 of *Crowe* in saying:

> To publish or exhibit a particular picture or print might amount to a publication of indecent matter in one set of circumstances although in other circumstances this would not be so.

This means that a work circulated within a community where sexually transgressive content is the norm will be assessed differently than if the same work were published to the public at large.

Taken to its logical conclusion, it should follow that an obscene article that is kept private and not shared with anyone should never be subject to criminal sanction, because there is no victim who might be offended by it. In the United States, this is the case; *Stanley v Georgia* (1969) 394 U.S. 557 determined that the private possession of obscene materials cannot be criminalised there. But in Australia, the mere possession of obscene material is criminalised under State law, suggesting that legal moralism remains alive and well in this country.

3.3. CSAM

The production and distribution of actual child sexual abuse material (CSAM) – sexualized photos or videos of real children – is rightly criminalised. A child cannot consent to the production or distribution of such content, and for good reason – its availability is directly associated with real life harms such as sextortion and sexual harassment. Nothing in this submission should be taken as suggesting any weakening of existing laws that prohibit dealings in real CSAM.

With that said, examining which CSAM offences the police choose to prosecute and which they choose to overlook – or even to perpetrate themselves – provides insight into whether the prosecution of this category of crime is really being motivated by a desire to protect children from harms to which they cannot consent, or whether legal moralism continues to remain a driving force for law enforcement.

Signs consistently point to the latter. In the very recent case of *DPP v Daniel* [2024] ACTSC 128, the Federal Police arrested a grandmother over a video of her two year old granddaughter receiving a massage, which she shared with her daughter via private TikTok message. Because the toddler was unclothed, the grandmother was charged with distributing child abuse material, even though the judge acknowledged that there was no intent at sexual exploitation, and that no victim was harmed (Peters 30 April 2024).

Conversely, thousands of child victims were sexually exploited and harmed over 11 months during 2016 and 2017 when a police unit from Queensland operated a dark web child abuse website as part of a sting operation (Høydal et al. 2017). Inconceivable as it may seem, police thought so little of the rights of the child victims that they not only facilitated the distribution of thousands of child abuse images over this period, but even personally uploaded new abuse images to the site themselves.

When this abhorrent operation was finally exposed by journalists, UNICEF and Amnesty International immediately condemned it as an unacceptable international human rights violation (Vigsnæs et al. 2017). There is no getting around the fact that this single operation amounts to the largest scale instance of institutional online sexual abuse in Australian history – and there can be no excuse whatsoever for the police having perpetrated it.

These examples reveal a disturbing trend: while police enthusiastically pursue cases of victimless crime, they simultaneously fail to prioritise the protection of children and even perpetrate harm against them directly. This raises serious questions about the true motivations behind the enforcement of CSAM laws. These same questions will recur below when considering the treatment of fictional content that has been refused classification.

4. Legislative context

The public policies explored above, originating from the common law, are codified across various sources of Commonwealth primary and secondary legislation, but not in a fully consistent or coherent manner. The Consultation Paper recognises this and explores whether responsibilities for content classification at the Commonwealth level could be consolidated into a single national regulator.

But the fragmentation is even greater when one considers not only regulatory instruments such as the National Classification Scheme and the Online Safety Act, but also criminal laws that can be brought to bear against those found to be distributing or importing material that has been Refused Classification. This includes the Criminal Code Act 1995 (Cth) and also the Customs Act 1901 (Cth), relevant provisions from which will be outlined below.

Note that this section of the submission does not cover State laws, which are yet another source of law somewhat in variance again from the Commonwealth regulatory scheme and interoperating with it.

4.1. National Classification Scheme

As noted above, the National Classification Code (the Code, as amended in 2013) requires that classification decisions should give effect, as far as possible, to the following principles:

(a) adults should be able to read, hear, see and play 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.

Section 11 of the Classification (Publications, Films and Computer Games) Act 1995 further provides that the following matters are to be taken into account in making a classification decision:

(a) the standards of morality, decency and propriety generally accepted by reasonable adults; and
(b) the literary, artistic or educational merit (if any) of the publication, film or computer game; and
(c) the general character of the publication, film or computer game, including whether it is of a medical, legal or scientific character; and
(d) the persons or class of persons to or amongst whom it is published or is intended or likely to be published.

The Code, applying these principles, drills down further into how they should be applied in the case of publications that are or would be refused classification under the Scheme, namely publications that:

(a) describe, depict, express or otherwise deal with matters of sex, drug misuse or addiction, crime, cruelty, violence or revolting or abhorrent phenomena in such a way that they offend against the standards of morality, decency and propriety generally accepted by reasonable adults to the extent that they should not be classified; or
(b) describe or depict in a way that is likely to cause offence to a reasonable adult, a person who is, or appears to be, a child under 18 (whether the person is engaged in sexual activity or not); or
(c) promote, incite or instruct in matters of crime or violence.

Yet more detail is provided in separate Guidelines for the classifications of films, publications, and computer games. As they are in relevant respects similar, here is the guidance provided in the Guidelines for the Classification of Publications (2008) as to when publications will be classified "RC":

(a) if they promote or provide instruction in paedophile activity; [sic]

or if they contain:

(b) descriptions or depictions of child sexual abuse or any other exploitative or offensive descriptions or depictions involving a person who is, or appears to be, a child under 18 ;
(c) detailed instruction in:
    (i) matters of crime or violence,
    (ii) the use of proscribed drugs;
(d) realistic depictions of bestiality;

or if they contain gratuitous, exploitative or offensive descriptions or depictions of:

(e) violence with a very high degree of impact which are excessively frequent, emphasised or detailed;
(f) cruelty or real violence which are very detailed or which have a high impact;
(g) sexual violence;
(h) sexualised nudity involving minors;
(i) sexual activity involving minors;

or if they contain exploitative descriptions or depictions of:

(j) violence in a sexual context;
(k) sexual activity accompanied by fetishes or practices which are revolting or abhorrent;
(l) incest fantasies or other fantasies which are offensive or revolting or abhorrent.

Specific examples of "fetishes or practices which are revolting or abhorrent" as given in the Code as examples of publications that would be excluded from the X 18+ rating category are "body piercing, application of substances such as candle wax, 'golden showers', bondage, spanking or fisting."

It is immediately apparent from the above how the Scheme draws from the existing common law of obscenity, by importing concepts such as "the standards of morality, decency and propriety generally accepted by reasonable adults." It is also apparent how out of alignment this legal moralistic approach is with community attitudes in some respects, especially in relation to the implicit classification of certain mild and common sexual fetishes such as bondage and spanking as "revolting or abhorrent."

What may be less immediately obvious is how much the Code, in particular, broadens the scope of material that will be Refused Classification far beyond the common law concept of obscenity. In particular, there is scant precedent for the treatment of works covering "drug misuse or addiction, crime, cruelty, violence or revolting or abhorrent phenomena" as obscene under any circumstances. Neither is there any precedent at all for such a broad injunction against works depicting children even *non-sexually* if they are "likely to cause offence to a reasonable adult."

In practice, it can also be observed that these classification guidelines have been applied quite inconsistently. Mainstream TV series such as *Euphoria* (depicting characters represented as children having sex) and *Game of Thrones* (representing characters engaged in incest) are routinely passed with MA 15+ or R 18+ ratings. A mainstream movie, *Pretty Baby* starring an 11 year old Brooke Shields, was even passed with an M rating despite depicting full frontal female child nudity and rape.

