

CENSORSHIP PROCEDURE

Report No 55

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This Report reflects the law as at 30 June 1991

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ISBN 0 642 16333 2

Commission Reference: ALRC 55

Terms of reference

FILM AND LITERATURE CENSORSHIP PROCEDURE

1. I, MICHAEL DUFFY, Attorney-General of Australia, noting:
 - that the Commonwealth, the States and the Territories are in broad agreement as to the policy that ought to be pursued in relation to the censorship of imported and locally produced film for public exhibition and sale or hire, related advertising matter and imported and local printed matter;
 - that there is similar agreement that there should be a principal censoring agency at Commonwealth level but that individual jurisdictions should be able to vary the decisions of that agency for their own jurisdictions;
 - the difficulties in administering Australia's law relating to these matters because those laws are unnecessarily complicated and are not uniform;

refer to the Law Reform Commission for review and report under section 6 of the *Law Reform Commission Act 1973*:

- (a) how the laws to which that Act applies, including the laws of the Territories, relating to the censorship of imported and locally produced film for public exhibition and sale or hire, related advertising matter and imported and local printed matter can be simplified and made more uniform and efficient while giving effect to the policy agreed between the Commonwealth, the States and the Territories;
- (b) any related matter.

2. The Commission is to consult relevant federal, State and Territory government authorities.
3. The Commission is to draft legislation and the appropriate explanatory memorandum to give effect to its recommendations. The legislation should include model State and Territory legislation.
4. The Commission is to report by 1 June 1991.

DATED 10 May 1990.

Michael Duffy
Attorney-General

Participants

The Commission

The Division of the Commission constituted under the *Law Reform Commission Act 1973* for the purpose of this report comprised the following members of the Commission:

President

Justice Elizabeth Evatt AO, LLB (Syd), LLM (Harv)

Deputy President

Mr JH Greenwell

Commissioner

Dott Paolo Totaro

Officers of the Commission

Secretary and Director of Research

Stephen Mason, BA, LLB, MTCP (Syd)

Writing and research

Margaret Ryan, BA, LLB (Syd) Senior Law Reform Officer

Legislative drafting

Stephen Mason, BA, LLB, MTCP (Syd)

Principal Executive Officer

Barry Hunt, BA (Syd)

Library

Joanna Longley, BA (Lib) (CCAEE)

Louise Levido

Project Assistant

Lynne Munnich, BA (Syd)

Word processing and typesetting

Rhonda Kasalo

Consultants

Barbara Biggins, President, Australian Council for Children's Films and Television

Paul Byrnes, Director, Sydney Film Festival

Wendy Clifford, General Manager, Video Industry Distributors Association

Daryl Fedden, General Manager, Gordon and Gotch Limited

Nick Hampton, Chief Executive, Video Industry Distributors Association

John McKenzie, Chief Executive Officer, Cinematograph Exhibitors Association

Grant Peters, National Co-ordinator, Australian Video Software Dealers Association

John Rossiter, Chief Executive, Video Industry Distributors Association

Natasha Serventy, Legal Consultant, Arts Law Centre of Australia

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John Smith, Chief General Manager, Greater Union Organisation
Janet Strickland, Janet Strickland & Associates
Peter Wilkinson, Chairman, Motion Picture Distributors Association of Australia

Persons nominated by State and Territory Governments*

Brendan Bailey, Government Law Office, ACT
Pauline Barnett, Attorney-General's Department, SA
Robert Bradshaw, Registrar-General, NT
David Cannavan, Justice Department, Qld
Kathy Ettershank, Attorney-General's Department, Vic
Annie Foster, Attorney-General's Department, SA
Peter Maloney, Attorney-General's Department, Tas
Anne O'Connell, Attorney-General's Department, NSW
Bernadette Steele, Attorney-General's Department, Vic
Lindsay Stephens, Department of the Arts, WA

The recommendations in the report and statements of opinion and conclusion are those of the members of the Commission. They are not necessarily shared by the consultants or nominees nor by the Departments or organisations with which they are associated

Summary of recommendations

Public consultation program

1. The Office of Film and Literature Classification should conduct a continuing consultation and research program to ensure that members of the Classification Board and the Review Board are kept up to date with the attitudes and values of the wider community. Funding for this program should be a permanent part of the Office's budget (para 2.5, 3.10).

Rationalising the legislative scheme

Legislative scheme

2. The present legislation dealing with the classification of films and publications should be rationalised into a national legislative scheme consisting of

- a federal Act establishing the Classification Board and the Classification Review Board and detailing procedures for classifying films and publications
- a code, agreed to by the Commonwealth, the States and the Northern Territory, containing the criteria for classification. The code should be attached as a schedule to the federal Act
- State and Territory laws adopting the classifications made under the federal Act and restricting the dissemination of films and publications (para 2.13).

Intergovernment agreement

3. To emphasise the national character of the classification process and criteria, the States, the Northern Territory and the Commonwealth should agree on a formal procedure for securing agreement to the amendment of the code and the classification procedures (para 2.15).

Changes to code and federal Act

4. Proposed changes to the code or to the federal Act (in respect of classification procedure) should be made available for public comment three months before being adopted (para 2.16).

Classification

Classification guidelines

5. There should be guidelines to help interpret the criteria in the code (para 3.7).

6. The guidelines should be issued by the Attorney-General after consultation with State and Territory governments (para 3.7).

7. Draft guidelines and amendments should be released for public comment for at least three months before being issued by the Attorney-General (para 3.8).

Consumer advice

8. The Classification Board should determine consumer advice to apply to films classified PG, M, R or X (para 3.9).

Public awareness campaign

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9. The current public awareness campaign should become a continuing function of the Office of Film and Literature Classification (para 2.7).

Classification of films

10. The Classification Board should classify films on a national basis. The procedure for the classification of films should reflect current procedures under the *Classification of Publications Ordinance 1983* (ACT) (para 3.2).

11. The Classification Board should be able to refuse to deal further with an application for classification if, in its opinion, the copy of the film submitted is incomplete or inadequate (para 3.2).

12. The Director should be able to keep any film submitted for classification for as long as he or she directs (para 3.3).

Classification of publications

13. The Classification Board should classify publications on a national basis. The procedure for the classification of publications should reflect current procedures under the *Classification of Publications Ordinance 1983* (ACT) (para 3.5).

14. The Classification Board should be able to give a 'continuing' classification to periodicals. This classification should be subject to revocation at any time (para 3.6).

Reclassification after two years

15. The Classification Board should be able to reclassify a film or publication on its own motion after two years have passed since the previous decision (para 3.11).

Reconsideration of decisions

16. The Classification Review Board should continue to be the body that has the function of reconsidering decisions of the Classification Board, both for films and for publications. The Attorney-General, the applicant for classification and the distributor of the film or of the publication should be able to apply for a reconsideration (para 3.12, 3.13).

17. Standing to apply for reconsideration of decisions should be widened to include any person, provided he or she is not merely meddling or acting in bad faith and provided he or she is not appealing from a merely advisory classification (G, PG, M) to another advisory classification (para 3.18).

Notification of decisions

18. Decisions of the Classification Board and the Classification Review Board should be notified in the Commonwealth *Gazette* in addition to being notified on Discovery (para 3.19).

Media covered

Clothing

19. Clothing should be made classifiable. It should be included in the definitions of 'publication' and 'advertisement' (para 3.22).

Computer programs

20. Computer programs should be made classifiable and should be included in the definition of 'publication' (para 3.28).

Audio material

21. If governments decide that audio material needs to be regulated by classifying, it should be included in the definition of 'publication' (para 3.32).

The Boards

Classification Board

22. The Film Censorship Board should be called the Classification Board (para 3.35).

23. The maximum number of members on the Classification Board should be 15 (para 3.36).

24. There should be no special qualifications for members prescribed by legislation but in making appointments to the Board, regard should be had to the desirability of ensuring that its membership is broadly representative of the Australian community (para 3.36).

25. The maximum period of appointment as a member of the Classification Board should be five years, with a maximum period of service of six years (para 3.37).

26. The Director should be able to delegate his or her powers to the Deputy Director or other designated members of the Board. The Director should also be able to delegate the powers of the Classification Board to people employed in positions approved by the Board, to allow them to deal with straight forward matters (para 3.40).

Classification Review Board

27. The Film and Literature Board of Review should be called the Classification Review Board (para 3.35).

28. The maximum number of members on the Classification Review Board should be 10. The minimum number should be five (para 3.38).

29. There should not be any special restrictions on appointment to the Review Board. In making appointments to the Review Board, however, regard should be had to the desirability of ensuring that its membership is broadly representative of the Australian community (para 3.38).

Fees

30. A single fee for classification should be determined by the federal Attorney-General. Arrangements as to the sharing of that fee should be agreed between the Commonwealth, State and Northern Territory governments (para 3.41).

31. The Director should be able to exempt films from classification fees if it is in the public interest to do so (para 3.41).

Advertisements

Approval of advertisements

32. The Classification Board should be able to approve or refuse to approve advertisements for films and publications (para 4.2, 4.3).

33. The grounds for refusing approval should be the same as those on which films and publications are classified RC (para 4.4).

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Note: RC means refused classification.

Advertising unclassified films

34. Advertisements for unclassified films should not be published unless an exemption has been granted by the Classification Board (para 4.5).

Videos containing advertisements

35. A video should not be classified if it contains an advertisement for a film of a higher classification than the film on the video (para 4.6).

Advertising X films

36. Advertisements for X films should not be screened in public. It is consistent for jurisdictions which prohibit the sale of X films to prohibit the advertising of X films (para 4.7, 5.3).

Advertising in cinemas

37. Advertisements for M films should not be screened in a public place with G films (para 4.8).

Advertising R films

38. Advertisements for R films should only be screened with R films, in a restricted publications area or after 8pm (para 4.8, 4.9).

Advertising publications

39. Advertisements for Category 1 restricted publications should not be published in unclassified publications or G publications (para 4.10).

40. Advertisements for Category 2 restricted publications should only be published in restricted publications areas (para 4.10).

Television

41. To ensure consistency with these recommendations, it would be desirable for the Australian Broadcasting Tribunal's Television Advertising Conditions to:

- prohibit the advertising of RC films
- only permit the advertising of R films during AO programs
- prohibit the advertising of M films between 4 and 6pm on weekdays and during G programs which have been promoted for viewing by children or which may reasonably be expected to attract substantial numbers of children as viewers
- require advertisements for films to include the consumer advice for the film (para 4.14).

Radio

42. To ensure consistency with these recommendations, it would be desirable for the Australian Broadcasting Tribunal's Radio Advertising Conditions to require an advertisement for a film or video broadcast on the radio to include a statement of the film's classification and consumer advice (para 4.15).

Enforcement

Offences

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43. Regulation of the dissemination of films and publications should continue to be the responsibility of the States and Territories. Laws should regulate the screening of films in public, the sale and hire of videos, the sale of publications and the production and possession of certain material. The Commission's recommended offences are drafted on the basis that each jurisdiction will make its own decision about the availability of X videos. The principal offences should be those which restrict the availability of R, X and RC films and Category 1 restricted, Category 2 restricted and RC publications and those which ensure that the markings and consumer advice determined by the Board are communicated to the public (para 5.1, 5.5).

44. Offences should be drafted as ones of strict liability, that is, there should be no requirement of *mens rea*, if they are directed at professionals engaged in the dissemination of films and publications as a business (para 5.4).

Parental defences

45. It should be no defence to an offence involving showing material to children which it is illegal for them to see that the defendant is the child's parent or that the child's parent gave permission for the child to see the material (para 5.7).

Offences by children

46. A child of or over the age of 15 should be held liable for attending the screening in public of an R film and for buying an R or an X film, provided he or she knew such action was wrong (para 5.8).

Screening R films before children

47. That the child was under the age of two should be no defence to the offence of screening an R film in public before a child (para 5.9).

Display of R videos

48. Retailers should be encouraged to restrict the display of R videos to parts of their premises less accessible to children (para 5.10).

Publications

49. Not all publications should have to be classified. The classification of publications which would be classified Category 1 restricted, Category 2 restricted or RC should, however, be compulsory (para 5.14).

Possession of material

50. The possession of prescribed publications, prescribed films, RC publications and RC films, with the intention to publish them should be prohibited. For jurisdictions which prohibit the sale of X films, this offence will also apply to X films (para 5.16).

Note: Prescribed publications are unclassified publications which, if classified, would be classified RC, Category 1 restricted or Category 2 restricted. Prescribed films are unclassified films which, if classified, would be classified RC, X or R.

51. The mere possession of RC films or RC publications should not be an offence (para 5.16). The Commission recommends that the question of the possession of RC material should be reconsidered after the Government has indicated its decision on the recommendations in the Commission's final report on customs and excise law (para 6.3).

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52. The possession of child pornography should be an offence, regardless of its intended use (para 5.17).

Prosecution

53. There should be no deeming of intention to publish merely because of the possession of a specified number of films or publications of a certain type or title (para 5.20).

54. Seized goods should not be forfeited unless they are the subject of a successful prosecution (para 5.24).

Time limit

55. Seized material should be returned if no prosecution has been commenced 12 months after seizure (para 5.25).

Penalties

56. It may be appropriate in some instances for maximum penalty levels for second and subsequent offences to be set at a higher level (para 5.26).

Registration

57. Whether distributors and retailers should be licensed should remain a decision for each jurisdiction (para 5.29).

Labelling

58. A system of official Commonwealth classification labels should not be introduced (para 5.30).

Customs related issues

Customs (Prohibited Imports) Regulations

59. Regulation 4A of the Customs (Prohibited Imports) Regulations should be amended to accord with the criteria for RC in the code (para 6.3).

Customs (Cinematograph Films) Regulations

60. The Customs (Cinematograph Films) Regulations should be repealed (para 6.6).

61. If the Commission recommends in its report on Multiculturalism and the Law that references to blasphemy in federal customs law be retained, consideration should be given to including blasphemy in the Customs (Prohibited Imports) Regulations reg 4A, in relation only to films for public exhibition (para 6.7).

Film festivals

62. State and Territory controls on the public exhibition of films provide sufficient regulation of film festivals (para 6.8).

1. Introduction

Introduction

Background to the reference

1.1 ***Censorship and classification legislation.*** The distribution of films and printed matter in all Australian jurisdictions is regulated by censorship and classification laws. There are many such laws, federal, State and Territory. Some are similar in content and style, others unique. State, Northern Territory, and Commonwealth governments have agreed on the broad content of film classification policy and for some years the States and the Northern Territory have allowed films (cinema and video) to be classified for their jurisdictions by a federal agency, the Film Censorship Board. The procedural aspects of this 'national' system have never been rationalised or made uniform, however, and the Film Censorship Board operates under more than eight pieces of legislation. This lack of uniformity has led to administrative difficulties for the Film Censorship Board and for the film and print distribution industries.

1.2 ***The reference.*** With the concurrence of State and Territory governments, the federal Attorney-General asked the Commission to report how the Commonwealth, State and Territory laws relating to the censorship and classification of imported and locally produced film and printed matter for public exhibition, sale or hire could be simplified, and made more uniform and efficient, while still giving effect to policy agreed between the Commonwealth, the States and the Northern Territory.

The Commission's work

1.3 As is its usual practice, the Commission appointed a number of honorary consultants from industry and community groups to help it with this reference. Relevant officers from State and Territory administrations also agreed to help. The names of the consultants and officers are listed at the beginning of this report, and the Commission acknowledges with appreciation the contribution they have made. They attended several lengthy meetings to discuss the Commission's proposals and draft documents and provided other detailed comments and assistance. Their expertise and insights were of great value. The Commission published a Discussion Paper (ALRC DP 47), setting out detailed proposals and draft legislation, in March 1991. It was distributed widely and drew significant and detailed comment from individuals and from many community and other groups. Over 150 submissions were received from groups as diverse as the North Coast Christian Media Council and the Canberra Rape Crisis Centre. Because the reference is concerned with the procedure for classifying, and with achieving uniformity of law within the existing policy framework, the Commission conducted detailed consultations with particular groups to ensure that comment was focussed on these matters. The Commission gratefully acknowledges the assistance of all those people and organisations who gave interviews and made submissions. Those who made formal submissions to the Commission are listed in Appendix 3.

