

Classification (Publications, Films and Computer Games) Act 1995

Independent review of Part 10 (Material
prohibited in certain areas in the Northern
Territory)

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Independent Review

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Executive summary

1. Review conducted for the purposes of section 114 of the Commonwealth Classification Act

- (a) This is a report of a review undertaken for the purposes of section 114 of the *Classification (Publications, Films and Computer Games) Act 1995* (Cth) (**Commonwealth Classification Act**).
- (b) Under section 114 the review is required to assess the effectiveness of the measures provided for by Part 10 of the Commonwealth Classification Act.
- (c) The review that we have undertaken has been conducted as a 'desktop' review.
- (d) The report describes the offences established under Part 10 in relation to the possession and control of prohibited material in areas that are prescribed under the Commonwealth Classification Act as 'prohibited material areas', and the powers in relation to seizure and forfeiture of prohibited material.
- (e) The report also compares the offences established under Part 10 of the Commonwealth Classification Act with offences under the *Classification of Publications, Films and Computer Games Act* (NT) (**NT Classification Act**). We note that in comparison to the Commonwealth Classification Act, which imposes prohibition on the possession and control of the relevant prohibited materials in the prohibited material areas, the NT Classification Act provides for a scheme of regulation of classified material.
- (f) We have concluded that we do not have adequate evidence to determine the effectiveness or otherwise of the measures in Part 10 of the Commonwealth Classification Act, nor to determine whether the scheme for prohibition provided for by the Commonwealth Classification Act is more effective than the scheme for regulation that operates under the NT Classification Act.

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Date: 6 August 2015

Background

2. Requirement for independent review

- (a) Subsection 114(1) of the Commonwealth Classification Act provides that the Indigenous Affairs Minister must cause an independent review to be undertaken of the first seven years of the operation of Part 10 of the Commonwealth Classification Act. Pursuant to subsection 114(2), the review must:
 - (i) assess the effectiveness of the special measures provided for by Part 10; and
 - (ii) consider any other matters specified by the Indigenous Affairs Minister.
- (b) Subsection 114(3) of the Commonwealth Classification Act provides that the review must be completed, and a report be prepared, before the end of eight years after Part 10.
- (c) The requirement for an independent review was inserted into the Commonwealth Classification Act by the *Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Act 2012* (Cth) (**Stronger Futures Act**).

3. Terms of reference

- (a) The terms of reference for this independent review are as follows:

Section 114 of the Classification (Publications, Films and Computer Games) Act 1995 (Classification Act) requires that the Commonwealth Minister cause an independent review to be taken of the first seven years of operation of Part 10 of the Classifications Act.

The review must assess the effectiveness of the special measures provided for by this Part.

The review must be completed and a report prepared before 4 September 2015. The Indigenous Affairs Minister must table the report in both Houses within 15 days sitting days after receiving the report.

- (b) On 20 July 2015, Minter Ellison was engaged to undertake the independent review.

4. Materials considered

- (a) Australian Human Rights Commission, *Stronger Futures in the Northern Territory Bill 2011* and two related bills (6 February 2012).
- (b) Commonwealth of Australia, *Classification (Publications, Films and Computer Games) Act 1995* (compilation start date 11 March 2015).
- (c) Commonwealth of Australia, *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory Emergency Response and Other Measures) Act 2007* (compilation start date 12 January 2011).
- (d) Commonwealth of Australia, *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory Emergency Response and Other Measures) Bill 2007 – Explanatory Memorandum* (circulated by the authority of the Minister for Families, Housing, Community Services and Indigenous Affairs, the Hon Mal Brough MP).

- (e) Commonwealth of Australia, *National Classification Code* (compilation start date 1 January 2013).
- (f) Commonwealth of Australia, *Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Act 2012* (compilation start dated 16 July 2012).
- (g) Commonwealth of Australia, *Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Bill 2011 – Replacement Explanatory Memorandum* (circulated by the authority of the Minister for Families, Housing, Community Services and Indigenous Affairs, Minister for Disability Reform, the Hon Jenny Macklin MP).
- (h) Commonwealth of Australia, Department of Social Services, *Stronger Futures in the Northern Territory: Report on Consultations* (October 2011).
- (i) Northern Territory, *Classification of Publications, Films and Computer Games Act* (compilation as in force at 1 January 2013).