But while mainstream Hollywood TV and movies can be classified quite leniently, it is no exaggeration to say that if a person enters the country with Japanese cartoons that depict exactly the same subjects as *Euphoria* or *Game of Thrones*, they stand a very real risk of being arrested and charged with child abuse offences – as will be discussed further in section 6.3 below.

4.2. Criminal Code

The definition of child abuse material under the Criminal Code Act 1995 (Cth) is exceptionally broad, complex, and lengthy. Despite this, it is worth setting out in full here, due to the recommendation made in the Stevens Report that the Scheme definition should be harmonised with the definition in the Criminal Code. Child abuse material is defined under section 473.1 of the Code to include:

(a) material that depicts a person, or a representation of a person, who:
    (i) is, or appears to be, under 18 years of age; and
    (ii) is, or appears to be, a victim of torture, cruelty or physical abuse;

and does this in a way that reasonable persons would regard as being, in all the circumstances, offensive; or

(b) material that describes a person who:
  (i) is, or is implied to be, under 18 years of age; and
  (ii) is, or is implied to be, a victim of torture, cruelty or physical abuse;

and does this in a way that reasonable persons would regard as being, in all the circumstances, offensive; or

(c) material that depicts a person, or a representation of a person, who is, or appears to be, under 18 years of age and who:
  (i) is engaged in, or appears to be engaged in, a sexual pose or sexual activity (whether or not in the presence of other persons); or
  (ii) is in the presence of a person who is engaged in, or appears to be engaged in, a sexual pose or sexual activity;

and does this in a way that reasonable persons would regard as being, in all the circumstances, offensive; or

(d) material the dominant characteristic of which is the depiction, for a sexual purpose, of:
  (i) a sexual organ or the anal region of a person who is, or appears to be, under 18 years of age; or
  (ii) a representation of such a sexual organ or anal region; or
  (iii) the breasts, or a representation of the breasts, of a female person who is, or appears to be, under 18 years of age;

in a way that reasonable persons would regard as being, in all the circumstances, offensive; or

(e) material that describes a person who is, or is implied to be, under 18 years of age and who:
  (i) is engaged in, or is implied to be engaged in, a sexual pose or sexual activity (whether or not in the presence of other persons); or
  (ii) is in the presence of a person who is engaged in, or is implied to be engaged in, a sexual pose or sexual activity;

and does this in a way that reasonable persons would regard as being, in all the circumstances, offensive; or

(f) material that describes:
  (i) a sexual organ or the anal region of a person who is, or is implied to be, under 18 years of age; or
  (ii) the breasts of a female person who is, or is implied to be, under 18 years of age;

and does this in a way that reasonable persons would regard as being, in all the circumstances, offensive; or

(g) material that is a doll or other object that resembles:
    (i) a person who is, or appears to be, under 18 years of age; or
    (ii) a part of the body of such a person;

    if a reasonable person would consider it likely that the material is intended to be used by a person to simulate sexual intercourse.

Section 473.4 of the Code defines the test of what would be offensive to a reasonable person by reference to criteria drawn from the common law, namely the standards of morality, decency and propriety generally accepted by reasonable adults; the literary, artistic or educational merit (if any) of the material; and the general character of the material (including whether it is of a medical, legal or scientific character).

However, this codification omits consideration of the circumstances of publication, the relevance of which is recognised both in the common law, and in the Classification Act's directive to consider "the persons or class of persons to or amongst whom it is published or is intended or likely to be published". It makes no difference for the purposes of the Criminal Code, for example, that a vendor of a DVD or comic might offer it for sale only at an adult store or convention.

The Code establishes a range of offences concerning such material, which are contained in Division 273 (Offences involving child abuse material outside Australia), Subdivision B of Division 471 (Offences relating to use of postal or similar service for child abuse material), and Subdivision D of Division 474 (Offences relating to use of carriage service for child abuse material). Although there are too many offences to list in full, a few notable examples are:

- Under 474.22, it is an offence to use a carriage service to access child abuse material.
- Under 474.22A, it is an offence to possess child abuse material obtained through a carriage service.
- Under 474.25, an internet service provider or hosting provider who is aware that their service can be used to access material that they have reasonable grounds to believe is child abuse material, must report it to the Australian Federal Police within a reasonable time after becoming aware of its existence.

In the case of actual CSAM, provisions such as these are entirely appropriate. But given the Code's extremely broad definition of "child abuse material" which encompasses a wide range of legitimate literature and artwork, their effect is to be wildly disproportionate and excessive.

The most inexcusable element of the Criminal Code definition of child abuse material is that it draw no distinction between actual CSAM, and victimless works such as drawings, stories, sex toys, and 18+ pornography. It would be bad enough if the involvement of a real victim were subordinated to the question of whether a "reasonable person" would find the material offensive. But the existence of a real victim isn't simply subordinated, it is *ignored altogether* as if it were a completely irrelevant consideration.

Not only does the Criminal Code ignore this distinction, but so too do the police. According to a Freedom of Information Act request (returned 17 May, on file with the author), the Federal Police don't even track whether the charges that they lay concern victimless crimes or crimes with victims.

The offences are therefore targeted not at protecting real children from abuse or providing justice for real children who have already been abused, but instead at criminalising those who have (or who are assumed to have) deviant desires, regardless of whether they have caused any harm or not. In other words, Australian federal criminal law views child abuse material offences *entirely* as obscenity offences, rather than as potential sex crimes with real victims. It is difficult to imagine a more appalling example of Victorian style legal moralism.

Were it possible to rely on prosecutorial discretion to ensure that charges were not laid over victimless crimes, the law's overbreadth might not be as concerning. But as will be discussed further below at 7.3, this is unfortunately not the case. On the contrary, police have an ignoble record of overzealously enforcing these ill-considered provisions to the letter, while spurning the opportunity to work with the adult content industry on crime prevention initiatives (McGrady 2024).

For now it suffices to note the most notorious example, the 2008 case of *McEwen v Simmons & Anor* [2008] NSWSC 1292 in which the conviction of a man over a parody pornographic cartoon of the Simpsons exposed the Australian legal system to ridicule around the world. Popular author Neil Gaiman (2008) memorably described the decision as "nonsensical in every way", while scholar Mark McLelland (2005:9) has aptly described Australia's conflation of CSAM with fictional and fantasy materials as "thoughtcrime".

4.3. Customs Act

Section 233BAB of the Customs Act 2001 and Reg 4A of the Customs (Prohibited Imports) Regulations 1956 together criminalise the importation of child abuse material and other Refused Classification publications. Section 233BAB duplicates (rather than incorporating by reference) the Criminal Code's broad definition of the term child abuse material, while Reg 4A duplicates the National Classification Code's broader still definition of Refused Classification material (including publications that deal with matters of sex, drug misuse or addiction, crime, cruelty, violence or revolting or abhorrent phenomena).

Essentially this creates a hybrid that draws from two separate legal regimes to establish the broadest possible range of materials the importation of which is criminalised at the border, including a wide range of books, films, games, and artworks that are lawfully available overseas and are commonly brought across the border by travellers. When the bar of criminality is set so low, enforcement resources are wasted and unjustified harms are done to individuals who pose no risk of harm to the community.