The present situation

Who is responsible for what

1.4 ***Powers over censorship and classification.*** Censorship and classification of films and publications are matters in which federal, State and Territory governments all have powers. The federal Government can rely on the Constitution s 51, in particular the power to regulate overseas and interstate trade, and s 122, the power to make laws with respect to the Territories. It has used these powers to prohibit the importation of films for public exhibition unless they are registered¹ and to prohibit the importation of films and publications that portray child pornography, bestiality, excessive cruelty or violence or that promote drug abuse, crime or violence.² State and Territory laws require all films and videos for commercial use to be classified, and provide for a voluntary classification scheme for printed matter. They restrict the dissemination of some of these films, videos and publications (either absolutely³ or to people over 18⁴). These laws are made by State and Territory Parliaments but the federal

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Government retains the power to make laws setting classification criteria for the Australia Capital Territory.⁵

1.5 ***Film Censorship Board acts for all jurisdictions.*** Under agreements between the Commonwealth, the States and the Northern Territory, the Film Censorship Board (whose decisions can be reconsidered by the Film and Literature Board of Review) classifies films on behalf of the States and the Northern Territory. The Film Censorship Board's classifications apply automatically in the Australian Capital Territory.⁶ New South Wales, the Northern Territory, South Australia and Victoria have made similar arrangements with the Commonwealth for classification officers, appointed under the *Classification of Publications Ordinance 1983* (ACT) and working in the Office of Film and Literature Classification (the federal agency that houses the Film Censorship Board, the classification officers and the Film and Literature Board of Review) to classify publications on their behalf.

1.6 ***The 1984 scheme.*** After consultation between the federal, State and Territory governments, a new 'national' scheme for the classification of publications and videos was put into place on 1 February 1984.⁷ This legislative package was designed to give effect to the following principles:

adults are entitled to read, hear and see what they wish in private and in public
people should not be exposed to unsolicited material offensive to them
children must be adequately protected from material likely to harm or disturb them.

The package was intended to serve as a model for the States and the Northern Territory. Control over the distribution (not the classification) of videos was focussed at the point of sale rather than at the point of importation. Accordingly, the requirement that videos be registered on importation⁸ was abolished and each State and the Northern Territory legislated to make classification of videos compulsory.⁹

An overview of the regulatory scheme

1.7 ***Introduction.*** The objective of Australian censorship laws is to regulate the availability of films and publications within the broad framework of general community standards. They do this by

- establishing a system that classifies films and publications within a series of broad categories, such as, for films, R or M and for publications, Category 1 restricted
- prohibiting or restricting in particular ways, depending on the classification, the sale, display and public exhibition of films and publications.

All films (including videos) for public exhibition or sale must be classified. Classification of publications, however, is voluntary. There are, nevertheless, restrictions on the sale and display of some publications. Classification of a publication provides a measure of certainty for the distributor.

1.8 ***Controls — films.*** The controls on sale, display and exhibition differ for films and publications. The sale of X films is prohibited except in the Northern Territory and the Australian Capital Territory. Even there, they can only be sold as videos (and then only to adults), not shown publicly. Children may not attend the screening of R films or buy or hire R videos. There are restrictions on advertising, copying and possessing certain films and there are requirements to provide information about classifications.

1.9 ***Controls — publications.*** A number of restrictions are imposed on the display or sale of so-called 'adult' publications, whether classified or not. The object of the restrictions is, in essence, to ensure that children do not get access to them. Under the scheme applying in most jurisdictions, publications that fall within the criteria for Category 2 restricted publications (the more explicit publications) can only be sold on premises where children are not allowed. While they can be displayed there, they must leave the premises in the traditional plain brown wrapper. Category 1 restricted publications can only be sold to adults, and only in a sealed wrapper. In both cases, the publication must, if it has been classified, be appropriately marked.

Joint Select Committee

1.10 In 1988 a Joint Select Committee of the federal Parliament reported on the operation of the Customs (Cinematograph Films) Regulations, the Customs (Prohibited Imports) Regulations reg 4A and the *Classification of Publications Ordinance 1983* (ACT) as they relate to videos. It addressed a number of questions about the effectiveness of these provisions in controlling access, particularly by young people, to pornographic and violent material, and 'the likely effects upon people, especially children, of exposure to violent, pornographic or otherwise obscene material'.¹⁰ A number of the Committee's recommendations have been implemented, particularly the recommendations that reasons for classifications be publicised and that

a widespread education campaign be mounted to combat a lack of community awareness about the meaning of classification categories and their content.¹¹

Relevant recommendations in the Committee's report are noted in this report.

Lack of uniformity

1.11 Despite the recognition, at Ministerial level, among federal, State and Territory officers with responsibility for censorship matters and in the film and print distribution industries, that uniformity of policy and procedure is desirable, there is still a marked lack of uniformity in classification and censorship laws. While every State and the Northern Territory has legislation which, to some degree, imitates the Australian Capital Territory model, there are still significant differences.

- ***Determined markings and consumer advice.*** The markings to be displayed on films and videos are not uniform throughout all jurisdictions. Most jurisdictions have not amended their legislation to require the display of consumer advice, despite an agreement made between Ministers in 1989.¹²
- ***Reclassification.*** Australian Capital Territory, Tasmanian and Victorian laws provide that films and publications can be reclassified at the Board's own motion after two years. This is not the case in other jurisdictions.¹³
- ***Standing to have decisions reviewed.*** Standing differs among jurisdictions. In New South Wales, for example, only the Minister or applicant for a classification can apply to have a classification decision reviewed. In Queensland, 'the exhibitor or distributor' can also apply. Under the Customs (Cinematograph Films) Regulations and under Victorian law, 'persons aggrieved' may also apply.¹⁴
- ***Classification of publications.*** The classification of publications under the *Classification of Publications Ordinance 1983* (ACT) is not adopted or effective throughout Australia. Western Australia, Tasmania and Queensland operate their own schemes.¹⁵

This situation is exacerbated when agreement is reached on changes to the scheme, as some jurisdictions' legislation is updated more quickly than others. What has resulted is a set of State, Territory and federal legislation that is neither uniform nor comprehensive. Australia does not have a single, uniform classification procedure for the entire country.

This report

1.12 This report consists of six chapters, setting out the policy framework for the reference and the way its recommendations can be implemented (chapter 2), the procedure for classification (chapter 3), matters relating to the advertising of publications and films (chapter 4), enforcement issues (chapter 5) and matters related to import controls (chapter 6). Draft legislation is attached in two parts: Appendix 1 is the legislation establishing the classification bodies and detailing the procedures they will use and Appendix 2,

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which consists of provisions creating offences to back up the classifications and restrictions, is intended as a model for the States and Territories. Both Appendixes include explanatory memorandums.

2. Policy and implementation

Censorship and classification policy

Policy issues excluded

2.1 The Commission's Terms of Reference exclude a review of censorship and classification policy. Accordingly, the Commission does not advance recommendations on classification criteria (especially the outer limits of what is permissible) or on the broader question whether particular kinds of material should be available generally, available under restrictions or not available at all. On these questions, Australian governments are in substantial agreement.

- **Classification criteria.** All States and Territories allow the Film Censorship Board to classify films on their behalf under criteria which, though not identical, are similar. All governments have agreed to the basis of these criteria. The few jurisdictions that have kept the right to overturn a decision of the Board in practice do so very infrequently.
- **The availability of particular kinds of material.** The only significant divergence in policy on this matter is that the sale of X videos is prohibited in the States but permitted in the Territories.

There are two aspects of the classification criteria: their wording and their interpretation. Although the Discussion Paper made it clear that these policy matters were outside the terms of reference, many submissions commented on them.

Focus of present policy

2.2 **Present policy basis.** The basis of present censorship policy is the principle that adults in a free society ought to be allowed to see what they wish so long as that right does not infringe the rights of others to avoid offensive material, and adequate protection is given to children.¹⁶ Current policy sees 'offensiveness' mainly in terms of sex and violence and, particularly, any combination of the two. However, the standards that have been agreed on are expressed so broadly that they can cover other concerns. For example, it would be possible, under the classification criteria, for films or publications that incite to racial or religious hatred to be refused classification and, in effect, banned.¹⁷ This may be thought consistent with the recent trend to 'outlaw' incitement to racial hatred. Two aspects would need to be considered before such an extension could be agreed to. Any decision to ban, or to restrict the dissemination of, films and publications on such grounds will need to be made in the light of a careful balancing of the right to freedom of expression and, for example, the need to protect minorities from discrimination and harassment.¹⁸ However, even if there is no question of banning or restricting material, the classifying body, which is intended to be representative of community standards and attitudes, can still play a useful role in informing the potential audience for films about the way in which these issues are treated in an individual work so that they can make their own decisions whether to patronise it or not.

2.3 **Criteria too vague?** A number of submissions the Commission received expressed concern about the agreed policy.¹⁹ Many regarded the existing classification criteria as too vague, with too many loopholes, and suggested that all forms of child pornography, child abuse, incest, sexual violence, bestiality and drug promotion be prohibited, whether

implicit, explicit, pictorial, non pictorial, illustrated, implied, inferred, fantasised, or obliquely suggested.²⁰

These submissions seemed to proceed on the basis that it is the subject matter of a film or publication that makes it offensive, rather than the way the subject matter is treated in the work. As the terms of reference do not extend to the criteria, the Commission cannot comment on this point. The Commission is satisfied that the draft legislation in Appendixes 1 and 2 accurately reflect the current policy.

The way the criteria are interpreted

2.4 ***Representing the community.*** Classification decisions are made on a judgment of how much the material offends, or is likely to offend, the standards or sensibilities of the reasonable adult. This judgment is, and because of its nature can only be, a subjective one. The classifying bodies are intended to represent the community and interpret and apply the criteria for the community in a way the community wants. It is apparent from submissions that not everyone is satisfied that the Film Censorship Board is interpreting the criteria in accordance with community standards.²¹

Films and videos are being classified by the Commonwealth Censor in a way which shows that he and his board are out of touch with the standards of average reasonable adults.²²

Members of the public who are not satisfied with any classification should be able to institute a review. Also it would be helpful to be able to register a complaint. This would indicate whether the standards of the Censorship Board are in fact community standards or merely what the industry or the Board believes should be community standards.²³

Because of the way the Film Censorship Board is structured, and because of its workload, there is a tendency for members of the Film Censorship Board to become 'experts', removed from the community. This happens to a lesser extent in the case of the Film and Literature Board of Review because it is a part time body. Members of the Film Censorship Board spend the great majority of their time viewing films and videos. The Board's working arrangements allow members to consult the community, and inform themselves of community attitudes, only on an *ad hoc* basis. There is no institutionalised way for Board members, or for Board of Review members, to find out what the community thinks. Nor is there any institutionalised way for members of the public to make an input into the work of either Board,²⁴ either in relation to the guidelines it uses or to have individual decisions reviewed.²⁵

Relations between the Boards and the community

2.5 ***The need for consultative and information processes.*** The Film Censorship Board, the classification officers who classify publications and the Film and Literature Board of Review represent the community. Their judgments are supposed to reflect the community's views. There should, therefore, be a strong emphasis on public participation and consultation in the Boards' work. A number of recommendations in this report address this concern. In addition, the Commission recommends that the Office of Film and Literature Classification should establish a continuing process for community consultation and participation to ensure that the Boards' members keep up to date with the attitudes and values of the wider community. Such an institutional process is essential if the Boards are to be able to claim to represent the views of the community. A continuing consultation and research program should be a key element of the Office of Film and Literature Classification's function.²⁶ Its importance should be reflected in the Office's working arrangements and in its funding. It would be appropriate for the States and Territories to support this program, including by providing funding, given that the Office of Film and Literature Classification provides an important service for all Australian jurisdictions.

Supplying information needs

2.6 ***The changing role of the censors.*** An equally important part of this increased community involvement is a flow of information from the Board to the community. The 1984 legislative package reflected a change in the role of censors that had been taking place for some years. Rather than focussing on preventing material from being disseminated, policy now concentrates more on classifying films and publications into defined categories, with restrictions on dissemination only being imposed at the upper limits of what is considered acceptable by the general community. Very little material is censored in the traditional sense of dissemination being totally prohibited.²⁷ Classification is seen primarily as providing people with information about the kind of material they can expect to see in a film or publication. It is a 'pre-warning' of material that might be thought offensive. It supplies an information need about films and publications that the industries' marketing does not.

2.7 **Public awareness campaign.** The Joint Select Committee recommended in 1988 that a widespread education campaign be mounted to combat a lack of community awareness about the meaning of films and video classification categories and their content.²⁸ The campaign, co-ordinated by the Office of Film and Literature Classification in conjunction with the States and Territories and the film and video industries, was launched on 22 May 1991. The aims of the campaign are to inform the community about

- the meaning of the classification categories and symbols
- the role of parents in selecting material to be viewed by children
- the process by which films are classified and
- the factors influencing the classification of a film.

Research done before the campaign started showed that many members of the public are unaware of, or are confused about, the classification symbols. It suggested that most people have never given any serious thought to classification.²⁹ Parents with children under 15 were found to make most use of classification ratings.³⁰ The campaign, which includes a series of commercials to be shown at all cinemas, encourages viewers to use the information provided by the Film Censorship Board (called consumer advice) when choosing a film or video for themselves and their families. Like the public consultation program recommended above, public information campaigns are an important part of the flow of information between the community and the Boards. A single, one-off campaign, however, would not be adequate. Information programs should be a continuing function of the Office of Film and Literature Classification, built into the Office's structure and funding, in the same way as the suggested consultation program. Implementation of both these programs will ensure that the Boards fulfil their objectives of representing the whole community's views.

Implementation of a national classification scheme

The present legislative scheme

2.8 Each State and Territory has its own legislation about the censorship and classification of films and publications.³¹ So far as the classification criteria and procedure for films and videos are concerned, it is broadly modelled on the *Classification of Publications Ordinance 1983* (ACT). That Ordinance is made by the Governor-General, not the Australian Capital Territory Legislative Assembly. While it is subject to disallowance by either House of the federal Parliament, it cannot be amended by the Parliament: it must be accepted as it was laid before Parliament or disallowed in its entirety. Any amendment to the national scheme for films that is agreed on by federal, State and Territory governments must pass through each Parliament (except the Australian Capital Territory Legislative Assembly) before the scheme is uniformly amended. The logistical problems with this are obvious. There are cases of amendments agreed to by governments not being implemented throughout Australia for several years.³²

The need for uniformity

2.9 A legislative framework is needed which will enable the federal, State and Territory laws about the classification of films and publications to operate, to the greatest extent possible, as national laws. This need for a national approach must, however, be reconciled with the legitimate desire of the States and the Northern Territory to retain a proper level of political and administrative control over censorship issues. The Commission has identified three broad options for implementing the proposals in this report. The options have been devised on the basis that the Commonwealth will retain responsibility for laws in relation to classification for the Australian Capital Territory, that is, that classification will not be a matter for which the Australian Capital Territory will have power to make laws. The Commission makes this assumption because of the exclusion of policy matters from the reference. The options are discussed in the following paragraphs.

Options

2.10 **A single national law.**³³ A major difficulty with the present system is that a single policy, agreed on by all jurisdictions, needs to be implemented by legislation in each before it can take effect on a

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national basis. The first option considered would overcome this problem. It would involve a federally administered classifying agency established by an Ordinance of the Australian Capital Territory, made by the Governor-General. The agency would classify films and publications under criteria, and in accordance with a procedure, set out in that Ordinance. The classifications given to particular films and publications (for example, R, M and RC) would be adopted by the States and Territories in enforcement laws. These laws would create offences to give effect to the restrictions imposed on the dissemination of material classified in particular ways. The criteria and procedure would have to be agreed to (as the present criteria are) by each jurisdiction. Amendments would need to be made only once, to the Australian Capital Territory Ordinance, but again only after agreement from the States and Territories.