5. Legislation under review

5.1 Prohibited material laws

- (a) Part 10 of the Commonwealth Classification Act sets out special classification measures for Indigenous communities in the Northern Territory. Part 10 was inserted into the Commonwealth Classification Act by the *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth) (**NTNER Other Measures Act**).
- (b) The Explanatory Memorandum to the NTNER Other Measures Act states that the (then) new Part 10 of the Commonwealth Classification Act contains:
 - (i) measures banning the possession of pornographic material within prescribed areas and prohibiting the supply of pornographic material in prescribed areas.
 - (ii) The new Part also gives police all necessary powers in prescribed areas to seize and destroy material which may be prohibited under the new Part 10.
- (c) The intention of these changes is captured in the main object of the special measures set out in Part 10, which is stated to be '*to protect children living in Indigenous communities in the Northern Territory*' from being exposed to prohibited material: section 98A of the Commonwealth Classification Act.

5.2 Prohibited material

- (a) Part 10 provides that certain offences attach to the possession, control or supply of prohibited material in a prohibited material area (Division 2), and prohibited material is subject to forfeiture and seizure if found in a prohibited material area (Division 3).
- (b) Prohibited material is defined in Part 10 to mean 'level 1 prohibited material' and 'level 2 prohibited material', with both terms defined in turn.
- (c) 'Level 1 prohibited material' means:
 - (i) a publication classified as Category 1 restricted or Category 2 restricted; or
 - (ii) an unclassified publication that contains material that would be likely to cause it to be classified Category 1 restricted or Category 2 restricted; or
 - (iii) a film classified as X 18; or
 - (iv) an unclassified film that contains material that would be likely to cause it to be classified X 18; or

- (v) a prohibited publication.
- (d) 'Level 2 prohibited material' means a publication, film or computer game classified Refused Classification (**RC**) or contains material that would be likely to cause it to be RC.
- (e) The *National Classification Code 2005* defines these classifications as follows:

Type	Definition of prohibited material
Publications	<p>RC: Publications that:</p> <ul style="list-style-type: none"> (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. <hr/> <p>Category 2 restricted: Publications (except RC publications) that:</p> <ul style="list-style-type: none"> (a) explicitly depict sexual or sexually related activity between consenting adults in a way that is likely to cause offence to a reasonable adult; or (b) depict, describe or express revolting or abhorrent phenomena in a way that is likely to cause offence to a reasonable adult and are unsuitable for a minor to see or read. <hr/> <p>Category 1 restricted: Publications (except RC and Category 2 publications) that:</p> <ul style="list-style-type: none"> (a) explicitly depict nudity, or describe or impliedly depict sexual or sexually related activity between consenting adults, in a way that is likely to cause offence to a reasonable adult; or (b) describe or express in detail violence or sexual activity between consenting adults in a way that is likely to cause offence to a reasonable adult; or (c) are unsuitable for a minor to see or read.
Films	<p>RC: Films that:</p> <ul style="list-style-type: none"> (d) 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 (e) 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 (f) promote, incite or instruct in matters of crime or violence. <hr/> <p>Films (except RC films) that:</p> <ul style="list-style-type: none"> (a) contain real depictions of actual sexual activity between consenting

Type	Definition of prohibited material
	<p>adults in which there is no violence, sexual violence, sexualised violence, coercion, sexually assaultive language, or fetishes or depictions which purposefully demean anyone involved in that activity for the enjoyment of viewers, in a way that is likely to cause offence to a reasonable adult; and</p> <p>(b) are unsuitable for a minor to see.</p>
Computer games	<p>RC: Computer games that:</p> <p>(a) 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</p> <p>(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</p> <p>(c) promote, incite or instruct in matters of crime or violence.</p>