The Australian Border Force (ABF) is the agency responsible for enforcing this provision. The ABF was formed in 2015 as the paramilitary-style enforcement arm of the Department of Immigration and Border Protection. ABF officers are not police, yet they are granted extraordinary coercive powers such as the ability to make arrests and to search private digital devices at the border – which would in most other circumstances require a warrant. These powers have been wielded indiscriminately, recklessly, and on occasion even corruptly (Coyne 2017).

A scathing 2017 report by the Australian National Audit Office (ANAO 2017) found that the ABF's enterprise risk management framework did not adequately address the risk of officers exercising coercive powers unlawfully or inappropriately. In particular, the ANAO found in its report that officers were inadequately trained, and that "Some personal searches of

passengers at international airports examined by the ANAO were unlawful or inappropriate." The ABF pushed back against the ANAO's recommendations in part, and as of 2020, there had been no independent government assessment of the state of their implementation (Commonwealth of Australia 2020).

While section 233BAB does duplicate the Criminal Code's criteria of what a reasonable person would consider offensive, once again it omits to codify the common law criterion that considers the class of persons to whom a publication is made in determining whether it is obscene. As such, a person who enters Australia with offensive images in a private chat group on a digital device can still face charges. Indeed, in practice, charges have frequently been laid over cartoon images, and even over images that had been deleted from a device before the defendant crossed the border (Australian Border Force 2024).

In section 3.3 above, the determination of law enforcement authorities to prosecute victimless crimes raised questions over whether they were truly motivated by a victim focus. It could just as well be asked whether the ABF is truly devoting itself to the interests of real victim survivors, given recent reports that as a workplace, it has been found to be a hotbed of misogyny and sexual harassment (Karp 23 April 2024).

4.4. Online Safety Act

Under the Online Safety Act 2021, Australia's eSafety Commissioner has responsibility for responding to reports of online content that would be refused classification under the National Classification Scheme. Under Part 9 of the Act establishing an Online Content Scheme, the Commissioner is authorised to direct an Internet service provider or hosting provider to remove content that has been or would be refused classification.

This marks a significant shift in Australia's approach to regulating online content. By empowering the eSafety Commissioner to respond to reports of Refused Classification content, the Act acknowledges the challenges of policing online materials in a global environment. The Commissioner's role is critical in addressing the proliferation of harmful content online, including real CSAM, violent extremism, and hate speech.

The importance of this role has grown as the volume of materials available to Australian consumers has shifted from physical imports such as books and DVDs, to online materials such as websites and streaming services. However, the ready availability of Refused Classification materials such as fetish-themed pornography and adult graphic novels online highlights the practical difficulties in enforcing the Scheme. The Commissioner faces significant challenges in identifying, removing, and prosecuting such content, particularly given the transnational nature of online platforms.

A narrowing of the scope of the Refused Classification category, as proposed in this submission, would impact the eSafety Commissioner's role. By refocusing on the more achievable goal of removing actual sexual abuse material, the Commissioner could more effectively target harmful content that causes real harm to individuals and communities.

5. Scope and purpose of the Scheme

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

The Guiding Principles of the National Classification Scheme – that adults should be able to read, hear, see and play what they want; children should be protected from material likely to harm or disturb them; and everyone should be protected from exposure to unsolicited material that they find offensive – remain as relevant today as ever. This submission does not recommend that these Guiding Principles be altered.

It also remains appropriate for the Scheme to take into account community concerns about depictions that condone or incite violence, such as sexual violence – however the phrase "condone or incite" has a very specific meaning that should not be confused with the mere representation or description of violence or sexual violence in a fictional context. A piece of art does not "condone" that which it represents. This principle therefore ought to have only very narrow application, principally to publications that aim to actually incite imminent unlawful action. A long line of U.S. case authority beginning with *Brandenburg v Ohio*, (1969) 395 US at 444, 447–9 is instructive in this regard, and see also 7.2 below.

Likewise, community concerns about the portrayal of persons in a demeaning manner should be limited to cases of hateful speech such as racial or sexual vilification, that are targeted at real human victims with the intent of fomenting hatred against them. Instead, this principle seems to have principally been applied to criminalise the representation of consensual sexual fetishes, whose participants are not victims at all.

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

The suggested criteria to define classifiable content – that they are professionally produced, distributed on a commercial basis, and directed at an Australian audience – are sensible and worthy of support.

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

The phrases "the standards of morality, decency and propriety generally accepted by reasonable adults" and "likely to cause offence to a reasonable adult" as contained in the Classification Act and the Code are remnants of an era of legal moralism (see section 3.2 above). These phrases carry hidden biases and normalise discrimination against sexual minorities, whom they implicitly stigmatise as not being "reasonable adults" (see further 6.2 below).

No additional substantive guidance as to the application of these inherently subjective concepts is contained in the Classification Guidelines, despite appearances. For example, the definition of "revolting and abhorrent phenomena" in the Publications Guidelines (2008) add nothing to the definition of "offensive", because it is defined in an entirely circular way as "Fetishes or practices, sometimes accompanied by sexual activity, which are considered offensive."

The Films Guidelines (2012) provide a definition of "offensive" which, while not circular, is hardly any more helpful; "Material which causes outrage or extreme disgust". The Guidelines go on to explain that this would include "Fetishes such as body piercing, application of substances such as candle wax, 'golden showers', bondage, spanking or fisting." Yet is such content really so outrageous or disgusting in any objective sense, when the prevalence of interest in BDSM activities in the general population is as high as 69% (Neef et al. 2019)?

In short, the idea that there is any social consensus among "reasonable adults" on matters of morality, decency, propriety, or offensiveness is a legal fiction. It serves simply to create a false aura of objectivity around the subjective preferences that privileged members of society hold about the publications that other people ought to be permitted to read, write, or watch.

Other than the unexamined exceptionalism with which our society treats sex (Gruber 2023), there is no reason to be less tolerant of other people seeking out graphical sexual content than we are towards those who seek out graphically violent content. When considering that the *Saw* movies which graphically depict people being tortured, beheaded, and disembowelled are passed with ratings as low as MA 15+, yet videos of consenting adults spanking each other for pleasure are Refused Classification, the absurdity of the current classification Scheme becomes manifest.

While the desire to ensure that persons are not exposed to unsolicited sexual content that offends them is understandable – and can absolutely be accommodated within the Scheme – this does not necessitate or justify the blanket censorship of sexual content that crosses a completely arbitrary line of morality, decency, propriety or offensiveness. The desire to do so is an authoritarian impulse that has no place in a diverse democratic society such as Australia. To go further and even *criminalise* the possession of such media in certain circumstances – as the Refused Classification category essentially does – is a serious and unjustifiable human rights violation (see 7.2 below).

Australia's classification regime should therefore move on from these antiquated and harmful concepts in favour of a more objective, harms-based approach, as suggested in the Stevens report (2020:34). This could be done by substituting the above phrases with something like "The potential harm to identifiable individuals or communities." Such harm should be based on available empirical evidence, rather than on mere supposition or "guilt by association" about the supposed proclivities of those who seek out sexually graphic content.