2.11 *A federal Act.* The second option is similar. However, it would acknowledge the almost universal comment in submissions to the Commission, and the recommendation of the Joint Select Committee on Video Material, that any federal legislation in this area should be an Act of the federal Parliament.³⁴ As one submission put it

Censorship raises important social and political issues and should be in the domain of Parliament at the behest of elected representatives subject to review like all other legislation. The setting up of laws outside the Parliamentary framework contributes to the demise of Parliamentary democracy and responsible government.³⁵

2.12 *A classification code.* A third suggestion was made during the course of consultations on the Discussion Paper.³⁶ This suggestion would involve the creation, by a federal Act, of the classifying bodies. That Act would also set out the procedures those bodies would follow. The classification categories and criteria, however, would not be legislated by any State or Territory, nor by the Commonwealth. Instead, they would be, as they are at present, agreed to by the States, the Northern Territory and the Commonwealth. They would form a 'code'. An agreement between governments would include provision for amendment of the code from time to time. The classifying body would be instructed by the federal Act to make decisions in accordance with the terms of the agreed code as in force for the time being. The text of the code as it stood when the federal law was enacted would be published for information as a schedule to the federal Act. The schedule would not, however, be part of the Act.³⁷

Recommendation

2.13 *A federal Act with a classification code.* The Commission recommends that the third alternative be adopted. There should be a federal Act, based on the Constitution s 122, establishing the classification bodies and setting out the procedure for classification. State and Northern Territory legislation should simply adopt in enforcement laws the classifications given to particular films and publications under that Act. Classification decisions should be made in accordance with a code agreed to between the Commonwealth, the States and the Northern Territory. This alternative accurately reflects, and maintains, the balance of responsibilities that has been arrived at between these jurisdictions. It recognises that, in relation to the classification criteria and categories, the Commonwealth, the States and the Northern Territory are equal partners, and that policy on these matters is derived from agreement between all the jurisdictions. There will be a single procedure, avoiding the overlaps and duplications that presently exist, and the classifiers will derive their powers from a single source, removing the difficulty that they sometimes face now of conflicting legislation from different jurisdictions.³⁸ Provision will need to be made for amendments to the code to be published.

2.14 *'Opting out'.* Under this recommended system, responsibility for ensuring that the code reflects the wishes of the community will lie, and will be seen to lie, with the governments of each of the jurisdictions. A jurisdiction which did not agree with a particular amendment would still have the right to 'opt out' of the arrangement—but at the price of establishing its own system and administrative arrangements. Under the present law, decisions of the Film Censorship Board and of the Film and Literature Board of Review are final in all jurisdictions except South Australia, Tasmania and Western Australia. There, there are local mechanisms to review and, if thought appropriate, override, those decisions.³⁹ The Commission's draft legislation is formulated in such a way that if a State or the Northern Territory wished to establish or keep its own review mechanism, it could do so without affecting the core of the uniform scheme.

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2.15 ***Intergovernment agreement.*** The adoption of this recommendation will involve the negotiation of a formal agreement between the States, the Northern Territory and the Commonwealth. This agreement will need to set out the aims and objectives of the scheme. It will also need to cover such matters as

- the voting rights of each of the jurisdictions
- the way the code, and the procedure for classification, are to be amended
- the procedures for ensuring that agreed changes are carried into effect.

The Commission has not drafted such an agreement. That is better left to negotiations between the States, the Northern Territory and the Commonwealth.

2.16 ***Exposure drafts of amendments.*** The Commission does make one recommendation about amending the code or the federal Act in relation to classification procedure. An exposure draft of the proposed amendment should be open for public comment for three months before it is agreed to by the States, the Northern Territory and the Commonwealth. Allowing this opportunity for public comment and submissions will help Ministers to keep in touch with community views and provide a real opportunity for public participation in the policy making process. As noted earlier,⁴⁰ having formal public participation is particularly important in an area where decisions are supposed to reflect community standards.

3. The classification process

Introduction

3.1 This chapter explains the basis of the provisions in the draft *Classification Bill 199?* (Cth) in Appendix 1. It covers

- the procedure for classifying films and publications, and for reviewing those classifications
- the media that ought to be required to be classified, or that should be able to be classified
- the structure and composition of the administrative bodies that make classification decisions.

Classification of films

General procedure

3.2 In Discussion Paper 47 the Commission proposed that the way films are classified should largely reflect current procedures under the *Classification of Publications Ordinance 1983* (ACT). In particular, classification should only be on written application and a synopsis of the film should be provided.⁴¹ It also proposed that the Chief Censor be able to require that a copy of the film be given to the Board for screening before the Board. Some difficulty has been experienced in the past when prints supplied to the Board were not in final form, or were of poor quality, and were regarded by the Board as inadequate for classification purposes. It was suggested, therefore, that the Board should be able to decline to deal further with an application on that ground alone. The decision to reject a film as inadequate would be reviewable.⁴² No objection was raised to these proposals in the Commission's consultations, and the Commission recommends that they be adopted.

Keeping a copy of the film

3.3 Successful prosecution for offences relating to films often depends on the Board being able to confirm that the film in question is or is not identical to the classified film it purports to be. Australian Capital Territory law presently allows the Board to keep a film submitted for classification for 'such period as the Chief Censor directs'.⁴³ The Board's practice is only to keep those films

- which are refused classification
- which are submitted by an applicant with a history of distributing films in several versions and
- whose classification may be considered controversial.⁴⁴

The Commission understands that no difficulties have been experienced with that provision. It recommends that the Board continue to be able to keep a film it classifies. The Discussion Paper proposed that the Board should have to make a copy of the film, rather than keep the applicant's copy.⁴⁵ The reason was to ensure that the cost of keeping the copy, where the Board decided to do so, was borne by the Board, not by the applicant. Submissions indicated that industry groups were less concerned with the cost than with the potential for copyright infringement if the Board were to make a copy.⁴⁶ There is an acceptance that the cost of the print given to the Board should be seen as an ordinary part of the cost of marketing the film and the Commission recommends that the present practice continue.

Classification of publications

A uniform national scheme

3.4 *The present position.* At present, classification officers at the Office of Film and Literature Classification classify publications for New South Wales, Victoria, South Australia and the Territories. In the case of New South Wales and the Northern Territory, those officers have been appointed classification officers under each jurisdiction's legislation. Victoria simply adopts the classifications made

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under the Australian Capital Territory Ordinance and South Australia nominates the Australian Capital Territory Ordinance as its 'corresponding law'. Western Australia, Tasmania and Queensland operate their own schemes.

3.5 *A uniform scheme — general procedure.* There is considerable industry support for changing this position, and for making the procedure for classifying publications more uniform and simpler.⁴⁷ The Commission understands that State and Territory Ministers are considering how to achieve this. The Discussion Paper proposed a single, uniform procedure for classifying publications. It was similar to the procedure for films, but, in accordance with the existing position in all jurisdictions, the Board would be able to classify a publication on its own motion. No difficulties with the proposal were identified in the Commission's consultations and the Commission recommends that it be adopted.

3.6 *Classification of periodicals.* Under the definition of 'publication' in the present law,⁴⁸ each issue of a regularly published journal (such as a daily newspaper) is a separate publication. To avoid the need to classify each separate issue, the Discussion Paper proposed that the facility presently in the Australian Capital Territory law for a continuing classification to be given should be available in the national scheme. Under the proposal, the Board would be able to declare that a classification given to one issue of such a publication is to apply automatically to all, or some specified, future issues without the need for individual classification. This facility would benefit distributors of periodicals which fall into the restricted categories and are of a consistent standard. A 'continuing' classification could be revoked at any time. This would happen if a particular issue of the publication exceeded the bounds of the periodical's classification. If a 'continuing' classification was revoked, the Board would have to classify the most recent issue of the publication.⁴⁹ There was no opposition to this proposal in consultations, and the Commission recommends that it be adopted.

Classification guidelines

To help apply the code

3.7 Because the classification criteria in the national code⁵⁰ are broad, it has been accepted for some time that guidance needs to be given about the way they are to be interpreted and applied. Under the present law, guidelines for the classification of publications and films are drawn up by the Office of Film and Literature Classification in consultation with State and Territory governments. The Commission agrees with the need for guidelines. It recommends, however, that they should be issued by the federal Attorney-General after consultation with the States and Territories. This will ensure that the guidelines are made by, and with the agreement of, the governments ultimately responsible for their content. The Commission recommends that the guidelines be published in the Commonwealth *Gazette* and that they should be taken into account in the classification process. They should not be binding on the Boards, but their existence should enhance consistent decision-making and improve community understanding of the classification system.

Reflect community standards

3.8 The guidelines are an important way of ensuring that the classification criteria reflect community standards, without the need for constant changes to the national code. They are an interpretation of the general principles and an expression of current standards. As such, they need to be based on as much public input as possible.

I agree about the necessity of guidelines but would insist that here too as with classification, they be based on advanced, up to date community attitudes.⁵¹

The Commission recommends that drafts of the guidelines, and of any substantial alterations to them, be released for public comment for at least three months before being issued by the Attorney-General. Submissions should be called for. The Office of Film and Literature Classification should be responsible for the administration of that process. There is no need to provide for this procedure in the draft legislation.

Consumer advice for films

Providing information

3.9 The States and Territories decided in 1988⁵² that more information should be given to consumers about why a film is given a particular classification and what the viewer may expect to see.⁵³ A kind of shorthand 'consumer advice' was envisaged, with words or phrases such as 'bad language', 'frequent violence' or 'nudity' having to be part of the advertising for the film. The 'consumer advice' was to be part of the determined markings to be displayed on video containers and advertisements for films. Not all States and Territories have implemented this decision. The video industry has agreed to comply voluntarily, even though there is no legislation in most States. Submissions clearly supported the provision of consumer advice.⁵⁴ The Commission regards the provision of consumer advice as a critical part of the classification process. It recommends that consumer advice continue to be required for films. The Board should specify appropriate consumer advice whenever it classifies a film PG, M, R or X. Consumer advice need not be required for G films because they contain nothing about which forewarning is needed. The advice should be notified in the classification certificate. The decision on what the consumer advice is to be should be reviewable.

What the community wants to know

3.10 Consumer advice should, clearly, tell people what it is about a film that caused it to be classified a particular way. It should do this in a way that is meaningful and that addresses issues known to be of relevance and concern to the members of the community who will use it. Submissions suggested the Board should become more involved with the community.⁵⁵

We consider that [a] function of the Film Censorship Board should be to set up a means for regular communication and involvement with the wider community.⁵⁶

The Joint Select Committee recommended that the Board should have a research capacity to assist in the maintenance of its awareness of community standards.⁵⁷ The Commission agrees. It is essential that the members of the Board maintain a close involvement with the community. The Office of Film and Literature Classification should conduct a continuing program of consultation to find out what people want to know about films and what sort of consumer advice is effective. Research such as that carried out for the public awareness campaign (discussed at paragraph 2.7) is a step in the right direction.⁵⁸ Such a research program will also help to monitor community standards of morality, decency and propriety, for the purpose of ensuring that the guidelines remain current. The funding for this program should be built in to the Office's budget.

Reclassification after two years

3.11 Community standards change over time and classifications may become outdated. The Commonwealth, States and Territories agreed in 1987 that the Film Censorship Board ought to be able, on its own motion, to issue a fresh classification for a film (or reconsider a decision to approve or refuse to approve an advertisement) after two years.⁵⁹ The Discussion Paper included draft clauses to give effect to that agreement and extended it to publications.⁶⁰ Several submissions commented adversely on the Board having this power.⁶¹ One organisation suggested that the Board should only be able to reclassify a film to a higher classification, to prevent the 'lowering of community standards'.⁶² The Commission does not agree that the Board should be limited in the decisions it can make. It may be that community standards change so that what was once regarded as offensive becomes quite acceptable. The Commission recommends that the 1987 agreement be implemented unchanged.

Reconsideration of decisions

Present procedures for reconsideration of decisions

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3.12 **Present procedures.** At present, decisions of the Film Censorship Board (in relation to films) and of classification officers (in relation to publications) are reconsidered by the Film and Literature Board of Review. Under Australian Capital Territory law, only the applicant for classification, the Attorney-General and the publisher of the film or publication may apply to the Board of Review for reconsideration of a decision.⁶³ The position is different under State and Northern Territory laws. There is no uniformity. Some only allow the local Minister and the applicant to apply.⁶⁴ Others allow a 'person aggrieved' as well.⁶⁵ The Australian Capital Territory Ordinance requires the federal Attorney-General, if asked by a State or the Northern Territory Attorney-General, to initiate a review by the Film Censorship Board of a decision in relation to a film after two years have passed since the previous decision.⁶⁶ To seek reconsideration of a decision, an applicant must lodge a signed application with the Chairman of the Board of Review within 30 days after the decision.⁶⁷ A fee is charged.⁶⁸ There is no provision under Australian Capital Territory law for the applicant to participate in the Board's proceedings, by representation or otherwise, but the Commission understands that representations are sometimes accepted. The Board meets in private. It considers the application as though it were a fresh application for classification and applies the same criteria as the Film Censorship Board.

3.13 **Recommendation.** The Commission recommends that this mechanism continue. This reflects the conclusion of the Administrative Review Council in 1986, that, in the context of Customs, the Review Board was the appropriate body to reconsider censorship decisions, and that there was no need to involve the Administrative Appeals Tribunal.⁶⁹

Who should be able to initiate a reconsideration?

3.14 **The issue.** This system differs from other reviews of administrative decisions. It is not a review of an administrator's decision by an independent body. Rather, it is a reconsideration of a decision of one independent body by another independent body. The question who should be able to ask for this second look has been raised in the Commission's consultations.

3.15 **Proposal in Discussion Paper.** The Commission proposed that standing to apply for reconsideration of a decision be widened to include any person, provided he or she was not acting in bad faith and was not a meddler. Submissions indicated widespread support for this proposal amongst community groups.⁷⁰ Industry groups were, however, opposed.⁷¹

3.16 **Arguments against widening standing to seek reconsideration.** In the Commission's consultations those arguing against widening standing to have classifications reconsidered had a number of concerns.

- **Increased costs.** Widening standing was said to increase the uncertainty of classification decisions and increase industry costs.⁷² For example, if, on a reconsideration, a film were given a different classification, all advertising would have to be withdrawn and the film would have to be re-launched with the new classification — possibly at significant cost.⁷³ Periodical publications may become valueless if the appeal procedure results in them going out of date before being released for sale.⁷⁴
- **'Subjective' decisions.** The 'subjective' nature of classification decisions was seen as making wider rights to initiate a reconsideration inappropriate.⁷⁵
- **The representative nature of the Classification Board.** The Classification Board represents the community, rather than being an expert legal body. The same is true of the Review Board, which is similarly constituted and uses similar processes.⁷⁶ Wider rights to have the Classification Board's decisions reconsidered are therefore unnecessary.
- **Present rights adequate.** Finally, submissions argued that the ability of members of the general public to ask the federal Attorney-General, or a State or Territory Attorney-General, to intervene, coupled with the ability of any 'person aggrieved' to seek judicial review under the *Administrative Decisions (Judicial Review) Act 1975* (Cth)⁷⁷ is adequate.⁷⁸

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If standing were to be widened, these groups felt that it should only be widened to 'persons aggrieved'.⁷⁹

3.17 **Widening rights.** The Commission recommends that standing to seek reconsideration of a classification or associated decision should be widened. Apart from the strong support for widening standing shown in submissions to the Joint Select Committee on Video Material⁸⁰ and to the Commission, there are a number of reasons for widening the scope for community involvement in the classification process.