5.3 Prohibited material area

- (a) Prohibited material area is defined in Part 10 to mean an area in the Northern Territory in relation to which a determination under subsection 100A(1) of the Commonwealth Classification Act is in force. Under that subsection, the Indigenous Affairs Minister may, by legislative instrument, determine that an area in the Northern Territory is a prohibited material area.
- (b) The Minister may make a determination on his or her own initiative or following a request by, or on behalf of, a person who is ordinarily resident in the area to which the determination relates: subsection 100A(3) of the Commonwealth Classification Act.
- (c) Before making a prohibited area determination, the Indigenous Affairs Minister must engage in community consultation: subsection 100A(4) of the Commonwealth Classification Act. That community consultation must involve:
 - (i) making available information in the area setting out the proposal to make the determination and an explanation, in summary form, of the consequences of making the determination: subsection 100A(4)(a) of the Commonwealth Classification Act;
 - (ii) ensuring that people living in the area have been given a reasonable opportunity to make submissions about the proposal, the consequences of the making of the determination and their circumstances, concerns and views so far as they relate to the proposal: subsection 100A(4)(b) of the Commonwealth Classification Act.
- (d) A failure to comply with the consultation requirements does not affect the validity of a determination: subsection 100A(5) of the Commonwealth Classification Act.
- (e) Subsection 100A(6) sets out the following criteria that the Indigenous Affairs Minister must have regard to in making a determination:
 - (i) the object of this Part (see section 98A);
 - (ii) the wellbeing of people living in the area;

- (iii) whether there is reason to believe that people living in the area have been the victims of violence or sexual abuse;
 - (iv) the extent to which people living in the area have expressed their concerns about being at risk of violence or sexual abuse;
 - (v) whether there is reason to believe that children living in the area have been exposed to prohibited material;
 - (vi) the extent to which people living in the area have expressed the view that their wellbeing will be improved if this Part continues to apply in relation to the area;
 - (vii) any submissions of the kind referred to in paragraph (4)(b);
 - (viii) the views of relevant law enforcement authorities;
 - (ix) any other matter that the Indigenous Affairs Minister considers relevant.
- (f) The Indigenous Affairs Minister has power to revoke or vary a determination or to delegate, by writing, delegate any or all of his or her powers and functions to the Indigenous Affairs Secretary.

5.4 Offences

- (a) Division 2 of Part 10 sets out the following offences:
- (i) Possession or control of level 1 prohibited material in a prohibited material area: section 101 of the Commonwealth Classification Act. This offence is punishable by 50 penalty units.
 - (ii) Possession or control of level 2 prohibited material in a prohibited material area: section 102 of the Commonwealth Classification Act. This offence is punishable by 100 penalty units.
 - (iii) Supplying, or taking certain steps to supply, prohibited material to a third person in a prohibited material area: subsection 103(1) of the Commonwealth Classification Act. This offence is punishable by 100 penalty units.
 - (iv) Supplying, or taking certain steps to supply, five or more items of prohibited material to a third person in a prohibited material area: subsection 103(2) of the Commonwealth Classification Act. This offence is punishable by 200 penalty units.
- (b) Section 104 provides that the offences in Division 2 of Part 10 extend to body corporate managers if:
- (i) the body corporate commits an offence against this Part; and
 - (ii) the manager knew that the offence would be committed; and
 - (iii) the manager was in a position to influence the conduct of the body corporate in relation to the commission of the offence; and
 - (iv) the manager failed to take all reasonable steps to prevent the commission of the offence.

5.5 Seizure and forfeiture of prohibited material

- (a) Division 3 of Part 10 provides the police with the power to seize prohibited material.
- (b) Section 106 of the Commonwealth Classification Act provides that a police officer may seize material if they find material that they suspect on reasonable grounds is prohibited material in a prohibited material area.