The suggested change would also make the Scheme more consistent with the principle that everyone should be protected from exposure to *unsolicited* material that offends them, which has not been effectively implemented in the Scheme as it exists today. This is because although the Classification Act directs that "the persons or class of persons to or amongst whom it is published or is intended or likely to be published" should be considered in making classification decisions, this has not been given sufficient weight relative to the opinions of the public at large as to whether material is offensive. This skews the Scheme towards finding offence in materials to which no offence would likely be taken by its intended audience.

Recommendation #1: "The potential harm to identifiable individuals or communities" should be added to the Code as a matter to be taken into account in making a classification

decision. References to "the standards of morality, decency and propriety generally accepted by reasonable adults" and "likely to cause offence to a reasonable adult" should be removed.

In addition to this, changes are needed to the Code's definition of Restricted Classification publications, but these are discussed below at 6.3 alongside discussion of related changes that would be needed to the Guidelines.

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

As follows from the discussion above, it is suggested that the definition of a "submittable publication" should be amended to remove the reference to depictions or descriptions "likely to cause offence to a reasonable adult." What remains in that definition – that the publication would either be refused classification or is unsuitable for a minor to see or read – is more than sufficiently broad, but perhaps not sufficiently clear.

An alternative proposal that has the benefits of both simplicity, and conformity with the reference to Refused Classification material, would be to alter the definition to specifically refer to the likelihood that a publication would be classified Category 1 - Restricted or Category 2 - Restricted. There already exists ample documentation to clarify these categories in the Publications Guidelines (2008), though the Guidelines will themselves ultimately need to be revised (see 6.2 below).

As to the idea of broadening a submittable publication to include publications with content unsuitable for children under 15 (essentially an MA 15+ classification which does not currently exist for publications), the benefits are less clear. Doing so would greatly increase the scope of the classification obligation for publications, and it is not sufficiently clear what new publications might fall into that category, nor how useful the classification might actually be in practice.

Currently, young readers can already obtain guidance on the suitability of publications for their age by consulting a librarian, bookseller, teacher, or parent. In view of this, it is suggested that classifying publications for readers under 15 is not currently warranted. With that said, an impact assessment could be undertaken to provide more context for evaluating the proposal.

Recommendation #2: The definition of a "submittable publication" should be changed to remove paragraphs (b) and (c), replacing them respectively with "are likely to cause the publication to be classified Category 1 - Restricted" and "are likely to cause the publication to be classified Category 2 - Restricted"**.**

6. Alignment with community standards and evidence

One of the greatest shortcomings of the Scheme is its reliance on the discriminatory legal fiction of the "reasonable adult" whose views form a solid bedrock of "moral" community standards that allows classification decisions to be objectively made.

The Publications Guidelines (2008) define a "reasonable adult" as someone "possessing common sense and an open mind, and able to balance personal opinion with generally accepted community standards." The Guidelines go on to talk about offensive material as being "material which offends against generally accepted standards, and is therefore likely to offend most people."

But even granting that such generally accepted standards exist and could be ascertained in some way, why should "most people" be empowered to decide what types of sexual interests other adults are permitted to have? This invites a form of majoritarian tyranny that is calculated to marginalise sexual minorities and to stigmatise their desires as "unreasonable" – or to use the Third Reich's preferred terminology, "degenerate."

In shifting towards a more objective, harms-based approach, the Scheme must place less weight on divining the views of this mythical "reasonable person" as an arbiter of community sentiment, and more emphasis on gathering diverse views and empirical evidence on the impacts of potential classification decisions.

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

Although the common law of obscenity purports to be guided by community values in determining what material would have the tendency to deprave and corrupt a reasonable person, this is a sham, since no evidence of the offensive or corrupting tendency of the material is admissible (see section 3.2 above).

The Scheme does not need to suffer from this same limitation, and can adopt an empirical approach towards investigating the potential harms that individuals or groups in the community might suffer from exposure to a publication that is to be classified. But it is just important to investigate the potential harms that individuals or groups in the community might suffer from the *censorship* of such a publication. In a different context, Margaret Otlowski (2000:254) writes:

> in assessing the appropriate relationship between law and morality, it should not be overlooked that it is possible that the enforcement of morality may itself lead to harm, far in excess of any possible harm that the prohibited practices themselves may entail.

This is never more true than in the case of censorship of fiction and art. Frequently the harms said to be done by fictional material are anecdotal, rhetorical, or abstract. But the harms being done through their criminalisation are very tangible and real (some examples have already been given, and more are to follow in the next section 6.2).

The formation of an independent Classification Advisory Panel that would conduct regular reviews of the Classification Guidelines by reference to empirical data about the impacts of classification decisions on diverse populations, has the potential to help to reset the balance of Australian classification law by placing it on a more evidence-based footing.

There is already a considerable base of evidence on the impacts of the ready availability of pornography on rates of sexual offending, and counter-intuitively for many, this evidence suggests that far from increasing rates of sexual violence, it seems to lower them (Ferguson and Hartley 2022). This may be because access to visual representations of sex can act as a safe outlet that prevent some people from resorting to antisocial behaviour, if they might otherwise be inclined towards that. On the other side of the debate, there is also evidence of the negative effects that pornography can have in areas such as body image (Tylka 2015) and on safe sex practices (Wright et al. 2018).

But since debates and legislative initiatives in this area usually boil down to "think of the children", there is the need to invest more heavily into research on potential harms to children from the availability of pornography, including Refused Classification material. The finding that availability of pornography leads to lower rates of sexual violence does seem to carry over to sexual abuse of children (Diamond et al. 2011). But since real CSAM is harmful to its victims and can only ever be refused classification (regardless of its effects on potential perpetrators), the more relevant research question is as to whether fantasy and fictional sexual materials – which modern researchers refer to as FSM (see Lievesley et al. 2023) – have harmful or helpful social effects.

This is not a novel question, though it is one which is yet to receive a comprehensive answer. When Denmark was considering whether to ban FSM along with real CSAM, it ended up not doing so on the strength of a report from Copenhagen's renowned Sexological Clinic that there was no evidence to suggest that such material was harmful (Farmer 23 July 2012). Similarly, a study aimed at empirically testing the assumptions underlying the US government's claims about the potential impact of FSM on the acceptance of sexual abuse of minors found no evidence to support these claims (Paul and Linz 2008).

The most recent research into this question is published by Lievesley et al. (2023), who propose a novel research program and some initial research questions that provide a theoretical framework for more evidence-based inquiry on FSM use. This program focuses on people who already experience attractions to children, and therefore might be assumed to be the highest-risk group of FSM consumers – or conversely, the group for whom FSM use might be most beneficial as an abuse prevention intervention.

The Australian approach has not been based on, nor seemingly taken any account whatsoever, of this line of research. Indeed, at 401 Lievesley et al criticise the Australian Institute of Criminology (2019) for recommending that a legal age of consent effectively be established for sex dolls (which, as seen at 4.2 above, did later occur), identifying this as an instance of research:

> explicitly highlighting a lack of available empirical evidence about the utility of some forms of FSM, but which then call for their avoidance in practice due to potential risks (while ignoring potential benefits).

The most parsimonious explanation for this might well be that policy makers don't actually care about whether FSM use is harmful or helpful, but simply employ harms-based language as an ex post facto justification for an immutable moral judgement to ban FSM that they have already made. But to not care about the empirical data behind FSM use is to not really care about children – or at least, to put their interests below those of easily-offended adults.