- **Ensuring that decisions reflect community views.** Classification decisions are supposed to reflect the prevailing standards in the general community. To allow wider rights for the general community to be involved in the process will underline the community-based nature of the decision-making process and help ensure that decisions are a reflection of current community standards.
- **Attorney-General's standing not enough.** The Commission is not persuaded that the ability of the Attorney-General to ask for a reconsideration is enough. The decision to ask for a reconsideration of a particular decision would be likely to be highly contentious and an Attorney could only be expected to act under acute political pressure.⁸¹ This is too high a hurdle for ordinary community members — the Office of Film and Literature Classification can only recollect one appeal by the Attorney-General, on the request of the Tasmanian Attorney.
- **Cost and certainty.** Concern about uncertainty of decisions and cost is based on a fear that broadening standing rights will 'open the floodgates'. In relation to the analogous question of public interest litigation, the Commission's earlier report concluded that that fear was unwarranted.⁸² In fact, the fees associated with an appeal would tend to discourage frivolous or speculative appeals and those without real public support. In any case, the validity of a classification decision is not affected unless and until a different classification is awarded. This means that, unless an appeal is successful, no costs will be incurred by industry.
- **Boards already representative?** The Commission acknowledges that the Classification Board is intended to represent community values. However, it does not follow from this that reconsideration of its decisions is unnecessary, as was suggested in some of the Commission's consultations. The existence of the Review Board shows that a facility for reconsideration is seen as essential. The representative nature of the Boards suggests, in fact, that standing to reconsider a decision should be open to the community generally, not simply to industry groups.

The Commission notes the informal nature of the Boards' deliberations. Widening standing should not lead to their work turning into an adversary contest.⁸³ Both Boards can control their own procedure and should continue to operate in an informal way.

3.18 **Recommendation.** The Commission recommends that the class of appellants should be widened to include any person, unless the Review Board is of the opinion that the application is made in bad faith or that the applicant is merely meddling. However, this should only apply in a limited range of cases.⁸⁴ A distinction should be drawn between classifications which result in legal restrictions on dissemination (R, X and RC for films and Category 1 restricted, Category 2 restricted and RC for publications) and classifications which are merely advisory (G for films and publications and PG and M for films). Standing to initiate a reconsideration should only be widened where the first group of classifications is in issue. A person (other than the producer, exhibitor or distributor or the Attorney-General) should not be able to seek reconsideration of a film's advisory classification on the assertion that it should have received a different advisory classification, for example, that a film classified PG should have been classified M. This recommendation limits widened standing to instances where there is a real question of restricting access to material. If a publication or a film is reclassified, different determined markings and consumer advice will apply. It would be unreasonable to expect immediate compliance with requirements to display the relevant markings. The Commission recommends that a 30 day period of grace be given to allow distributors, retailers and exhibitors time to change the markings.

Notification of decisions

3.19 The traditional way of notifying decisions of the Film Censorship Board and the Film and Literature Board of Review is the Commonwealth *Gazette*. Now though, the Office of Film and Literature Classification notifies all classification decisions by way of Telecom Discovery public network which provides 'on-line' access to a database of classification decisions. In Discussion Paper 47, the Commission proposed that decisions should continue to be notified in the *Gazette*.⁸⁵ This would ensure that anyone can get access to the Board's decisions. Not all organisations, or individuals, have access to Telecom Discovery, although it is hoped that libraries will eventually have the necessary facilities. Those submissions that considered the question supported the Commission's proposals.⁸⁶ The Commission recommends that decisions continue to be notified in the Commonwealth *Gazette*. However, the detail that appeared in previous notices in the *Gazette* is not needed. A short form of notice should be used, for example, the title of the publication or film, sufficient other distinguishing characteristics and its classification.

Media subject to the scheme

Primary focus

3.20 The primary focus of current censorship policy and legislation is films and printed matter. It is not intended that this focus be changed. There are, however, several other products which have caused community concern and which, it has been suggested, ought to be dealt with under this legislation:

- clothing
- computer games
- audio tapes and records.

Films and publications

3.21 Consistently with the present law, the draft laws in Appendix 1 and 2 define 'film' to include

any form of recording from which a visual image can be produced, whether or not by means of a device.⁸⁷

The draft laws also define 'publication' as 'any written or pictorial matter'. Advertisements for films and publications are specifically excluded from the definitions.

Clothing

3.22 The question whether clothing with writing or pictures on it constitutes a publication for the purposes of classification (and, ultimately, for the purpose of regulating its public display) has been raised in several jurisdictions. Some of the controls over restricted publications are not necessarily appropriate for clothing, for example, that Category 1 restricted publications be displayed for sale and sold in a sealed package. Others, however, are appropriate, for example, those controlling availability to children. In Discussion Paper 47 the Commission proposed that clothing be excluded from the definition of publication.⁸⁸ This proposal was criticised in several submissions.⁸⁹ It was pointed out that the reason present legislation deals with films and publications is that they are media by which written or pictorial messages may be conveyed. Clothing has in recent years become increasingly used for the same purpose and, it was suggested, should fall within the same legislative scheme.

It is the availability of the offensive material that is controlled by censorship laws. Restricting availability reduces the likelihood of offensive material being widespread in the community and of persons who do not wish to see such material being exposed to it. Classification of material, resulting in restricted availability, also makes a statement about the level of public exposure that is appropriate for such material.⁹⁰

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The Commission agrees that it is consistent to restrict the availability of clothing which has on it offensive writing or pictures. Equally as important is the control of the wearing in public of offensive clothing. The Commission recommends that clothing be included in the definition of 'publication'. Classification will not be compulsory unless the clothing is a 'prescribed publication', that is, one which would, if classified, be classified higher than G.⁹¹ It is not anticipated that this recommendation will involve much additional work for the Classification Board. The wearing, or display, in public of clothing which has been, or would be, given a restricted classification should be prohibited, but this offence should be one for which the prosecution should have to prove *mens rea*. Clothing bearing writing or pictures and which is advertising a film or publication should, however, be excluded from the definition of publication. It will be subject to approval by the Board as an advertisement.

Computer games

3.23 **An area of concern.** The development of so-called 'adult' computer games, and the easy access to some programs over telephone lines, have prompted concern. Several State governments have received complaints about computer games, as has the Office of Film and Literature Classification. There has not yet been a decision by governments that computer programs need to be regulated but several jurisdictions have indicated that they would like this issue to be addressed by the Commission. For this reason, and because of the accepted principle that children should be protected from material likely to harm or disturb them, the Commission has given consideration to the question whether computer programs can be regulated effectively within the framework of the classification system.

3.24 **Present controls.** The importation of computer programs that

depict sex, drug misuse or violence in a manner that is likely to cause offence to a reasonable adult person to the extent that they should not be imported or that

depict a child (whether engaged in sexual activity or otherwise) who is, or who is apparently, under the age of 16 years in a manner that is likely to cause offence to a reasonable adult person

is prohibited under the Customs (Prohibited Imports) Regulations unless permission to import is granted by the Attorney-General.⁹² Some games of which the Commission has heard⁹³ may contravene some State laws that make it unlawful to incite racial hatred.⁹⁴ There are two forms in which computer games are available. First, games are available on computer software purchased over the counter. Second, they can be accessed over the telephone from a 'bulletin board'⁹⁵ by using a modem attached to a computer. The sale of computer software over the counter is comparable to the sale of videos and magazines and could be regulated within the existing classification scheme. The provision of computer games via telephones does not, however, fall so easily within the scheme, mainly because of difficulties of enforcement. The transmission of programs over the telephone is governed by the *Crimes Act 1914* (Cth). Section 85ZE makes it an offence knowingly or recklessly to use the telecommunications service in a way that would be regarded as offensive. The technical difficulties of detection, however, make enforcement difficult. A requirement that the games provided on bulletin boards be classified would be virtually unenforceable. It must be acknowledged, therefore, that any requirement that computer programs be classified would, in practice, probably only fall on distributors and retailers in the 'over the counter' market.

3.25 **Proposal.** The Commission considered whether computer programs could be included in the definition of 'film' or 'publication' and thereby made subject to classification and consequent point of sale and exhibition restrictions. To treat them as films would require all computer programs to be classified. Given that 'adult' computer games comprise a very small percentage of the product sold by licensed distributors and reputable retailers, this would be unwarranted.⁹⁶ In Discussion Paper 47, the Commission proposed that they be treated as publications.⁹⁷ The proposal generally received widespread support.⁹⁸

This proposal is supported, only for the reason that the volume of material available in the market-place is so extensive that the resources required to automatically classify it all would be beyond the resources of the Board.⁹⁹

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Under a later recommendation,¹⁰⁰ only programs that are likely to be classified higher than G would need to be classified. Few programs would require classification.

3.26 ***Difficulty of classifying computer programs.*** There are physical difficulties in classifying computer programs. Their 'interactive' nature means that what is accessed is determined by the 'player'. To view the entire contents of the program may not be possible. Despite this, however, the Commission is satisfied that computer programs could be adequately classified.

3.27 ***Burden on industry.*** Concerns were expressed to the Commission about the serious impact delays resulting from submitting material for classification would have on importers. Distributors who import computer software under license agreements compete against unlicensed importers who import the same product simultaneously (parallel importers). Any delay in the distribution of imported software caused by having it classified would be likely to disadvantage licensed importers with consequent benefits to the parallel importers.¹⁰¹ Under the Commission's proposal, however, only computer games which would be classified RC, Category 2 restricted or Category 1 restricted would have to be classified. This would have minimal impact on 'mainstream' distributors as most of their products are not of that kind.

3.28 ***Recommendation.*** The Commission recommends that computer programs be included in the definition of 'publication'. The principles behind the classification of publications — the prohibition of material that offends against community standards to the extent it should be banned, restricting the access of children to material which may harm them and providing a warning as to contents — apply equally to computer programs. Implementation of this recommendation will require additional resources, for example, sufficient computers to enable the Board to examine a variety of computer software. The Commission has not quantified these resources, but it expects, given the number of programs that will be subject to classification, that the additional resources should not be significant.

Telecom services

3.29 The Commission's attention has been drawn to concerns about the standard of some of the information available on Telecom's 0055 recorded information service and other 'facilities' allowed by Telecom to be provided by way of its Discovery service.¹⁰² A Senate Select Committee on Community Standards Relevant to the Supply of Services Utilising Telecommunications Technologies was recently established. It is conducting an inquiry into, amongst other things

whether a code of conduct should be observed by providers and carriers of commercial recorded services utilising telecommunications technologies

whether it is appropriate to control the provision of or access to such services.

If the Committee recommends that some regulation or assessment is required, the Commission suggests that the criteria for classifying films and publications, which is a generally accepted set of standards, would be an appropriate model for Telecom to use in assessing the suitability of services to be provided through Telecom's facilities.

Audio material

3.30 ***Present situation.*** The Office of Film and Literature Classification does not presently classify audio material such as records, tapes and compact discs. Broadcasting on radio and television is subject to the *Broadcasting Act 1942* (Cth) which prohibits the broadcasting of material which is blasphemous, indecent or obscene.¹⁰³ Most jurisdictions, if their legislation refers to sound recordings at all, deal with them by including them in a definition of 'article' and prohibiting the publication of indecent articles. The Victorian legislation, however, includes audio material in its definition of 'publication'.¹⁰⁴ There is no general agreement among States and Territories that this is necessary; each jurisdiction is presently monitoring the situation.

3.31 ***Proposal.*** In Discussion Paper 47, the Commission suggested that, if governments decide that some regulation of audio material is necessary, records, tapes, compact discs and other audio material

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should be treated as 'publications', but that certain of the restrictions should not apply to the sale or display of discs or tapes:

- that they only be displayed for sale or sold in a sealed package
- if classified Category 2 restricted — that they only be delivered to a purchaser in an opaque wrapping.

These exemptions would not extend to written material accompanying the discs, however. Few submissions commented on this proposal, indicating, presumably, that there is little community concern about the availability, and standard of, material in this medium. The Victorian government indicated support, as would be expected having included it in its recent legislation.¹⁰⁵

3.32 **Recommendation.** The Commission is not persuaded that there is presently a problem which needs addressing. Further monitoring of the situation would be appropriate. If, however, governments decided that the dissemination of audio material does need to be controlled, it should be included in the definition of 'publication'.

Administrative issues

The present administrative arrangements

3.33 In 1988 the federal Attorney-General decided that, for administrative convenience, all the classification functions in the portfolio should be amalgamated into one organisation. As a result, the Office of Film and Literature Classification, which incorporates the Film Censorship Board (which classifies films) and classification officers (who classify publications)¹⁰⁶ was established, headed by the Chief Censor. The Office has three main functions:

- supervising the operations of the Film Censorship Board and the classification officers
- providing administrative support to the Film and Literature Board of Review
- providing policy advice to the federal Attorney-General on matters concerning classification, including proposed legislative changes.

The proposed administrative arrangements

3.34 **Overview.** The Commission recommends that the Office's structure and operations remain fairly much unchanged. One change that the Commission recommends is that responsibility for classifying films and publications should rest with the Classification Board, which should also have the function of approving advertisements for films and publications on a national basis. This will mean that work now performed by classification officers and deputy censors will be performed by the Board. The Commission recognises that there may be a need for the Board to be relieved of some of the more routine work in order to concentrate on complex issues. The internal arrangement of work and staff positions within the Office should not, however, be constrained by legislation. The recommendation made later, that the Director should be able to delegate the functions of the Board, will adequately address this issue.¹⁰⁷ The Board's decisions, on publications and films, should continue to be able to be reconsidered by the Classification Review Board.¹⁰⁸

3.35 **Names of the Boards.** In the Discussion Paper, the Commission proposed that the names of the Boards be changed to reflect the fact that their main function is classifying material.¹⁰⁹ It proposed that the name of the Film Censorship Board be changed to Classification Board and the name of the Film and Literature Board of Review be changed to Classification Review Board. Many submissions expressed the view that it is important to retain the word 'censorship' in the titles.¹¹⁰

The deletion of the word 'Censorship' would be misleading as censorship is one of the roles of the Board and the suggested new name could lead to future undermining of the Board's censorship role.¹¹¹

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The Commission does not agree. The Board's task is to classify material into legislatively created and defined categories. It is State and Territory laws which censor material by prohibiting or restricting the dissemination of material placed in those categories. Accordingly, the Commission recommends that its proposal be adopted. The titles of the officers should also reflect the reality of their roles: for example, the Chief Censor should be titled 'Director' (of the Office) and the Deputy Chief Censor 'Deputy Director'.

3.36 ***Composition of the Classification Board.*** The Discussion Paper also proposed that the composition of the Classification Board remain unchanged. To give more flexibility, however, the present limit on the Board's size, 12 (including the Director, the Deputy Director and the Senior Classification Officers), should be increased to 15. This should provide adequately for the increased workload of the Board due to it classifying publications as well as films. Under the present law, no specific qualifications are required for membership of the Board. The Commission proposed in the Discussion Paper that the Government not be restricted in the class of persons whom it can appoint to the Board. It was suggested during consultations that each government should be able to appoint a person to the Board. That suggestion brought expressions of concern that political appointments could compromise the independence and integrity of the Board.¹¹² Several submissions suggested that the Board should include certain people: women, parents¹¹³ and people with 'direct experience and knowledge of children and adolescents'.¹¹⁴ Underlying these suggestions is a concern to ensure that the Board is broadly representative of the community. The appointment of members by particular governments, or from particular groups in the community, would not necessarily achieve this goal. Legislation should specifically direct the Government's attention to this objective in making appointments to the Board. Beyond this, however, it would be undesirable to prescribe qualifications for membership of the Board.