- (c) Subsection 107(1) of the Commonwealth Classification Act provides that the police officer who is responsible for the seized material must, within seven days, serve a seizure notice on the owner of the material or, if the owner cannot be identified after reasonable inquiries, the person from whom the material was seized. If the owner of the material cannot be identified after reasonable inquiries and it was not seized from a person, or if it is not possible to serve the seizure notice on the required person, subsection 107(1) does not apply: subsection 107(2) of the Commonwealth Classification Act.
- (d) A seizure notice issued under subsection 107(1) must state the matters prescribed by subsection 107(3) of the Commonwealth Classification Act.
- (e) Seized material can be returned to the owner either on request within 60 days of the seizure notice (section 108 of the Commonwealth Classification Act) or on application made to a magistrate within 60 days after a refusal to return the prohibited material (section 109 of the Commonwealth Classification Act). Under section 108 of the Commonwealth Classification Act, the responsible officer must only return the material if satisfied, on reasonable grounds, that the material is not prohibited material. Under section 109 of the Commonwealth Classification Act, a magistrate must only return the material if satisfied, on reasonable grounds, that the material is not prohibited material.
- (f) Seized material that is not returned to its owner under sections 108 or 109 of the Commonwealth Classification Act is forfeited to the Commonwealth and must be destroyed, disposed of or otherwise dealt with as the Minister directs.

Review

6. Effectiveness of prohibited material laws

- (a) Under subsection 114(2) of the Commonwealth Classification Act, the review of Part 10 of the Commonwealth Classification Act is required to '*assess the effectiveness of the special measures provided for by this Part*'.
- (b) There is limited publicly available information regarding the effectiveness of the prohibited material laws.
- (c) The Replacement Explanatory Memorandum to the Stronger Futures Act, which inserted the requirement for an independent review into the Commonwealth Classification Act, states that:

The prohibited material measure was discussed during the 2011 Stronger Futures in the Northern Territory consultations. Communities expressed the view that the restrictions should continue.¹

- (d) That comment appears to be based on the report prepared by the Department of Social Services, titled the *Stronger Futures in the Northern Territory Report on Consultations*. That report states, in relation to the prohibited material measures, that:

Where there was discussion about the continuation of the current special measures, a majority of comments expressed the view that pornography was not wanted in their community and that the current restrictions should continue. Many respondents who commented indicated that pornography was not an issue in their communities. This view was tempered by the acknowledgement that pornographic material is readily accessible via mobile phones and this was seen as difficult to control.²

- (e) The Australian Human Rights Commission report on *Stronger Futures in the Northern Territory Bill 2011 and two related Bills*, dated 6 February 2012, relevantly states that:

It is difficult to draw firm conclusions about the effectiveness of the prohibited material measures without data from comparable communities without the restrictions. However, it would appear that the number of recorded offences indicates that there is either a low level of illegal use and/or distribution of pornography, or police are limited in the type of incidents they can deal with.

...

The impact of the specific pornography prohibitions has been marginal and has attached an unwarranted and damaging stigma to communities. This has the effect of reinforcing negative stereotypes and ultimately undermining the good intentions of the measures. The carryover of previous prescribed areas means that the change to a more consultative process will have no effect in these communities. The communities will have to take public steps to exempt themselves from

¹ Replacement Explanatory Memorandum to the Stronger Futures Act, p.12.

² Department of Social Services, *Stronger Futures in the Northern Territory Report on Consultations* (October 2011) p. 51.

*pornographic restrictions, which will compound the stigma associated with pornography bans.*³

- (f) Whereas the Commonwealth Classification Act provides for the classification of materials, enforcement of classification requirements generally occurs under State and Territory legislation. The Northern Territory has enacted the *Classification of Publications, Films and Computer Games Act (NT Classification Act)*.
- (g) The offences under the NT Classification Act are extensive and include offences in relation to materials to which the offences under Part 10 the Commonwealth Classification Act relate. The offences under the NT Classification Act include:
- (i) in relation to films:
- a person must not exhibit an unclassified film in a public place (subsection 35(1));
 - a person must not exhibit a film classified RC in a public place or a film that is classified X 18+ in a public place that is not a restricted publications area (section 37);
 - a parent or guardian of a child must not permit the child to attend the exhibition of a film in a public place if the film is classified RC, X 18+ or R 18+, or is unclassified but would, if classified, be classified RC, XC 18+ or R 18+ (section 40);
 - a person must not exhibit a film in a private place if the film is classified RC, X 18+ or R 18+, or is unclassified but would, if classified, be classified RC, XC 18+ or R 18+, and a child is present during any part of the exhibition (section 42);
 - a person must not exhibit a film in a public place if the film is classified R 18+ and a child is present during any part of the exhibition (section 43);
 - a person must not exhibit a film in a public place if the film is classified MA 15+, a child under the age of 15 years is present during any part of the exhibition, and the child is not accompanied by a parent or guardian of the child (section 44);
- (ii) in relation to the sale of films:
- a person must not sell an unclassified film (section 45);
 - a person must not possess a film classified RC, or an unclassified film, at premises where classified films are sold – and an occupier of premises commits an offence if classified films are sold at the premises and another person possesses a film classified RC or an unclassified film at the premises (section 48);
 - a person must not display a film classified X 18+ for sale in a place that is not a restricted publications area, a person must sell a film classified X 18+ to another person who has not made a direct request for the film, and a person must not sell a film classified X 18+ that is not contained in a package made of opaque material (section 49);