As “revolting or abhorrent” as “reasonable adults” might well consider FSM to be, caring so little about its effects on actual rates of child sexual abuse is far worse.

Apart from indifference from government, other factors inhibiting such research include a lack of interest from funders, legal barriers (Lyons et al. 2010), and the stigma surrounding the subject, which results in researchers – especially LGBTQ+ researchers – receiving hate mail and death threats simply for doing their jobs (Walker 2023).

The Classification Advisory Panel has a responsibility to approach this stigmatised issue with objectivity and scientific rigour, untainted by political agendas and media-driven moral panic. By applying the scientific method, the Panel can uncover the truth about the effects of FSM and make informed decisions based on evidence, rather than fear and misinformation.

Recommendation #3: A Classification Advisory Panel should be empowered and resourced to commission empirical research into the possible harms and benefits of the availability in society of fantasy and fictional sexual materials (FSM), including the possible impacts on rates of actual sexual abuse.

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

In determining the composition of the Classification Advisory Panel and the community sectors and researchers with whom it would consult, it is important to include groups that have historically been excluded as stakeholders, yet who are most at risk from harm when content that their communities create or consume is refused classification. These would include:

- **People recovering from trauma.** The exclusion of LGBTQ+ and sex-positive communities from classification consultations has led to a misguided assumption that FSM content depicting acts that would be abusive in real life only caters to sexual abusers. However, this couldn't be further from the truth. Victim survivors of sexual trauma are among the most avid consumers and creators of FSM. Art therapy (Regev and Cohen-Yatziv 2018) and expressive writing (Greenberg et al. 1996) provides many with catharsis that helps in processing and relating traumatic events. Yet, under Australian law, these creative expressions would often be refused classification. This not only isolates these individuals but also perpetuates victim-blaming by treating their trauma response as criminal deviancy.

- **Women.** In contrast to live visual pornography, which is primarily consumed by men, written erotica – including graphic and taboo forms of comic book art (Madill 2015), erotic fan fiction (Duggan 2020), and novels such as *50 Shades of Grey* (Robbins 2012) – is predominantly created and consumed by women. Much of this FSM content would be refused classification under the current Scheme. However, these women's interests do not indicate any criminal tendency, paraphilia, or pathology; rather, they represent a healthy exploration of sexual thoughts, which they may have no intention or inclination to act upon in the real world. As McLelland (2005:19) writes, “current legislation in Australia places unreasonable limits on the

ability of young women and girls to create mutually supportive online networks that challenge sexism, heterosexism and homophobia."

- **Young people.** Similarly, it is extremely common, and developmentally normal, for young people to create and share FSM content, such as fan fiction and art which place characters from pop culture franchises such as *Harry Potter* and *Steven Universe* into fantasy pairings and relationships. But many young people experience bullying over fictional pairings that are perceived as not being morally "pure". This has led to children accusing each other of promoting "pedophilia" or "incest" over trivial matters like character height differences or the ages of fictional creatures. Such bullying has serious consequences, contributing to mental health difficulties and even self-harming behaviours (Abuirme 2022). Australia's classification Scheme has exacerbated this toxic trend, by equating fictional representations with reality and thereby reinforcing the stigma that causes this form of harassment in the first place.

- **LGBTQ+ people.** As explained above (see 3.1), the approach of legal moralism that underpins obscenity law is entangled with a dark history of homophobia. As recently as 1995, the Tasmanian Attorney General banned all of the films in the State's Gay and Lesbian film festival (many of which were documentaries) on the grounds that "these films all relate to homosexual and lesbian lifestyles" (Huntley 1995). Today, LGBTQ+ communities continue to disproportionately suffer the impacts of censorship of art and fiction that is read as sexualised and obscene, in ways that wouldn't apply to their straight equivalents (York 2022:172). McLelland writes:

> As studies have shown, community values regarding homosexuality and other 'queer' sexual acts consistently view these acts more negatively than heterosexual acts. It would not be an overstatement to say that for many people, homosexual activity, whatever the context, is ipso facto 'offensive' behavior." (McLelland 2005:10)

- **Survivors of child sexual abuse.** The definitions of "child abuse material" in the Scheme and Criminal Code – which include merely *describing* acts of child sexual abuse – are so broad that they even muzzle survivors of child sexual abuse and incest from telling their own stories. This is ethically indefensible and must change. In 2019 in the United Kingdom (which uses a similarly overbroad definition to Australia), an award-winning graphic novel by a survivor of incestual child sexual abuse was censored as CSAM – although the harrowing story was anything but (Malcolm 2019). In *Godbout v Attorney General of Quebec* (2020) QCCS 2967, Canada's child pornography law, which was then also of similar breadth to Australia's, was struck down in part because it unconstitutionally restricted the freedom of survivors to recount such narratives. This is discussed further at 7.2 below.

- **Sex workers.** In 2010, furore erupted over reports of bans on the depiction of "small breasted women" by the Australian Classification Board (Fae 28 January 2010). While these reports may have oversimplified the situation, it is evident that numerous pornographic magazines including Barely Legal (Hustler), Finally Legal and Purely 18, all featuring verified adult models, have been refused classification due to the models' youthful appearance. Similar controversy arose over the revelation that depictions of female ejaculation would be refused classification, even while male ejaculation is routinely passed with an X classification. In none of these

cases is anyone being harmed or exploited, and it seems far-fetched to suggest that anyone is being spared from offence by such oddly selective censorship. Sex work is work, and arbitrary decisions such as these can affect livelihoods.

- **Sex-positive communities.** The Scheme's first Guiding Principle – that adults should be free to read, hear, see, and play what they want – aligns with a core value of the consensual BDSM community: that adults should be able to explore their sexuality with other consenting adults as they choose. Some activities and role-play scenarios within this community, such as spanking, bondage, watersports, and ageplay, are often misinterpreted by outsiders as enacting or condoning sexual abuse. But despite their edgy nature, safety and consent are paramount values for the BDSM community (Pitagora 2013). It is therefore wrong that recordings and representations of these activities and scenarios are criminalised in Australia, when they cause no harm to anyone.

The simplistic and false assumption that no "reasonable adult" could have a legitimate reason to create or consume media that are currently Refused Classification affects a broad range of stakeholders who pose no risk to the community. Yet these stakeholders face a huge barrier of stigma in advocating for themselves. All the more effort therefore needs to be given to include these stakeholders in the work of any future Classification Advisory Panel.

Additionally, the Panel should include experts in fields like psychology, sociology, media studies, and law – including criminal defence, not only law enforcement – as well as representatives from relevant community organisations and advocacy groups. This diverse composition will ensure that the Panel's recommendations are informed by a wide range of perspectives and experiences, and that the classification system is reformed to better serve the needs of all Australians.

Recommendation #4: The Classification Advisory Panel should include representation from stakeholders who are negatively impacted when media content is Refused Classification, including victim survivors of trauma and child sexual abuse, LGBTQ+ people and women, young people, sex workers, and sex-positive communities.

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

The Classification Advisory Panel should address the disproportionately harsh treatment of fictional content under the Guidelines. The most urgent change to be made in this regard is to address the Guidelines' unaccountable failure to distinguish between real CSAM and fictional material in the Refused Classification category.