3.37 ***Length of appointment.*** The present maximum period of appointment to the Board is six years but in practice members are appointed for three years. It was suggested to the Commission that appointments should be longer than three years to attract interstate applicants (who may not think it worth moving to Sydney for an appointment of only three years) and to provide a reasonable term of service without the need for re-appointment. The Commission agrees with the need to provide a reasonable period of appointment so that appointment is made attractive to those who may have to move interstate. Several submissions expressed concern, however, that a long period on the Board may tend to desensitise a person to the impact of violence and pornography.¹¹⁵

We suggest a shorter period of appointment of Board members (say 2 years). This should help minimise desensitisation of Board members due to repeated watching of objectionable material, and hence reduce any tendency for a progressively more permissive application of the classification guidelines.¹¹⁶

The Commission agrees that there may be a tendency for people who regularly see films containing violence and sex to lose touch with the reaction of people who do not regularly watch such material. The increased involvement of Board members with the community through the recommended research program of the Office of Film and Literature Classification¹¹⁷ should reduce the possibility of members 'losing touch'. There are important benefits to be gained from members working on the Board for longer periods. These include a consistent interpretation of the classification criteria and guidelines. Consistency is an important and desirable aim in a system which is a source of community advice about content and suitability for children. The Commission recommends that the appropriate balance between these competing considerations would be struck if there were to be a maximum period of appointment of five years with a maximum period of total service of six years.¹¹⁸

3.38 ***Composition of the Classification Review Board.*** The Commission recommends that the decisions of the Classification Board should continue to be able to be reviewed by a specialist body, a Classification Review Board.¹¹⁹ This Board should continue to be an independent statutory authority, although its resources will no doubt continue to be provided through the Office of Film and Literature Classification. There are few changes proposed to the constitution of the Review Board. The most significant change is to the number of members, presently a maximum of six, a minimum of five and a quorum of three. The Commission proposed in the Discussion Paper that the maximum be increased to 10.¹²⁰ This was opposed in one submission as being unnecessary.¹²¹ The Commission nevertheless recommends the increase in size to provide more flexibility. As with making appointments to the Classification Board, the federal Government should take into account the need for the Review Board to

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represent the community at large rather than to be a body of 'experts'. The title of the Chairman should be altered, in accordance with the federal Government's policy of gender neutrality, to Convenor. It was suggested that it be required that at least one member of the Board be aged 18 or 19 when appointed, to try to ensure that the views of young people are made known to the Board.¹²² For reasons similar to those set out in paragraph 3.36, however, the Commission recommends that there be no special restrictions on the appointment of persons to the Review Board.

3.39 ***Establishing the Boards.*** The Film Censorship Board and the Film and Literature Board of Review are currently established by the Customs (Cinematograph Films) Regulations, made under the *Customs Act 1901* (Cth). It is preferable to have the legislation establishing the federal administrative framework in the same legislation as the classification procedures under which they will operate. Accordingly, the Commission recommends that the Boards be established under the *Classification Bill 199?* (Cth) in Appendix 1.

Delegation

3.40 The Chief Censor is able to delegate any of his powers, duties and functions under existing law.¹²³ Under the Commission's recommendations, the Classification Board will classify publications as well as films. This will increase the workload of the Board. It is likely that the Board will sometimes require assistance with its work. Consequently, in the Discussion Paper the Commission proposed that the Director should be able to delegate not only his or her powers but also those of the Board.¹²⁴ It was anticipated that the Director would delegate much of the work relating to publications and some classifying of films, for example, that which is likely to be straight forward. The width of that power was questioned.¹²⁵ The Commission appreciates the concern expressed about the Director having power to delegate to any public servant and recommends that the delegation should only be to occupants of positions approved by the Board and where the Board has determined the delegation is necessary for efficiency reasons. This will ensure that the power to delegate will not be at large but will be subject to appropriate controls.

Fees

3.41 The current arrangements for the levy, collection and disbursement of classification fees are complicated and inefficient. Fees are levied by the States and the Northern Territory, collected by the Office of Film and Literature Classification and redistributed to the various jurisdictions after an amount is deducted by the Office for its services. The Commission suggests that this arrangement would be greatly simplified if a single fee were determined by the federal Attorney-General and levied for each classification. Arrangements as to the amount and sharing of that fee can be made independently, by agreement between the Commonwealth, the States and the Northern Territory. This arrangement removes the need to provide that an application for classification must not be accepted by the Office of Film and Literature Classification unless it is an application with respect to each State and Territory.¹²⁶ The Commonwealth, the States and the Northern Territory agreed in 1990 that the Chief Censor should have the power to exempt films from classification fees where appropriate in the public interest, for example, if a film has a public interest, public health or educational purpose. The Commission agrees with that decision and recommends that the Director continue to be able to exempt films from classification fees.

4. Advertisements for publications and films

Marketing

4.1 Marketing is a major part of the film and print industries' activities. As with other products on which there are legal restrictions on availability, for example, alcohol, restrictions on marketing are needed to support the objectives of the restrictions. Controls on advertising should be concerned with the audience to which the advertising is directed. Films and publications to which children cannot legally have access should not be marketed to children. This is the fundamental principle behind the recommendations in this chapter.

Approval of advertisements

Advertisements for films

4.2 Not all advertisements for films are required to be approved. The Film Censorship Board is, however, presently empowered to approve, with or without conditions, or refuse to approve, advertisements.¹²⁷ Some jurisdictions enable the Board to require an exhibitor of a film to submit to the Board for approval a copy of every advertisement used or intended to be used in connection with the exhibition of the film.¹²⁸ The Commission agrees that the Board should be able to 'call in' advertisements and recommends that there be created an offence of failing to submit advertisements when requested by the Board to do so. The definition of advertising matter in relation to a film in the *Classification of Publications Ordinance 1983* (ACT) is restricted to the container of a video.¹²⁹ The Discussion Paper proposed that the definition of 'advertisement' for a film be widened to include every visual form of advertising a film (cinema or video), unless it was on clothing.¹³⁰ Submissions indicate support for advertising which appears on clothing to be subject to approval by the Board.¹³¹ The Commission has concluded that the restrictions on advertisements which are refused approval should apply to clothing used to advertise films or publications and recommends that the definition include clothing.

Advertisements for publications

4.3 There is presently no provision for the Board to approve advertisements for publications. The purpose of providing for the Board to refuse approval of advertisements is to restrict their dissemination if they are offensive. There is no reason why this ought not apply to advertisements for publications. The Commission recommends that the Board should be able to approve advertisements for publications, but only those it has classified.¹³² The Commission recommends that, as there is for advertisements for films, there should be an offence of failing to submit advertisements to the Board on request. It also recommends that the offences of publishing a film advertisement that has been refused approval, or publishing it otherwise than in accordance with conditions attached to its approval, be extended to include advertisements for publications.

Grounds for refusing approval

4.4 The criteria on which an advertisement is to be refused approval should be the same as the criteria on which films and publications are classified RC. The Board should also have to consider the matters set out in s 6 of the draft *Classification Bill 199?* (Cth):

- the standards of morality, decency and propriety generally accepted by reasonable adults
- the literary, artistic or educational merit (if any) that the publication or film has
- the general character of the publication or film, including whether it is of a medical, legal or scientific character
- the classification guidelines in force for the time being.

Advertisements for unclassified films

4.5 Under most current laws, a film cannot be advertised until it has been classified.¹³³ This restriction does two things. It prevents the advertising of films which cannot themselves be screened, that is unclassified films, and it maintains the integrity of the classification system as a way of providing information and advice about the content of films. The Commission recommends that this restriction be continued. State and Territory governments have recently agreed to limited exemptions to this rule. Under this scheme, each year the Board may approve a limited number of advertisements for unclassified films, except films likely to be classified R, X or RC. Advertisements approved under this exemption must display the words 'Subject to classification'. No jurisdiction has provided legislatively for this exemption yet. The Commission agrees with the exemption mechanism and recommends that it be included in the legislation.

Classification of videos containing advertisements

4.6 Present law prohibits the classification of a video if it contains an advertisement for an unclassified film. It also prohibits a video being classified lower than any film which is advertised on the video.¹³⁴ These restrictions are aimed at maintaining the integrity of the classification system as a source of information about what material is contained in a video. The advertising of higher classified films by an advertisement of a lower classification standard could be said to be misleading. Advertising R or X videos on G, PG or M videos involves marketing material which cannot legally be seen by children to an audience which is likely to include children. The Commission proposed in the Discussion Paper that a video should not be classified if it contains an advertisement for a film of a higher classification than the film on the video.¹³⁵ No submissions opposed this proposal and the Commission recommends that it be adopted.

Advertising X films

4.7 As the screening in public of X films is prohibited, the Commission recommends that the screening in public of advertisements for X films should also be prohibited. Under the recommendation in the preceding paragraph, a video which contains an advertisement for an X film will only be classified if the video itself is classified X. The advertising of X films by other means is discussed, in conjunction with the availability of X films, at paragraph 5.3. The Commission is satisfied that it is consistent for jurisdictions which prohibit the sale of X films to prohibit the advertising of X films.

Advertisements screened in cinemas

Advertisements with the feature film

4.8 Current laws do not place any restrictions on the screening of advertisements for films at the cinema, other than that they must not have been refused approval. In Discussion Paper 47, the Commission proposed that a restriction similar to that for advertising films on videos apply, that is, that no advertisement be screened for a film classified higher than the feature film. This proposal received wide support in submissions.¹³⁶ It was criticised by some as severely restricting the film industry's capacity to advertise the majority of its films, that is, those classified PG and M.¹³⁷ The Commission is aware of the difficulties its original proposal would cause for small, suburban exhibitors whose forthcoming attractions may be limited to one or two films, both of which may be classified higher than the feature film currently screening. Because of this, the Commission has modified its proposal and recommends that the only restrictions on advertising in cinemas be that advertisements for X films not be screened, that R films only be advertised at the screening of R films and that advertisements for M films not be screened with G films. The width of the M category is such that some M films are not appropriate to market to younger children.

Advertisements in cinema foyer

4.9 At some cinemas advertisements for films are screened in the foyer. This situation is distinguishable from advertising inside a cinema because the audience is not captive and has not chosen to see a film on the basis of its classification. There is a need, however, to try to prevent the marketing of R films to children. The Commission recommends, accordingly, that the only restriction on this sort of

advertising be that advertisements for R films only be screened after 8pm, by which time children will be less likely to be present.

Advertising publications

4.10 The Commission recommends that it should be an offence to advertise RC and prescribed publications.¹³⁸ They cannot be sold legally, so they should not be advertised. It was suggested to the Commission that a similar principle to that applied in relation to the advertising of films be applied to publications so that restricted publications could not be advertised in unrestricted publications.¹³⁹ The Commission agrees that publications which are not legally available to children should not be marketed in publications which are available to children. The Commission recommends that it should be an offence to advertise a Category 1 restricted publication in an unclassified publication or a G publication. It also recommends that advertisements for Category 2 restricted publications should only be published in restricted publication areas.

Broadcasting

Broadcasting Tribunal responsibility

4.11 The Commission's reference does not extend to the classification of films for television transmission. However, it is necessary to make some comment about the use of television to advertise cinema films and videos. The regulation of program standards for the commercial television stations is the sole responsibility of the Australian Broadcasting Tribunal.¹⁴⁰ The Australian Broadcasting Corporation and the Special Broadcasting Service are self-regulating.¹⁴¹ The Tribunal publishes standards for program classification, which licensees must apply to the programs they transmit. The sanction for non-compliance is possible revocation of the licence to broadcast.¹⁴² The Tribunal is soon to commence an inquiry into classification standards for television.

Advertising films on television

4.12 The Tribunal's Interim Television Advertising Conditions presently prohibit advertisements for X films and restrict advertisements for R films to those times when Adults Only (AO) programs may be shown.¹⁴³ Between 4pm and 6pm on weekdays, only advertisements for G films may be shown. Advertisements for PG, M and R films may be transmitted during a television program classified G for television provided the advertisement itself is classified G. If the television program has been promoted for viewing by children, however, such advertisements may not be transmitted if they include motion sequences from the films, or the rapid succession of stills from the film which simulates motion.¹⁴⁴ This allows some 'still life' advertising for PG, M and R films during G television programs which have been promoted for viewing by children.

Recommendation

4.13 ***Proposal in DP 47.*** In Discussion Paper 47 the Commission suggested that the advertising of films on television be restricted in the same way that advertising on videos is restricted.¹⁴⁵ Submissions from television licensees opposed this proposal.¹⁴⁶ They distinguished advertising on television from other means of advertising films and videos. Television advertisements are themselves classified according to content, and can only be transmitted during the time zone for programs of that classification or higher. Time zones are geared to daily viewing patterns so that, for example, when the AO time zone commences at 8.30pm, the child viewing audience usually falls to 12%.¹⁴⁷ It was said that the audience composition rarely differs from the normal pattern even if a program of a lower classification is broadcast in a higher classification time zone (for example, G in an AO zone). The audience is, therefore, primarily determined by the time zone, not the classification of the program being transmitted.

4.14 ***Recommendation.*** The Commission accepts that classification of advertisements, as opposed to mere approval, and the system of time zones distinguishes television from video and cinema as a medium for advertising films. There should, however, be consistency in approach between the rules for

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advertising films at the cinema, on video and on television, bearing in mind the differences between these media. Films which children cannot legally see, that is, R films, should not be marketed to audiences which are likely to include children and M films should not be marketed to younger children. It would be desirable if the Australian Broadcasting Tribunal's Television Advertising Conditions

- prohibited the transmission of advertisements for RC films
- restricted the transmission of advertisements for R films to during AO programs rather than to during the AO time zone
- prohibited the transmission of advertisements for M films between 4pm and 6pm on weekdays and during G television programs which have been promoted for viewing by children or which may reasonably be expected to attract substantial numbers of children as viewers
- required advertisements for films to display not only the classification symbol for the film but also the consumer advice.

These restrictions should apply whatever the classification of the advertisement.

Advertising films on radio

4.15 The Interim Television Advertising Conditions require all advertisements for cinema films or for videos to include a visual representation of the film's classification. It has been suggested that an analogous requirement ought apply to advertisements broadcast on the radio.¹⁴⁸ The Commission agrees that such a requirement would enhance the use of classifications as a source of information. It would be desirable if the Australian Broadcasting Tribunal's Radio Advertising Conditions required advertisements for cinema films or videos broadcast on the radio to contain a statement of the film or video's classification and consumer advice.

5. Enforcement

Introduction

Enforcement a State and Territory responsibility

5.1 The formulation and enforcement of rules restricting the dissemination of films and publications, both classified and unclassified, is presently the responsibility of the States and Territories. The Commission recommends that this should remain so. Each jurisdiction has legislation establishing the rules and providing penalties for their infringement. The Commission's terms of reference require it to review how the laws relating to the censorship of film and printed matter can be simplified and made more uniform and efficient, and any related matter. The rules regulating the sale, exhibition and distribution of these materials are part of the system of censorship. Now is an opportune time to review them with a view to having as uniform a set of laws as possible for the nation. The draft model enforcement provisions in Appendix 2 are a suggested model.

Resource priorities

5.2 Submissions and consultations have revealed a public perception that the enforcement of existing laws, including customs laws, which regulate and restrict the dissemination of publications and films is inadequate.¹⁴⁹

From a community viewpoint, any legislation will only be useful if it can be effectively policed. This will entail the legislation being easy to understand, and enabling the law enforcement agencies to be able to act effectively. The ALRC should draw attention to the need for States to ensure that sufficient resources are put into policing of these areas.¹⁵⁰

As the Commission pointed out in relation to the criminal justice system in its report *Sentencing*,¹⁵¹ the effectiveness of any law depends in part on the priority which governments and the parliament of the relevant jurisdiction accord it, shown by the level of resources devoted to detection of, and dealing with, contraventions. These matters are outside the terms of the Commission's reference: they are matters for individual jurisdictions. The Commission draws the comments it has received to governments' attention.

The availability of X videos

5.3 Under present laws, the exhibition in public of X films is prohibited throughout Australia.¹⁵² The sale and hire of X videos is, however, only prohibited in the States. The decision whether to permit the sale of X videos is made by individual jurisdictions. Many submissions strongly criticised the policy which allows the sale of X videos in the Territories.¹⁵³ They were more critical, however, of the fact that material that is banned in the States can be obtained so easily from the Territories by mail order.¹⁵⁴

An enormous difficulty with the legislation in the ACT which impinges on all states is that it fails to address X rated video retailers advertising the sale, by mail order, of videos in national media outlets, listing an ACT post office box address... It is quite apparent that interstate operators/distributors are using the ACT to circumvent their own State/Territory legislation to operate a lucrative business interstate.¹⁵⁵

The Commission acknowledges that this is a difficult situation. It will continue, however, unless either the Commonwealth and the Northern Territory change their censorship policy, so that material now classified X will be classified RC, or the Territories ban the sale of X videos. In present circumstances, the viability of the mail order industry depends on the extent to which the States enforce the prohibition against advertising X videos.¹⁵⁶ The model enforcement provisions include provisions banning advertising X films in the States: this is a necessary adjunct to their policy of prohibiting the sale of X films. It may be argued that sending an X video by Australia Post is in breach of the *Crimes Act 1914* (Cth) s85S.¹⁵⁷ As far as the Commission is aware, no prosecution has ever been commenced for an offence against this provision, or its predecessors, in relation to pornography. It is not clear that a court would regard as offensive the use of Australia Post to send to a person something that he or she had specifically requested and which it was legal to supply in the place where the thing was posted.