³ Australian Human Rights commission, *Stronger Futures in the Northern Territory Bill 2011 and two related Bills* (6 February 2012) p. 60-61.

- a person must not sell or deliver a film to a child if the film is classified RC, X 18+ or R 18+, or is unclassified but would, if classified, be classified RC, XC 18+ or R 18+, or sell or deliver a film classified MA 15+, or is unclassified but if classified would be classified MA 15+, to a child under 15 years of age (section 50);
- (iii) additionally in relation to films:
- a person must not leave a film in a public place or, without the occupier's permission, in a private place, if the film is classified RC, X 18+, R 18+ or MA 15+, or unclassified but if classified would have those classifications (section 52);
 - a person must not possess a film with the intention of publishing the film if the film is classified RC or X 18+, or unclassified but would if classified be classified RC or X 18+ (section 53);
- (iv) in relation to publications:
- a person must not sell or deliver a 'submittable publication' or a publication classified RC (section 54);
 - a person must not sell or deliver a publication classified Category 1 restricted unless the publication is contained in a sealed package made of plain opaque material and both the publication and the package bear the determined markings relevant to the publication's classification (section 55);
 - a person must not sell or deliver a publication classified Category 2 restricted in a place that is not a restricted publications area, or deliver a publication classified Category 2 restricted to another person who has not made a direct request for the publication (section 56);
 - a person must not sell or deliver a publication classified Category 1 restricted or Category 2 restricted to a child (section 57);
 - a person must not leave a 'submittable publication' or a publication classified Category 1 restricted, Category 2 restricted or RC in a public place or in a private place without the occupier's permission, or display a publication so that it can be seen from a public place (section 61);
 - a person must not possess or copy a publication with the intention of selling the publication if the publication is a submittable publication or classified RC (section 62).
- (h) The definition of 'submittable publication' in the NT Classification Act refers to the definition in the Commonwealth Classification Act or a publication called in by the National Director under section 90 of the NT Classification Act. The Commonwealth Classification defines 'submittable publication' as an unclassified publication that contains depictions or descriptions that are likely to cause the publication to be classified as RC, or are likely to cause offence to a reasonable adult or are unsuitable for a minor to see or read, having regard to section 9A (material classified as RC because it advocates terrorist acts) or the *National Classification Code*.
- (i) The distinction that we draw from a comparison between these offence provisions and the offence provisions at Part 10 of the Commonwealth Classification Act is that the NT Classification Act seeks to regulate the availability of the relevant classified material,

whereas the Commonwealth Classification Act simply places a prohibition upon the possession and supply of the relevant material.

- (j) We are not aware of any prosecutions in relation to offences under Part 10 of the Commonwealth Classification Act or in relation to offences under the NT Classification Act concerning the exhibition, possession, sale or delivery of classified materials in areas that are prohibited material areas.
- (k) We note that as the Commonwealth offences are supported by provisions for the seizure of relevant prohibited material, Part 10 of the Commonwealth Classification Act potentially provides for the removal of all prohibited materials from the relevant areas and therefore may, if sufficiently enforced, reduce the risk of inappropriate supply and viewing of that material.
- (l) However, we have no information regarding the resources that would be required to enforce the prohibitions under the Commonwealth Classification Act. We have no evidence to establish that a scheme for prohibition is more effective than the regulatory scheme provided for by the NT Classification Act.