It is worth noting again that when content is Refused Classification, it is effectively also criminalised under State law and under the Customs Act – and as explained above in section 6.2, this harms a broad range of people who deal in such content innocently and who pose no risk to the community – yet are falsely stigmatised as actual or potential sexual abusers.

Australia's treatment of offensive cartoons as equivalent to actual CSAM inexcusably downplays the seriousness of the latter. The production and distribution of CSAM is wrong not merely because it is offensive to look at, but because it is an act of sexual exploitation of its subject – it violates the consent of a living, breathing human child. It is for this reason alone that the state can justify criminalising its possession.

In the Simpsons cartoon porn case (*McEwen v Simmons & Anor* [2008] NSWSC 1292), Adams J made a similar point:

> At the outset it is necessary to appreciate, as I think, that there is [a] fundamental difference in kind between a depiction of an actual human being and the depiction of an imaginary person. The distinction is perhaps made clearer by considering the various depictions in video games and comics of imaginary persons involved in terrible violence, involving the infliction of torture and death. If the persons were real, such depictions could never be permitted. … **There was a tendency in the arguments before me to suggest that the distinction is merely one of degree. This is quite wrong.** Such an approach would trivialise pornography that utilised real children and make far too culpable the possession of representations that did not. [*emphasis added*]

As such the Guidelines, drawing from the Code, define child abuse material far too broadly, in a way that – if it were enforced consistently – would criminalise broad swathes of art and literature from the Marquis de Sade's 18th century pornography, through to fan art and fiction that school children create and share based on their favourite TV shows. But more than that, it would also extend to a broad range of art and writing with an intent other than sexual titillation, such as to be educational, cautionary, or horrifying.

The Public Consultation Paper expressly mentions graphic novels as worthy of review, drawing perhaps on submissions referenced in the Stevens report (2020:72, 86) that singled out Japanese cartoon artforms which they said should be criminalised in Australia regardless of context. But this is a double standard that smacks of racism.

Western cartoon art, not only Japanese, has a long history of dealing with taboo topics such as child sexuality and sexual abuse. Celebrated examples by award-winning authors include *Lost Girls* by Alan Moore and Melinda Gebbie, and a variety of works by Neil Gaiman such as *The Doll's House* and *Smoke and Mirrors*. Debbie Dreschler's *Daddy's Girl* was also referred to above at 6.2 as a memoir of incestual child sexual abuse, that was censored in the United Kingdom.

Japanese artforms too frequently treat these topics with depth and nuance. In submissions to a United Nations enquiry that examined whether the international legal definition of "child pornography" should be loosened to include cartoon images, several respondents (such as Japan Society for Studies in Cartoons and Comics 2019) referred to the manga *Kaze to Ki no Uta* [The Poem of Wind and Trees] as one of the most important works of Keiko Takemiya, who had been awarded with the Medal of Honor with Purple Ribbon by the Japanese government in recognition of excellence in her field.

The Comic Book Legal Defense Fund, in its submission (2019), wrote:

> Young adult fiction routinely addresses sexuality because it is a topic of immediate concern to young adult audiences. Memoirs by abuse survivors will often depict and

> describe the graphic details of abuse as an aspect of the healing process. Mainstream works of art and photography exist in a continuum of art history where the nude, including nude images of minors, are examined, depicted, and described. All of these legitimate areas of inquiry are endangered by the calls for government censorship contained in these Draft Guidelines, and the subsequent chilling effects of self-censorship that will result if laws are adopted as suggested.

Thus there can be no justification for refusing classification to comic books devoid of context, and indeed the context is very important.

One of the contextual factors already considered under the Guidelines for the Classification of Publications (2008) is that "stylised depictions are considered to have less impact than realistic depictions, especially photographs." By this standard, photograph-like representations (such as AI artworks) might reasonably be considered to have the highest impact and call for the most scrutiny in classification. United States law recognizes this by allowing for depictions that are "indistinguishable from" a real minor to be treated at law as if they were photographs (Malcolm 2023a).

The artistic merit of the publication is another factor already considered in classification. Indeed, the Guidelines even state that "Bona fide artworks are not generally required to be submitted for classification as they are not generally considered to be 'submittable publications'."

But an important contextual factor – by far the most important – is completely absent from the classification Scheme. Namely, no consideration is explicitly given to whether a representation actually depicts – and thereby harms – a real child. This is an inexcusable omission, which should be redressed immediately by amending the relevant part of the Code's definitions of Refused Classification material to limit them to works that depict or appear to depict actual children:

> ~~describe or~~ depict ~~in a way that is likely to cause offence to a reasonable adult,~~ a person who is, or ~~appears to be~~ is visually indistinguishable from, a child under 18 ~~(whether the person is~~ engaged in sexual activity ~~or not)~~;

Note that writings and less-realistic depictions of children could still be refused classification if they fall under the Code's separate Refused Classification criterion of works that "promote, incite or instruct in matters of crime or violence," which draws from the Guiding Principle that community concerns about "depictions that condone or incite violence" should be addressed. This in turn supports the existing Guidelines such as the Publications Guidelines' ban on works that "promote or provide instruction in paedophile activity" [sic] (this should really say "child sexual abuse," since "paedophile activity" is a meaningless phrase).

Beyond that, written and drawn works that appear to depict non-existing children in a sexual context could and in appropriate cases should still be restricted in categories such as MA 15+ and R18+, with an appropriate warning such as "child abuse content" (if it depicts abuse) or "coming of age" (if it depicts consensual teen sexuality).

The Classification Advisory Panel should then consider changes to the Guidelines that would be necessary to reflect these changes to the Code.

Recommendation #5: The Code and Guidelines should be amended to distinguish between real child sexual abuse material (CSAM) and fantasy and fictional sexual materials (FSM).

7. Fit-for-purpose governance arrangements for the Scheme

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

The consolidation of classification functions under a single national regulator at the Commonwealth level would help to streamline the current fragmented and inefficient system, reduce confusion and inconsistencies, and provide a more cohesive and effective approach to content classification.

However, it does not go far enough to consolidate only the classification functions of the Department of Infrastructure, Transport, Regional Development, Communications and the Arts (DITRDCA), the Australian Communications and Media Authority (ACMA), and the eSafety Commissioner. As identified above at 4.2 and 4.3, the Attorney-General's Department (which is responsible for the Criminal Code) and the Department of Home Affairs (which is responsible for the Customs Act) are also integrally involved in the criminalisation of most dealings in Refused Classification material.

Law enforcement units understand well that one of their main levers for obtaining increased funding and broader powers of surveillance is to take a public stance of "zero tolerance" towards child abuse material (McLelland 2005:66). But because such material is so broadly defined, it creates a scattergun approach that has resulted in some monumentally poor choices of targets for prosecution. As previously described, lifelong criminal consequences have been levied upon undeserving targets ranging from eleven year old children (Hunt 4 February 2014) to doting grandmothers (Peters 30 April 2024). This is unacceptable.

The Stevens Report (2020:13, 87) suggested that the definitions relating to sexualised depictions of minors in the Classification Code and Guidelines should be broadened to accord with the definition in the Criminal Code. This could only make matters worse. Both the Criminal Code and the Customs Act are overbroad and fail to include many important contextual factors recognised at common law and in the Scheme for assessing the harmfulness of content including, crucially, the class of persons to whom it was published.