Strict liability offences

5.4 Generally, criminal intention or a 'guilty mind' (*mens rea*) is a necessary element in the commission of an offence. In some circumstances, however, for example, where a defendant can reasonably be expected, because of his or her professional involvement, to know what the requirements of the law are, the mental, or fault, element can justifiably be excluded. The philosophy behind many of the provisions in the draft model enforcement provisions in Appendix 2 is that professionals engaged in producing or distributing films, videos or publications as a business, as opposed to members of the general public, can be expected to be aware of their duties and obligations. The provisions are drafted so that, if a particular set of circumstances exists, a specified person is guilty of an offence. Unless some knowledge or intention ought be required to commit a particular offence (in which case a specific defence is provided), the defendant's frame of mind at the time is irrelevant. The penalties for offences cast in these terms should be lower than for those requiring *mens rea*.

Offences

Existing offences

5.5 Existing State and Territory laws regulating the dissemination of publications and films cover the screening of films in public, the sale and hire of videos, the sale of publications, the advertising of publications and films and the possession of certain publications and films. The model enforcement provisions in Appendix 2 reflect the current emphasis of State and Territory laws. The principal offences should be those which restrict the availability of RC, X and R films and RC, Category 2 restricted and Category 1 restricted publications, and those which ensure that the markings and consumer advice determined by the Board are communicated to the public.

Parental defences

5.6 **Proposal.** A number of offences in the draft model enforcement provisions involve the showing or delivery to a child of material which is not legally available to children.¹⁵⁸ The Discussion Paper suggested that there should be defences to such offences if the defendant was the child's parent or the defendant had the child's parent's permission to show the child the material.¹⁵⁹ Submissions almost universally opposed the provision of parental defences.¹⁶⁰

The difficulty that we see with the Commission's proposal is that it seems to be saying legislatively that it is alright for children to be corrupted by objectionable films and publications so long as the corrupting is done by a parent or guardian. That, in substance, is the effect of allowing the defences in the form proposed by the Commission.¹⁶¹

5.7 **Recommendation.** The Commission notes that the Joint Select Committee on Video Material maintained that parents should not be deprived of the right to determine what their children can and cannot see.¹⁶² The Victorian Parliament also took that view and provided in the *Classification of Films and Publications Act 1990* (Vic) that parental permission be a defence to this type of offence. The Commission has concluded, however, that the need to protect children from such material outweighs arguments that parents have an absolute right to allow their children to see, or be shown, any material. It recommends that parents not be given a defence and that the permission of the child's parent should not be a defence.

Offences by children

5.8 In Discussion Paper 47 the Commission proposed that children aged at least 15 ought be held responsible for buying or attending the screening of R and X films, especially when other people are to be held responsible for selling or exhibiting such films to them.¹⁶³ The only submission to comment on this proposal suggested that liability should not be limited to children over 15, just to children who had knowledge.¹⁶⁴ The main responsibility for ensuring that children do not gain access to inappropriate

material should rest with the supplier of the material. It is desirable, however, that older children carry some responsibility. As it is unlikely that children under the age of 15 will be able to gain access to this material, the Commission has concluded that 15 years is an appropriate balance between those considerations and recommends that only children of or over 15 be held liable. These offences should not be ones of strict liability — the prosecution should have to prove knowledge on the part of the defendant child.

Screening R films before children — exemption for children under 2

5.9 Present laws include an offence of screening an R film in public in the presence of a child.¹⁶⁵ Most limit that liability, however, to cases where the child is over the age of 2 years.¹⁶⁶ The Discussion Paper proposed that the exception for children under 2 be removed.¹⁶⁷ Several submissions supported that proposal.¹⁶⁸ The proposal was opposed, however, by the Cinematograph Exhibitors' Association, which urged the retention of the exemption to allow parents to take children under 2 with them to a drive-in theatre. It said that, in some country areas, the drive-in may be the only form of entertainment.¹⁶⁹ The Commission is not satisfied that children under 2 are not affected by what they see and hear to the extent that they should be excluded from the protection afforded by the offence. It recommends that there be no exemption for children under 2.

Separate display of R videos

5.10 Several submissions raised the issue of requiring the display of R videos in a separate area to emphasise the legal restrictions attaching to them.¹⁷⁰ The Joint Select Committee on Video Material recommended that R material be displayed in a restricted area.¹⁷¹ Governments discussed this recommendation and agreed it was a matter for each jurisdiction. Only the Northern Territory and Western Australia have imposed such restrictions.¹⁷² The Commission agrees that separate display is ideal but concedes that it may be impractical in a number of instances, especially given that videos are now sold from premises as varied as petrol stations and corner stores. Retailers should be encouraged, nevertheless, to store R videos in an area or place less accessible to children. Ultimately, it is up to the retailer to prevent children purchasing R videos, wherever the video has been displayed.

Classification of publications — should it be compulsory?

Overview

5.11 Currently, the classification of publications, unlike films, is not compulsory in any jurisdiction. The majority of publications do not contain material which would be regarded by most people as offensive and would, if classified, be classified G. Dealings in such publications are unregulated. Most jurisdictions, however, have rules regulating dealings with publications which would be regarded as offensive, whether they are classified or not. Because classification is not compulsory, some jurisdictions provide that an unclassified offensive publication is safe from prosecution if it is disseminated under the same restrictions and conditions as apply to those that have been classified.¹⁷³ The only benefit of classification in those jurisdictions is that it is known for certain what the relevant restrictions applying to that publication are and that, if they are complied with, protection from prosecution in relation to the display or sale of that publication is guaranteed. The same protection can, however, be achieved without having the publication classified, provided an accurate assessment is made as to the likely classification of the publication.

Enforcement in a non-compulsory system

5.12 From a police officer's point of view, a marking showing that a publication has been classified indicates immediately the conditions under which the publication ought be displayed and sold and, consequently, enables him or her to assess whether there has been a breach of the law.¹⁷⁴ If, on the other hand, no classification marking appears on the publication, the police officer must either make an on-the-spot assessment of the likely classification of the publication to determine whether the relevant

conditions have been complied with or have the publication classified by the classifying authority. Most police do not have the expertise to make such assessments.

Compulsory classification of all publications unrealistic

5.13 The great majority of publications published or distributed in Australia raise no concerns with regard to censorship. A substantial increase in resources would be required, both for the industry and for the Classification Board, to classify all publications. The Commission has concluded that it would not be cost-effective to make classification of all publications compulsory just to regulate a small proportion of the publications now on the market. Accordingly, the Commission does not recommend that the classification of all publications be made compulsory.

Compulsory classification for a limited class of publications

5.14 The Commission proposed in Discussion Paper⁴⁷ that classification be compulsory for a limited class of publications.¹⁷⁵ Submissions indicate widespread support for this.¹⁷⁶ The Commission recommends that the limited class be those publications which would, if classified, be classified Category 1 restricted or higher. They have been termed 'prescribed publications'. This recommendation will target only those publications about which there is concern. Distributors and retailers who are in doubt as to whether a publication is a prescribed publication will either accept the risk or get the publication classified. This will achieve the objective of having such publications classified without necessarily imposing too great a resource burden on the Classification Board or on industry.

Possession of material

Should possession of RC films and publications be prohibited?

5.15 ***Present situation.*** The question has arisen whether the possession of material classified RC (or which would, if classified, be so classified), regardless of its intended use, should be illegal. Several jurisdictions prohibit the possession of RC material with the intention of publication.¹⁷⁷ In Western Australia and Queensland, however, the possession of RC films is an offence regardless of their intended use.¹⁷⁸

5.16 ***Recommendation.*** In Discussion Paper⁴⁷, the Commission proposed that the possession of certain publications and films with the intention to publish them should be an offence. Those publications and films were RC publications, RC films, publications that would, if classified, be classified RC, Category 2 restricted or Category 1 restricted and films that would, if classified, be classified RC, X or R.¹⁷⁹ Submissions supported that proposal and the Commission recommends that appropriate offences be included in State and Territory enforcement laws. The Commission indicated in the Discussion Paper that it did not agree that it ought to be an offence to have possession of RC films or RC publications, regardless of their intended use, merely because they are classified RC. Classification is done for the purpose of controlling dissemination. It is not done for the purpose of controlling what a person is able to have in his or her own home. Accordingly, an RC classification does not of itself mean a person cannot possess that material. It does mean that he or she cannot disseminate it. If the possession of material is to be banned, it should be to achieve some specific policy objective, not just because it has been declared unsuitable for commercial distribution. Banning the possession of material automatically upon it being classified RC would possibly be inconsistent with the International Covenant on Civil and Political Rights.¹⁸⁰ Article 19 provides exceptions to the right to freedom of expression if they are necessary

For the protection of national security or of public order (*ordre public*), or of public health or morals.

Being declared unsuitable for commercial distribution does not automatically place material within any of those exceptions. Accordingly, the Commission proposed in the Discussion Paper that mere possession of RC material not be an offence.¹⁸¹ This proposal was opposed in many submissions mostly on the basis of the offensive nature of RC material and its negative effect on society's morals.¹⁸² It was supported in one

submission.¹⁸³ The Commission is not convinced there is a special policy reason to ban the possession of all RC material and recommends that, in the absence of such reason, mere possession not be an offence.

Child pornography

5.17 ***Possession of child pornography.*** The mere possession of child pornography should, however, be an offence. This is not because child pornography has been deemed unsuitable for commercial distribution and is classified RC. The production of child pornography is likely to involve child sex abuse and is often associated with child sex abuse offences. The prime concern must be the welfare of children. Australia's obligations in this respect have been emphasised by its ratification of the United Nations Convention on the Rights of the Child. Under article 34 signatory States undertake to protect children from all forms of sexual exploitation and sexual abuse. Particular mention is made of measures to prevent the inducement or coercion of a child to engage in unlawful sexual activity and the exploitative use of children in pornographic performances and materials. The Commission suggested in the Discussion Paper that the best way to safeguard the welfare of children is to eliminate the production of and market for child pornography. It proposed that the possession and production of child pornography, regardless of its intended use, be prohibited. The Commission received many submissions in support of this proposal¹⁸⁴ and recommends that it be adopted.¹⁸⁵

5.18 ***Definition of child pornography.*** Child pornography is defined in the model enforcement provisions in Appendix 2 to accord with the classification criteria in the draft *Classification Bill 199?* (Cth) in Appendix 1. That wording reflects the wording in all jurisdictions' legislation with respect to child pornography. It limits the RC classification to situations involving children who are, or who appear to be, under 16. If the definition of child pornography were not limited to children under 16, some publications and films would be 'child pornography' yet would not be classified RC. Several submissions commented on the limited wording in the classification criteria and suggested it be changed to 'a child or a person who appears to be a child'.¹⁸⁶ The Commission is not, however, in a position to comment on current policy and has drafted the legislation in accordance with the present wording.

Prosecution

Seizure provisions

5.19 The Commission has included in the model enforcement provisions in Appendix 2 clauses enabling law enforcement agencies to seize material. Whilst the clauses represent what the Commission regards to be an appropriate balance between effective police powers and individual rights, the Commission recognises that policy on seizure and the issue of warrants varies between jurisdictions and that these clauses may not reflect the current policies of all jurisdictions.

Proof of intention — deeming provisions

5.20 Several of the offences in the model enforcement provisions¹⁸⁷ require the prosecution to prove an intention to publish. Before publication of Discussion Paper 47 some police expressed concern at the evidentiary burden this requirement poses and suggested that, for these offences, possession or production of a specified number of films or publications of a particular kind or title should be enough to prove, or at least to raise a presumption of, such an intention. The Commission indicated in the Discussion Paper that it did not agree with that suggestion. Several submissions disagreed with the Commission's view.¹⁸⁸ These submissions proceeded on the view that to require the prosecution to prove intention would lead to fewer successful prosecutions, and thus (it was said) weaken enforcement. The Commission is not convinced that the burden of disproving intention should be placed on the defendant. In an offence in which the defendant's intention is an essential ingredient, it should be for the prosecution to carry the burden of proving that intention. In particular cases intention may be difficult for the prosecution to prove. But prosecutorial difficulty does not of itself justify displacing the burden of proving a matter from the prosecution to the defence. Some further reason is needed if the balance in the criminal trial as between prosecution and defence is to be preserved.¹⁸⁹ In practice, a court may well be entitled to conclude, from proof of the existence of large numbers of similar publications or films, that the defendant intended to

publish them. At the end of the day, though, it should be for the prosecution to prove each element of its case, not for the defendant to carry a burden of disproving his or her intention. There should be no deeming of intention merely from the fact of possession.

Seizure and forfeiture of large numbers of films and publications

5.21 ***The problem.*** A similar question was also raised in the Commission's consultations, covering the case where prosecutions relating to a specified percentage of a large number of films or publications seized by police are successful. Those films and publications can, both under the present law and under this Commission's recommendations, be forfeited. The question is, should the remaining publications and films seized also be able to be forfeited, simply on the basis that offences have been proved in respect of the others? Should a convicted offender have to show cause why the remainder of the seized material should not be forfeited to the Crown? The problem facing police in many jurisdictions is that to prosecute in relation to a particular film or publication, they must have the film or publication classified by the Film Censorship Board to obtain evidence that the film or publication is in fact what the prosecution is alleging it is, for example, an X film. Classification requires the whole film or publication to be looked at. The demands on the time of the Board are significant, particularly for films. The major complaint of police is that the Board cannot classify a sufficient proportion of large seizures of films to prevent the bulk having to be returned when a prosecution has not commenced within the required time.

5.22 ***Reversal of burden of proof.*** Several jurisdictions have shifted the burden of proof in this case to the defendant, whether or not there has been a prosecution.¹⁹⁰ The Discussion Paper proposed that the burden should not be shifted. It drew a distinction between seizing material and forfeiting it. Seizure is a preventative action, designed to ensure that whatever forfeiture is justified will not be thwarted by disposal of the goods. Forfeiture, on the other hand, has two purposes:

- punishing the offender, by depriving him or her of property in the goods
- effecting the underlying policy, of preventing the circulation of material that contravenes the specified standards.

The Discussion Paper noted that 'automatic' forfeiture will not serve the second policy purpose: only forfeiture of goods that in fact infringe the standard will. Further, given the punitive element necessarily involved in forfeiture, goods should not be forfeited unless they are related to an offence, and it should be for the prosecution to show this, not for the defendant to disprove it.

5.23 ***Submissions.*** Several submissions disagreed with the view expressed in the Discussion Paper. The South Australia Police Department, for example, suggested that a mere allegation within a complaint that a film has a particular classification should be *prima facie* evidence of the film's classification. This would avoid the requirement of an evidentiary certificate.¹⁹¹ The Commission does not agree that the prosecution should not be required to produce evidence other than an allegation. The Commission's view was supported by the NSW Council of Churches.¹⁹²

5.24 ***Recommendation.*** The Commission recommends that seized goods should not be forfeited unless they are the subject of a successful prosecution. It acknowledges, however, that there are difficulties facing police in this area. They are difficulties of a very real and practical kind. Where possible, clauses in the model enforcement provisions in Appendix 2 have been drafted so as to place on the defendant the burden of proving a film was classified in a particular way.¹⁹³ This should reduce the need for evidentiary certificates stating that the particular film the subject of the prosecution has been classified. Instead, a certificate stating that a film of a particular title has not been classified G, PG, M or R will be sufficient. Such a certificate will be easy and quick for the Office of Film and Literature Classification to provide. Where certificates relating to a particular film (as opposed to a particular title) are required, provision has been made for 'condensed' certificates, that is, certificates stating merely that a film contains material which would lead to its being classified as specified in the certificate, if it were to be classified. This avoids the need for a 'full' classification and will enable the Office of Film and Literature Classification to process requests for evidentiary certificates more quickly. This will resolve the real difficulty facing police without disturbing the balance that ought to exist between prosecution and defence in the criminal trial.

Time within which prosecution to be commenced

5.25 In 1988 the States and Territories agreed to place a limit of between three and six months on the time within which a prosecution could be commenced after seizure. Some jurisdictions presently require seized material to be returned after 14 days if a prosecution or a 'show cause' proceeding has not been commenced.¹⁹⁴ The Commission proposed in the Discussion Paper that seized material should be returned to the person from whom it was seized or the owner if prosecution is not commenced within six months after seizure.¹⁹⁵ It was suggested in submissions that even six months was too short a time. The South Australian Police Department suggested 12 months as a more appropriate length of time.¹⁹⁶ One reason to extend the time is that time may be needed for the Classification Board to classify the material the subject of the prosecution. The recommendations in paragraph 5.24 should reduce the need for full classification, and so should alleviate this problem. Notwithstanding this, six months, the maximum agreed to by governments in 1988, may be too short a time. The Commission recommends that the limit be 12 months.

Penalties

5.26 The Commission has not suggested what the penalties ought to be for offences under the model enforcement provisions. That will depend on the policy and penalty structure of individual jurisdictions. Several submissions criticised existing penalties and stressed the need for adequate penalties.

If any provisions are to be obeyed they must have fines high enough to be a penalty, taking into account the vast amount of money generated by the video industry.¹⁹⁷

The penalties for such offences are not in proportion to the financial gains resulting from those offences nor the cost of the investigation to the community.¹⁹⁸

It was noted earlier that penalties for strict liability offences could generally be expected to be lower than for offences requiring *mens rea*. However, in a number of instances it may be appropriate for maximum penalty levels for second and subsequent offences to be set at a higher level. The Review of Commonwealth Criminal Law has recommended that there should not be a general provision of this kind, applying across the whole calendar of offences. However, it left open the question whether in particular instances higher maximum penalties for later offences could be justified.¹⁹⁹ The provisions in the model enforcement provisions for which a higher maximum penalty for a second or subsequent breach would be appropriate include child pornography offences and offences which place responsibility on professionals engaged in distributing and selling films and publications as a business.²⁰⁰ The threat of increased penalties for repeated offences should provide an incentive to industry members to ensure that their business systems comply with the law.

Regulation of industry

Licensing of distributors, retailers and exhibitors

5.27 ***The issue.*** The issue whether the regulation of the film, video and publication industries would be improved by introducing a licensing system for retailers and distributors was raised during the Commission's consultations.

5.28 ***The current situation.*** Queensland requires the registration of all film and video distributors (retail and wholesale) and exhibitors.²⁰¹ The Joint Select Committee on Video Material recommended that all video outlets, including mail order outlets, be registered under the Australian Capital Territory Ordinance and that it be made an offence to trade without a certificate of registration.²⁰² The Australian Capital Territory introduced a licensing requirement for retailers and distributors of X videos in the Australian Capital Territory in 1990.²⁰³ Western Australia requires all distributors (retail and wholesale) of restricted publications to be registered.²⁰⁴

5.29 ***The Commission's view.*** Requiring that all distributors, retailers and exhibitors be licensed would make the enforcement of restrictions on the sale and exhibition of films and publications

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easier. Police would know who is involved in the industry and where they are operating. All businesses would be identified for inspection purposes. The threat of de-registration for a serious breach of the regulations would act as an additional incentive to act within the law. Several submissions expressed support for a system of licensing all distributors, retailers and exhibitors.²⁰⁵ However, other issues, outside censorship and classification policies, are involved, including the extent of business regulation and 'red tape'. A registration system is not an essential element of a national scheme for classification and censorship of film and printed matter. The Commission suggested in Discussion Paper⁴⁷ that this is a matter on which individual jurisdictions should be left to implement their own policies. Given these other policy considerations, the Commission confirms the view it expressed in the Discussion Paper.

Official labelling

5.30 Concern has been expressed by publication and, to a much lesser extent, film distributors about unclassified products being labelled as though they have been classified. It has been suggested that there should be a central label authority to issue official labels after confirmation from the Office of Film and Literature Classification that a film or publication had been given a certain classification.²⁰⁶ The Commission is not persuaded that that would be of great help, particularly as most video distributors have the classification markings printed as part of the cover design or video 'slick'. The authorised release of a particular number of labels in relation to the classification of a particular film or publication would not guarantee that those labels will be used for that film or publication and not another. The model enforcement provisions in Appendix 2 include offences involving the use of false or misleading markings. On the information available to it, the Commission suggests that strict and consistent enforcement of those clauses will be more useful than an official label system of the kind proposed.

6. Customs related issues

Importation of films

6.1 There are two sets of Customs regulations relevant to imported films. The first, the Customs (Prohibited Imports) Regulations, list the types of publications and films which cannot be imported without the permission of the Attorney-General or of a person authorised by the Attorney-General.²⁰⁷ These regulations do not apply to films registered under the second, the Customs (Cinematograph Films) Regulations. These require films imported for public exhibition to be registered before leaving the control of Customs.²⁰⁸ It is important to appreciate the difference between these regulations as the Commission makes recommendations in respect of each. Many submissions failed to distinguish between them and were consequently confused as to the exact nature of the Commission's proposals in Discussion Paper 47.

Prohibited imports

Customs (Prohibited Imports) Regulations

6.2 The Customs (Prohibited Imports) Regulations prohibit the importation of

- pictures of child pornography, or of bestiality, likely to cause offence to a reasonable adult
- pictorial depictions of acts of considerable violence or cruelty or of sexual violence against non-consenting persons
- publications and films that promote or incite to crime, violence or drug abuse

unless permission is granted by the Attorney-General.²⁰⁹ These criteria differ slightly from the classification criteria for RC. For example, non-pictorial child pornography comes within the criteria for RC but it is not a prohibited import. The criteria for prohibited imports, with respect to sexual violence, are limited to violence against 'non-consenting' persons but the classification criteria for RC are not. This gap exists, not because of any policy decision that there is a category of material beyond what is able to be classified which should be allowed into Australia, but because of a reluctance on the part of the Australian Customs Service to become involved in censorship matters.²¹⁰ The Joint Select Committee on Video Material recommended that this 'gap' be closed by making the prohibited imports criteria the same as the criteria for RC.²¹¹

Recommendation

6.3 The Commission agrees that the criteria for prohibiting importation of films and printed matter under the Customs (Prohibited Imports) Regulations should be the same as the criteria for classifying publications and films RC. It recommends that the Customs (Prohibited Imports) Regulations be amended accordingly. This recommendation may result in an anomaly in respect of the possession of material which is not detected at the barrier. Under existing customs law, it is an offence to import a prohibited import and the import is forever liable to seizure and forfeiture. It is also an offence to possess a prohibited import.²¹² Thus it would be an offence to possess publications and films which breached the prohibited import/refused classification criteria only if they were imported, not if they were produced locally.²¹³ The Commission is presently reviewing the whole of customs and excise law with a view to producing a modern and efficient legislative scheme.²¹⁴ It is not clear at this stage whether possession of a prohibited import will remain an offence. If the Commission recommends that it should not be an offence, there will be no anomaly in respect of the possession of locally produced RC material. The Commission recommends that the question of the possession of RC material be reconsidered after the Government has indicated its decision on the recommendations in the Commission's final report on customs and excise law.

Registration of films imported for public exhibition

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The present law

6.4 Under the Customs (Cinematograph Films) Regulations, the importation of a film for public exhibition²¹⁵ is prohibited unless

- an application to register it is made
- if the application is refused, no further application is made for two years
- the film is exhibited only in the form, and under the title, under which it is registered.²¹⁶

Until registered, imported films (for public exhibition only) are subject to Customs control (that is, they cannot be moved, altered or otherwise interfered with without Customs authority²¹⁷). Registration is to be refused if the film

- is blasphemous, indecent or obscene
- is likely to be 'injurious to morality, or to encourage or incite to crime'
- depicts any matter 'the exhibition of which is undesirable in the public interest'.

This requirement of registration originated when film was dutiable and Customs had a revenue interest in maintaining strict controls over such films. For many years now, however, no duty has been payable.

Registration no longer needed

6.5 Another purpose of these restrictions on the importation of films was to ensure that censorship and classification policy was not subverted. However, it is no longer necessary to use customs or import controls to achieve this. Under present State and Territory law, and under this Commission's recommendations, all films to be publicly exhibited must be classified. In 1983 Australian governments decided that the most effective point at which to control videos was at the point of sale and, accordingly, registration requirements for videos were abolished. When controls are exercised by States and Territories to achieve a particular objective, there is nothing to be gained by having Customs duplicate that control. Furthermore, the form of the restrictions is unsatisfactory. The Commission's present thinking in its review of customs and excise law is that the imposition of conditions to be obeyed after importation is not an appropriate control on importation. Rather than impose conditions of this kind, specific offences should be created. It is unnecessary for customs law to create such offences: State and Territory laws already contain the offences necessary to achieve the policy objective.

Recommendation

6.6 Discussion Paper 47 contained a proposal that the Customs (Cinematograph Films) Regulation be repealed. This proposal received support from the Australian Customs Service.²¹⁸ Some submissions opposed the proposal,²¹⁹ with one group alleging the proposal represented a clear change in policy.²²⁰ The Commission does not see the repeal of these Regulations as a change in policy. State and Territory laws requiring all films exhibited in public to be classified achieves the existing policy objectives. The Commission recommends that the Customs (Cinematograph Films) Regulations be repealed. It does not recommend that the Customs (Prohibited Imports) Regulations be repealed.²²¹

Blasphemy

6.7 One consequence of the repeal of the Customs (Cinematograph Films) Regulations is that films imported for public exhibition would be subject to the Customs (Prohibited Imports) Regulations. A second is the removal of the present prohibition on the importation of blasphemous films for public exhibition.²²² No such prohibition exists on the importation of videos. The Commission is considering the law of blasphemy in its project examining whether the criminal law is appropriate for Australia's multicultural society. In Discussion Paper 48, *Multiculturalism: Criminal Law*, the Commission provisionally proposed that all references to blasphemy in federal law be removed.²²³ In a society in which there are many religions, it is not appropriate to give the special protection that blasphemy affords to only one of these²²⁴ and to extend the law of blasphemy would involve a determination of which organisations

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are religions. Several submissions expressed concern at the possible removal of blasphemy as a bar to the registration of films imported for public exhibition.²²⁵ If the Commission does not recommend in its reference on multiculturalism that references to blasphemy be removed from federal law, in relation to Customs, consideration should be given to transferring the prohibition on the importation of blasphemous films for public exhibition to the Customs (Prohibited Imports) Regulations.

Film festivals

6.8 A third consequence of the repeal of the Customs (Cinematograph Films) Regulations concerns film festivals. There are special provisions in the Regulations which avoid the need for films imported solely for film festivals to be registered.²²⁶ If the Regulations were repealed, those films would no longer require exemption from registration. The exhibition of unclassified films at film festivals would, however, still require exemption from the obligation under State and Territory laws that films be classified before being exhibited in public. The repeal of the Regulations will not, therefore, result in a loss of control by the States and Territories over the screening of films at film festivals. The Commission recommends that those State and Territory controls are all that is necessary to regulate film festivals. Some State and Territory legislation provides for exemptions from classification requirements.²²⁷ The Commission recommends that all jurisdictions make provision for exempting films from classification. This will enable them to approve, amongst other things, the screening of unclassified films at film festivals.

Appendix 1

Draft legislation

Draft Classification Bill 199? (Cth)

CLASSIFICATION BILL 199?

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**A BILL
for**

**An Act relating to the classification of publications and
films**

The Parliament of Australia enacts as follows:

PART 1 — PRELIMINARY

1. Short title

The Act may be cited as the *Classification Act 199?*.

2. Commencement

This Act commences on a day to be proclaimed, but if it has not commenced at the end of 6 months after it receives the Royal Assent, it commences at that time.

3. Interpretation

(1) Unless the contrary appears:

"**advertisement**" for a publication or for a film means an advertisement for a publication or film in any form, whether visual or audible, whether in the form of written or spoken words or other sounds and whether in a book, paper, magazine, poster, photograph, sketch, program, film or slide, and includes in particular:

- (a) writing or pictures in or on a container or wrapping that encloses the publication or the film; and
- (b) an item of clothing on which there appears writing or pictures advertising a publication or a film;

"**adult**" means a person of or over the age of 18 years;

"**approved**": *see section 16*;

"**Board**": *see section 24*;

"**child**" means a person below the age of 18 years;

"**classification certificate**": *see subsection 23(1)*;

"**classified**" means classified under this Act;

"**code**" means the National Classification Code as agreed to by the Commonwealth, the States and the Northern Territory for the time being;

"**decision**" means a decision:

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- (a) to classify or to refuse to classify a publication or a film; or
- (b) to approve or to refuse to approve an advertisement for a publication or for a film; or
- (c) to decline to deal further with an application;

"Deputy Director": *see sections 24;*

"determined fee": *see section 51;*

"determined markings": *see section 7;*

"Director": *see section 25;*

"distributor" of a publication or of a film includes a person who supplies the publication or the film in trade or commerce;

"film" means any form of recording from which a visual image can be produced, whether or not by means of a device, and includes:

- (a) a cinematograph film; and
- (b) a slide, video tape and video disc;

but does not include a computer program or an advertisement for a publication or for a film;

"member" means a member of the Classification Board or of the Classification Review Board;

"publication" means any written or pictorial matter, and includes:

- (a) a book, a paper and a magazine;
- (b) a disc or other device that contains a computer program or a sound recording; and
- (c) an item of clothing with writing or pictures on it;

but does not include:

- (d) a film; or
- (e) an advertisement for a publication or for a film;

"Review Board": *see section 39;*

"Senior Classification Officer": *see section 24.*

(2) RC is a classification.

(3) A copy of a classified publication or of a classified film is to be taken to have the same classification as the classified publication or classified film.

Notes

1. A copy of the National Classification Code as agreed at the date of enactment of this Act is set out in the Schedule.2. For the definition of "decision", paragraph (c), see subsection 13(2).3. RC means refused classification.

4. Films — order of classifications

The order of classifications for films is RC, X, R, M, PG and G, with G the lowest classification.

PART 2 — CLASSIFICATION

Division 2.1 — Classification to be according to the code

5. Classification

Publications and films are to be classified in accordance with the code (*see the Schedule*).

6. Matters to be taken into account

(1) The matters to be taken into account in making a classification decision about a publication or a film include:

- (a) the standards of morality, decency and propriety generally accepted by reasonable adults; and
- (b) the literary, artistic or educational merit (if any) that the publication or film has; and
- (c) the general character of the publication or film, including whether it is of a medical, legal or scientific character; and
- (d) the classification guidelines in force for the time being.

(2) The Attorney-General may issue classification guidelines to help people apply the classification criteria set out in the code, but only after consulting the Ministers of the Crown of each of the States and for each of the Territories responsible for censorship matters.

7. Director to determine markings

The Director may, by notice in the *Gazette*, determine markings for each kind of classification, giving information about the classification.

Division 2.2 — Procedure for classifying publications

8. Board to classify publications

The classification of publications is to be by the Classification Board, in writing, either on application or of its own motion.

9. Applications for classification

An application for classification of a publication is to be:

- (a) in a form approved by the Director;
- (b) in writing signed by, or on behalf of, the applicant; and
- (c) accompanied by:
 - (i) the determined fee; and
 - (ii) a copy of the publication.

10. Classifying periodicals

(1) In classifying a publication that is a single issue of a periodical, the Board may declare in writing that all, or some specified, future issues of the periodical are classified similarly.

(2) The Board may at any time revoke the classification as it applies to issues of the publication published after the revocation. If it does so, it is, at the same time, to classify the most recent issue of the periodical.