While Stevens blithely acknowledges that as a matter of classification policy, "a film's story may dramatise the coming-of-age of an adolescent and it may include scenes of implied, consensual, underage sexual activity … [or deal] with child abuse and the impacts on the victims", the reality is that such content has been and will continue to be wrongly prosecuted as child abuse material when coming to the attention of the Federal Police or Australian Border Force.

Rather than exporting the failed provisions that enable these unjust prosecutions from the Criminal Code into the Scheme, the reverse should be done. With law enforcement having so

egregiously mismanaged its prosecutorial discretion in cases of real CSAM – to say nothing of the resources wasted on prosecuting people over cartoons and stories – it is high time that its powers in the latter sphere should be curtailed in favour of the Australian Classification Board, with its greater specialised expertise in evaluating the harmfulness of fictional material.

The simplest and preferred option for doing this is to amend the definitions of child abuse material in the Criminal Code and in the Customs Act to accord with the narrower definitions recommended in this submission, namely representations of "a person who is, or is visually indistinguishable from, a child under 18 engaged in sexual activity". In that manner, prosecutions under the Criminal Code and Customs Act could be focused where they ought to be – on actual child abusers exploiting real children.

Importantly, making this change to the law need not affect government's ability to remove explicit fictional material from the Internet. That's because the eSafety Commissioner will retain the ability to order online service providers to remove such content as either Refused Classification, Class 1, or Class 2 material. In other words, even if fictional material were excluded from the criminal law, no changes would be needed to the Online Services Act to maintain the government's power to prevent such content from being generally available on the Internet.

While the Customs Regulations would also have to be amended to narrow the scope of its definition of Refused Classification materials in accordance with this submission, there would be no change to the requirement that classifiable content be submitted for classification before it can be imported commercially. Since most formerly Restricted Classification content would likely still be classifiable as Category 1 / R18+ or higher, the main object of the Scheme would not be prejudiced by decriminalising the importation of small quantities of such content by individuals in their luggage or personal digital devices.

Recommendation #6: The Criminal Code and the Customs Act should be amended to decriminalise the possession and the non-commercial importation of fantasy and fictional sexual materials (FSM).

If completely removing fictional material from criminalisation under the Criminal Code and Customs Act is too ambitious, then a second option would be to provide persons accused of such crimes with the opportunity to have the Classification Review Board review the materials involved. This option is discussed further at 7.3 below.

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

One of the key considerations that has been given insufficient weight in current regulatory arrangements, and should be given greater weight in designing a future single national regulator model, is ensuring its congruence with Australia's international human rights obligations, including freedom of expression and privacy.

The Universal Declaration of Human Rights (UDHR) enshrines the right to freedom of expression in Article 19, which includes the "freedom to seek, receive and impart information and ideas of all kinds." While this right is not absolute, any restrictions must be necessary and proportionate to achieve a legitimate aim.

The International Covenant on Civil and Political Rights (ICCPR), to which Australia is a party, reiterates this right in Article 19 and provides additional guidance on permissible limitations. The United Nations Human Rights Committee, which interprets the ICCPR, has consistently held that restrictions on freedom of expression must be:

- Provided by law
- Necessary for a legitimate purpose (such as protecting national security, public order, or the rights of others)
- Proportionate to the aim pursued
- The least restrictive means available

In the present context, the UN Office of the High Commissioner on Human Rights has cautioned that art and fiction can't be treated as equivalent to real child abuse images, and that criminalizing speech is only permitted as a last resort (Malcolm 2023b). Mark McLelland (2005) writes:

> Human-rights advocates have pointed out that since the Australian legislation applies equally to *written* as well as visual depictions of child sex, it exceeds by far, international human rights standards. [*emphasis in original*]

As to privacy, the ICCPR Article 17 states:

> No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

Restrictions on privacy must also be necessary and proportionate. As noted above at 3.1, it was only in 1997 following the case of *Croome v Tasmania* (1997) 191 CLR 119 that the last anti-gay law in Australia was repealed, and only then following a 1994 ruling of the United Nations Human Rights Committee (UNHRC) that essentially required Australia to do so. The Human Rights (Sexual Conduct) Act 1994 (Cth), which was passed in response to that ruling, states:

> Sexual conduct involving only consenting adults acting in private is not to be subject, by or under any law of the Commonwealth, a State or a Territory, to any arbitrary interference with privacy.

It might well be argued that this law and the human right of privacy underlying it apply equally to those who privately create or consume fictional sexual materials.

The UN's Sustainable Development Goal 16.2 aims to end child sexual exploitation and abuse, which aligns with Australia's efforts to combat child sexual abuse material online. However, any measures taken to achieve this goal must still respect the principles of necessity and proportionality. In the context of regulating online content, this means that any restrictions on freedom of expression or privacy must be carefully tailored to address

specific harms, rather than imposing blanket bans or overbroad definitions of "harmful" content.

We might look to other comparable common law jurisdictions for instruction as to how they have balanced domestic political pressures favouring a “tough” approach against CSAM with their own domestic and international human rights obligations. The Canadian case of *R v Sharpe* [2001] 1 SCR 45, and what occurred in its aftermath, are highly relevant here.

At the time that case was heard, Canada’s Criminal Code defined child pornography to include “any written material or visual representation that advocates or counsels sexual activity with a person under the age of eighteen years.” Sharpe was charged in part over the possession of fictional stories that he had written, and defended his case on the basis that the Code violated the Canadian Charter of Rights and Freedoms. At first instance, this argument was accepted.

On appeal by the Crown, the court read an exception into the law that permitted written material or visual representations created and held by the accused for personal use, effectively recognising a right to privacy analogous to that recognised in *Croome*. In addition an exception was recognised for visual recordings of lawful sexual activity, created by or depicting the accused, held exclusively for private use (with teen sexting being a common example of this).

Public reaction to the outcome of the case was negative however, and in response by 2005 the legislature had amended the Criminal Code to remove the requirement that fictional material “advocates or counsels” unlawful sexual activity, as well as removing an “artistic merit” defence. Thus amended, the law came before the courts again in the case of *Godbout v Attorney General of Quebec* (2020) QCCS 2967, when the “child pornography” at issue was a novel adapting the story of *Hansel and Gretel* as a work of horror fiction.

The Superior Court of Quebec ruled that the removal of the requirement that the work “advocates or counsels” abuse made the law unconstitutional, in part because without that phrase, not only authors of fiction but also child sexual abuse survivors could be criminalised simply for writing about their experiences, which would infringe their Charter rights to freedom of expression. Judge Blanchard wrote (at 143, translated from the French):

> The constitutional validity of the legislative provisions regarding child pornography … is greatly diminished by the fact that, at the very least, a certain category of expressive material which is at the heart of the values which underlie the right to freedom of expression, such as personal development and the search for truth by participating in a necessary social discourse that aims to denounce the behaviour of sexual predators, as admitted by the PGQ, is now subject to criminal prosecution.

In Australia, one of the Guiding Principles of the Scheme already echoes the language of Canada’s “advocates or counsels” requirement – by requiring that account be taken of “depictions that condone or incite violence, particularly sexual violence”. Going forward, the Department would do well to ensure that this factor is upheld as a necessary criterion for the evaluation of child abuse material, in order to ensure that Australia’s classification law does not violate its international human rights obligations.

Recommendation #7: Australia should conduct an independent human rights evaluation of the content classification Scheme to ensure that it aligns with international human rights standards, including freedom of expression and privacy.

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

Depending on how the single national regulator model develops, there may still be roles for the Classification Board and the Classification Review Board, at least as a transitional arrangement. They could include a role for the Board to provide specialised expertise and guidance on complex classification decisions, as well as quality assurance and oversight of industry self-classification decisions. Until the other institutional elements of the model coalesce further, it is difficult to be more specific.

However this submission focuses on one particular role that the Classification Review Board could undertake, namely to provide an initial independent review and appeal process for the classification of materials which are the subject of removal orders under the Online Safety Act by the eSafety Commissioner, or over which charges are laid under the Criminal Code by the Federal Police or under the Customs Act by Australian Border Force.

Currently the eSafety Commissioner makes their own determination of the classification of content before making a removal order, and section 220 of the Online Safety Act provides a right of review by the Administrative Appeals Tribunal (AAT). But since the AAT does not have specialised expertise in content classification, it would make more sense for reviews of classification decisions to be conducted by the Classification Review Board.

As to the Criminal Code and Customs Act, no review of a decision to treat content as Refused Classification is available other than in court. Since false charges relating to child abuse can have lifelong consequences, this comes too late – especially due to the lack of contextual factors that those Acts recognise for assessing the harmfulness of content, and due to the lack of care or discrimination that the Federal Police and Australian Border Force have displayed in determining which cases to prosecute (see above at 4.2, 4.3, 7.1, and 7.2).

A defendant ought to have the opportunity to obtain a preliminary independent review of the classification of materials over which they have been charged by the Classification Review Board before being required to enter a plea. For example, in 2008 the Director of Public Prosecutions laid charges over one of artist Bill Henson's photographs of an adolescent nude subject, before ultimately withdrawing them after the Classification Board cleared the image as lawful (Marr 2008:116). If such an early review were available to all criminal defendants faced with similar charges, much could be done to ameliorate the injustice they suffer from wrongful prosecutions brought under the enforcement agencies' overzealous "zero tolerance" approach.

Note that the Australian Law Reform Commission (2012:289) has previously made a similar recommendation which was widely supported by respondents at that time.

Recommendation #8: Under a single national regulator model, the Classification Review Board should be retained as an independent review and appeal body for classification decisions made under the Online Safety Act, Criminal Code, and Customs Act.

7.4. 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 largest gap in the single national regulator model that has been treated as out of scope for this submission is the role of the States and Territories. This role has two parts.

First, while the Australian Classification Board is responsible for classifying films, publications, and computer games at the national level, each State and Territory has its own set of regulations and laws regarding the sale, distribution, and exhibition of classified content.

Enforcement of classification laws also often falls under the jurisdiction of State and Territory governments. They may conduct inspections of retail outlets, cinemas, and other venues to verify that classified content is being handled and exhibited according to the law. They may also enact specific legislation or regulations to supplement the national classification scheme, such as additional restrictions on the sale or exhibition of certain types of content.

Second, States and Territories may maintain their own obscenity and child pornography laws, which operate in parallel to the classification system and to criminal federal law, but often at variance with it. For example, under Western Australia's Censorship Act 1996, "child pornography" is defined only to include depictions of children under 16 years of age – thus, depictions of 16 and 17 year old models are not criminalised, although they would remain illegal if prosecuted under federal law.

Although out of scope for this submission, there is merit in harmonising the treatment of classifiable content under State and Territory laws, so that a uniform set of content classification and criminalisation standards applies nationwide. Since, in any case, the Classification Act requires Commonwealth, State and Territory ministers to agree to any amendments to the National Classification Code and Guidelines, there will be a natural opportunity for discussions of harmonisation as part of these consultations.

Recommendation #9: The single national regulator model should seek to harmonise the treatment of classifiable content under State and Territory laws, to ensure a uniform set of content classification and criminalisation standards applies nationwide.

9. Conclusion

The government's commitment to modernising Australia's Classification Scheme by moving towards a more evidence-based framework for content classification and regulation is warmly welcomed. This shift acknowledges that the rapidly evolving media landscape

demands a more nuanced and informed approach to balancing individual rights and freedoms with the need to protect vulnerable groups.

By grounding policy decisions in empirical research and expert advice, the government can ensure that regulation is effective, proportionate, and responsive to the needs of all Australians. This submission aims to contribute to this evidence-based and human rights-compliant approach, one that prioritises the protection of consenting adults' rights to access and engage with sexual content, while safeguarding children and non-consenting adults from exposure to harmful material.

Perhaps the lowest hanging fruit among the recommendations made in this submission is that the permissibility of adult fetish content should not be gauged based on loaded concepts such as whether it is "revolting or abhorrent," but rather whether it risks causing actual harm to identifiable individuals and communities. Although it is a more difficult pill for many to swallow, exactly the same rational, evidence-based approach should be taken in relation to fantasy and fictional sexual material (FSM) such as the written word and comic art, with the ages of the fictional characters depicted being a factor, but not a dispositive one, in how such works should be classified.

There is no argument, from any reputable quarter, that real child sexual abuse is intolerable and wrong in every circumstance. Yet the "slippery slope" argument as advanced by some that the treatment of the sexuality and abuse of minors in art and fiction evinces a tolerance for it in reality is patronising, false, and offensive. It advances a policy of "guilt by association" that is foreign to Australian law. The argument also ignores the stark reality that children and victim survivors, especially those from within the LGBTQ+ community, are the most likely to be affected by the over-criminalisation of FSM (see 6.2 above).

In light of evidence that these FSM materials are more than likely to be harmless, and could even be helpful (see 6.1 above), the actions of Australian law enforcement in indiscriminately targeting creators and consumers of these materials for prosecution raises serious doubts as to whether the government is in fact pursuing the interests of children through these measures, or rather a puritanical and un-Australian agenda for the restriction of legitimate speech. Considering also the inconvenient truth that Australia is violating its human rights obligations to uphold the freedom of expression and privacy of creators and consumers of FSM, the case against a "zero tolerance" approach to FSM could not be clearer.

Apart from being ethically and legally indefensible, the "zero tolerance" approach is also doomed to failure. In every schoolyard in Australia, there are children who exchange FSM content such as manga and "furry fandom" art that would be Refused Classification, and could expose them to criminalisation. On every social media network, creators and fans share links to fiction and art hosted on websites that are legal overseas, and will likely always be beyond the reach of Australian law enforcement.

One of these, Archive Of Our Own (Ao3) for example, is run by a U.S. nonprofit the Organization for Transformative Works, whose express purpose is to prevent censorship of content that is protected by the First Amendment to the United State Constitution – much of which would be Refused Classification in Australia. But the site is anything but an anarchistic free-for-all. It incorporates a flexible and sophisticated filtering and tagging system, that allows individuals to curate their own experience, hiding content that they might find triggering or offensive, and surfacing content that matches their interests.

Here is where the answer lies. Not in a paternalistic approach that instructs adults on what media they are permitted to enjoy and throws them into a cage if they disobey, but rather an empowering approach that provides them with the freedom, the information, and the tools that they need to decide for themselves what they wish to read, hear, see or play. Official classification is part of the solution, but so too are the tagging and filtering systems that many online platforms are innovating without the need for any government intervention at all.

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