(3) The revocation takes effect when written notice of the revocation is given to the applicant or, if there was no applicant, notified in the *Gazette*. The notice to the applicant is to set out the reasons for the revocation.

Division 2.3 — Procedure for classifying films

11. Board to classify films

The classification of films is to be by the Classification Board, in writing, and is to be on application.

12. Application for classification

(1) An application for classification of a film is to be:

- (a) in a form approved by the Director; and

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- (b) in writing signed by, or on behalf of, the applicant; and
- (c) accompanied by:
 - (i) the determined fee; and
 - (ii) a written synopsis of the film, in English.

(2) The application may also be accompanied by a copy of an advertisement proposed to be used to advertise the film.

Note: The synopsis must be an adequate summary of the plot.

13. Screening of films

(1) The Director may require an applicant to provide a copy of the film to be classified for screening before the Board. The screening is to take place at a reasonable time and place, specified by the Director.

(2) The Board may decline to deal, or to deal further, with an application if, in its opinion, the copy is incomplete, or inadequate to allow a proper consideration of the application.

(3) The applicant, not more than 4 other persons nominated by the applicant and any other person approved by the Director are entitled to be present at the screening.

(4) The Director, a member and the Commonwealth are not liable for the loss of, or any damage to, the copy of the film caused by the screening.

(5) The Director may keep the copy of the film for as long as he or she directs.

14. Board to decide consumer advice for films

When the Board decides to classify a film PG, M, R or X, it is to determine consumer advice to apply to the film giving information about the content of the film.

15. Classification of videos containing advertisements

A video tape or a video disc that includes an advertisement for:

- (a) a film that has not been classified; or
- (b) a film that has been classified at a higher classification than the film on the video tape or video disc;

is not to be classified.

Division 2.4 — Approval of advertisements for publications and films

16. Board to approve advertisements

(1) Approval of advertisements for publications and for films is to be by the Board, on application or of its own motion. An approval may be conditional.

(2) In determining whether to approve an advertisement, the matters to be taken into account include the matters set out in section 6.

(3) If the advertisement:

- (a) describes, depicts, expresses or otherwise deals with matters of sex, drug misuse or addiction, crime, cruelty, violence or revolting or abhorrent phenomena in such a way that it offends against the standards of morality, decency and propriety generally accepted by reasonable adults to the extent that it should not be approved; or
- (b) depicts or describes a child (whether engaged in sexual activity or not) who is, or who appears to be, below the age of 16 years in a way that is likely to cause offence to a reasonable adult; or
- (c) promotes, incites or instructs in matters of crime or violence;
the Board is to refuse approval.

(4) If the advertisement is for a publication that:

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- (a) has been classified RC; or
 - (b) has not been classified and would, if classified, be classified RC, Category 2 restricted or Category 1 restricted;
- the Board is to refuse approval.

(5) If the advertisement is for a film that has not been classified, or has been classified RC, the Board is to refuse approval.

(6) However, the Board may approve advertisements for films that have not been classified, as follows:

- (a) the number of such approvals that the Board may give in any year is 30 or a higher number determined by the Attorney-General;
- (b) the Board is not to give such an approval for an advertisement for a film that, in the Board's opinion, is likely to be classified RC, X or R;
- (c) in determining whether to give such an approval in a particular case, the Board is to take into account criteria determined by the Attorney-General and published in the *Gazette*;
- (d) an approval is to be subject to the condition that, until the film is classified, the advertisement will be displayed with the words "Subject to classification" displayed as specified in the approval.

(7) The Director may at any time require the distributor or the exhibitor of a classified film to submit to the Board for approval a copy of every advertisement used or intended to be used in connection with the exhibition of the film. The requirement is to be in writing, given to the distributor or exhibitor.

Division 2.5 — Reclassification etc, after 2 years

17. Limit on re-applying for 2 years

An application for classification of a publication or of a film, or for approval of an advertisement, is not to be made if the publication, film or advertisement has been classified or approved or refused approval within the previous 2 years.

18. Reclassification etc, after 2 years

(1) If 2 years have passed since a decision about a publication or a film was made, the Board may reclassify the publication or the film.

(2) If 2 years have passed since a decision about an advertisement for a publication or for a film was made, the Board may reconsider the advertisement and may approve or refuse to approve it.

(3) The Board may act under subsection (1) or (2) at the request of the Attorney-General or of its own motion.

(4) It must so act if the Attorney-General requests.

(5) If a Minister of the Crown of a State, or for a Territory, responsible for censorship matters, or a person authorised by such a Minister, so asks in writing, the Attorney-General is to make the request.

19. Notice of intention to reclassify

(1) The Board is to arrange for written notice that it proposes to act under section 18 to be given, not later than 30 days before it decides the matter, to the person on whose application the classification or approval was made or given.

(2) The Board may arrange for such a notice to be given to other persons.

(3) The notice is to invite submissions about the matter.

20. Powers and duties on reclassification

(1) On a reclassification, the Board is to classify the publication or film, or approve or refuse to approve the advertisement, again, and Divisions 2.1, 2.2 and 2.3 apply accordingly.

(2) The matters to be taken into account include any submissions made in response to the invitation mentioned in section 19.

Division 2.6 — Reconsideration of decisions by Review Board — publications, films and advertisements

21. Application for reconsideration of decisions

(1) Any of the following may apply to the Review Board for a reconsideration of a decision of the Board:

- (a) the Attorney-General;
- (b) the applicant for classification or approval;
- (c) a distributor of the publication or of the film.

(2) The Attorney-General is to make such an application on request by a Minister of the Crown of a State, or for a Territory, responsible for censorship matters or a person authorised by that Minister.

(3) In addition, any other person may apply for such a reconsideration in relation to:

- (a) a publication — if the person contends that it should have been classified at some other classification; or
- (b) a film that has been classified G, PG or M — if the person contends that it should have been classified R or higher; or
- (c) a film that has been classified R or X — if the person contends that it should have been classified at a higher classification, or at a lower classification, than the classification it has been given.

(4) The Review Board may decline to entertain an application under subsection (3) if it is of the opinion that:

- (d) the application is made in bad faith; or
- (e) by making the application, the applicant is merely meddling.

(5) An applicant is not to be taken to be meddling merely because:

- (a) he or she does not have a proprietary, material, financial or special interest in the matter; or
- (b) his or her interest is no different from the interest in the matter of any other person.

(6) An application may be made:

- (a) if the application is made by or for the Attorney-General — at any time; or
- (b) otherwise — within 30 days after the decision is notified in the *Gazette*, but the Review Board may extend this period.

(7) An application is to be:

- (a) in a form approved by the Convenor of the Review Board; and
- (b) in writing signed by or on behalf of the applicant; and
- (c) except for an application made by or for the Attorney-General — accompanied by the determined fee.

(8) The Convenor of the Review Board is to notify the person on whose application the decision concerned was made of the application for reconsideration.

22. Dealing with applications for reconsideration

On an application, the Review Board is to deal with the application as though it were the Classification Board, and Divisions 2.1, 2.2, 2.3 and 2.4 apply accordingly.

Division 2.7 — Notification of decisions

23. Notice of classification and advertising approvals

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(1) The Director is to cause a certificate (a "**classification certificate**") for each publication or a film that is classified to be issued to the applicant.

(2) The classification certificate is to include:

- (a) the determined markings for the publication or film; and
- (b) for a film — the consumer advice for the film.

It is also to specify how the determined markings and consumer advice are to be displayed.

(3) The Director is to give written notice of a decision on an application under this Act (whether of the Classification Board or of the Review Board) to the applicant. The notice is to be given as soon as practicable but not later than 30 days after the decision.

(4) The Director may arrange for such a notice to be given to other persons.

(5) If there was no applicant, or the applicant is not the person on whose application an earlier decision was made about the publication, film or advertisement concerned, the Director is to give the notice to such other persons as, in his or her opinion, have an interest in the matter (whether as a retailer or distributor of the publication or film, or otherwise).

(6) In the case of a publication or a film, a copy of the classification certificate is enough notice of the decision.

(7) A decision in relation to a publication or a film is to be notified in the *Gazette* as soon as practicable after the decision is made.

PART 3 — THE CLASSIFICATION BOARD AND THE DIRECTOR

24. The Classification Board

(1) The Film Censorship Board constituted by the Customs (Cinematograph Films) Regulations as in force under the *Customs Act 1901* immediately before the commencement of this Act continues in existence but, from the commencement of this Act:

- (a) it is to be known as the Classification Board; and
- (b) it is to consist of the Director, the Deputy Director, the Senior Classification Officers and other members, but the number of members is not to be more than 15.

(2) The members are to be appointed by the Governor-General.

(3) Members may be appointed as full-time or as part-time members, but the Director, the Deputy Director and the Senior Classification Officers must be appointed as a full-time members.

(4) In making appointments to the Board, regard is to be had to the desirability of ensuring that the membership of the Board is broadly representative of the Australian community.

25. Director

The Director is responsible for ensuring the orderly and efficient conduct of the business of the Board and may give directions as to the arrangement of the Board's business.

26. 5 years the maximum period of appointment

(1) The period of an appointment is to be set out in the instrument of appointment and is not to be more than 5 years.

(2) Members are eligible for re-appointment, but may not hold office for more than 6 years.

27. Maximum age

The maximum age for holding office as a member of the Board is 65 years.

28. Terms and conditions of appointment

Subject to this Act and to any Act, the terms and conditions on which the members hold office are as the Governor-General determines.

29. Remuneration and allowances

Subject to the *Remuneration Tribunal Act 1973*, the members are to be paid remuneration as the Remuneration Tribunal determines, and allowances as prescribed.

30. Disclosure of interests

Each member of the Board who has a direct or indirect interest in a matter being considered, or about to be considered, by the Board must disclose the interest to the Board as soon as possible after becoming aware of the relevant facts.

31. Leave of absence

The Attorney-General may grant leave of absence to a full-time member, with or without conditions.

32. Full-time members not to engage in paid employment outside office

A full-time member is not to engage in paid employment outside the duties of the office without the Attorney-General's approval.

33. Resignation and removal of members

(1) The Governor-General may remove a member of the Board on the ground of misbehaviour or of physical or mental incapacity.

(2) If a member:

- (a) becomes bankrupt, applies to take the benefit of a law for the relief of bankrupt or insolvent debtors, compounds with creditors or makes an assignment of his or her remuneration for their benefit; or
- (b) contravenes section 30 without reasonable excuse; or
- (c) except on leave of absence granted or approved by the Attorney-General, is absent from duty for 14 consecutive days or for 28 days in any 12 months;

the Governor-General may remove the member from office.

(3) A member may resign office by writing given to the Governor-General.

34. Acting appointments to the Board

(1) The Attorney-General may appoint a person to act in the office of a specified member of the Board:

- (a) during a vacancy in that office; or
- (b) during a period, or during all periods, when the holder of that office is unable to perform the duties of the office, including when he or she is absent from Australia.

(2) A person appointed to act during a vacancy may not continue to act for more than 12 months.

(3) Anything done by or in relation to a person appointed or purporting to have been so appointed is not invalid merely because:

- (a) the occasion for the appointment had not arisen; or
- (b) there was a defect or irregularity in connection with the appointment; or
- (c) the appointment had ceased to have effect; or
- (d) the occasion for the person to act had not arisen or had ceased.

35. Attorney-General may appoint extra members for short terms

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The Attorney-General may appoint a person to be a member of the Board for a specified period if, in his or her opinion, it is necessary to do so for the efficient dispatch of the Board's business. The period of the appointment is not to be more than 3 months.

36. Delegations

(1) The Director may, either generally or as provided by the instrument of delegation, by written instrument, delegate to the Deputy Director, a member of the Board or a Senior Classification Officer any of the powers, duties and functions (except this power of delegation) of the Director.

(2) The Director may, either generally or as provided by the instrument of delegation, by written instrument, delegate a specified power of the Board to classify publications or films, or to approve or to refuse to approve advertisements for publications or for films.

(3) A delegation is to be to an officer of the Australian Public Service doing duty in the Attorney-General's Department, but the Director is not to delegate powers to an officer unless the Board has determined that it is desirable, for the efficient running of the Board, that powers of the Board be delegated to persons holding the office or position in the Attorney-General's Department that the person holds.

(4) A power or function delegated under subsection (1) or (2), when exercised or performed by the delegate, is, for the purposes of any law, to be deemed to have been exercised or performed by the Director, or by the Board, as the case may be.

(5) A delegation continues in force notwithstanding a change in the occupancy of, or a vacancy in, the office of the Director but, for the purposes of the application of the *Acts Interpretation Act 1901* subsection 33(3) to a delegation under this section, no other law precludes the revocation or variation of the delegation by the same or a later holder of the office.

37. Periodic reports

The Director is to give to the Attorney-General a report, for each year ending on 30 June, for presentation to the Parliament, relating to:

- (a) the activities, operations, business and affairs of the Board and the Office of Film and Literature Classification; and
- (b) the administration, operation and working of classification and censorship laws; during the preceding 12 months.

Note: For periodic reports see *Acts Interpretation Act 1901* section 34C.

38. Exercise of powers etc. of Board

(1) The constitution of the Board for the purposes of a particular application or matter is to be as the Director directs.

(2) Where the members of the Board dealing with a matter are divided in opinion, but not equally divided, the decision of the majority is to prevail.

(3) If the members of the Board are equally divided in opinion:

- (a) if the Board constituted for the purposes of the application or matter includes the Director — the Director is to have a casting vote as well as a deliberative vote; and
- (b) in any other case — the Director is to vary the constitution of the Board by adding 1 or more other members and the matter is to be considered again.

PART 4 — THE CLASSIFICATION REVIEW BOARD

39. The Classification Review Board

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(1) The Film and Literature Board of Review established by the Customs (Cinematograph Films) Regulations as in force under the *Customs Act 1901* immediately before the commencement of this Act continues in existence but, from the commencement of this Act:

- (a) is to be known as the Classification Review Board; and
- (b) consists of the Convenor, the Deputy Convenor and between 3 and 8 other members.

(2) Members of the Review Board are to be appointed by the Governor-General as part-time members.

(3) In making appointments to the Review Board, regard is to be had to the desirability of ensuring that the membership of the Review Board is broadly representative of the Australian community.

40. Convenor

The Convenor is responsible for ensuring the orderly and efficient conduct of the business of the Review Board and may give directions as to the arrangement of the Review Board's business.

41. 5 years the maximum period of appointment

(1) The period of an appointment is to be set out in the instrument of appointment and is not to be more than 5 years.

(2) Members are eligible for re-appointment.

42. Maximum age

The maximum age for holding office as a member of the Review Board is 65 years.

43. Terms and conditions of appointment

Subject to this Act and to any Act, the terms and conditions on which the members hold office are as the Governor-General determines.

44. Remuneration and allowances

Subject to the *Remuneration Tribunal Act 1973*, members are to be paid remuneration as the Remuneration Tribunal determines, and allowances as prescribed.

45. Disclosure of interests

Each member of the Review Board who has a direct or indirect interest in a matter being considered, or about to be considered, by the Review Board must disclose the interest to the Review Board as soon as possible after becoming aware of the relevant facts.

46. Resignation and removal of members

(1) The Governor-General may remove a member of the Review Board on the ground of misbehaviour or of physical or mental incapacity.

(2) If a member:

- (a) becomes bankrupt, applies to take the benefit of a law for the relief of bankrupt or insolvent debtors, compounds with creditors or makes an assignment of his or her remuneration for their benefit;
- (b) contravenes section 45 without reasonable excuse; or
- (c) except on leave of absence granted or approved by the Convenor or (in the case of the Convenor by the Attorney-General) is absent from Attorney-General, is absent from more than two consecutive meetings of the Review Board;

the Governor-General may remove the member from office.

(3) A member may resign office by writing given to the Governor-General.

47. Acting appointments to the Review Board

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(1) The Attorney-General may appoint a person to act in the office of a specified member of the Review Board:

- (a) during a vacancy in that office; or
- (b) during a period, or during all periods, when the holder of that office is unable to perform the duties of the office, including when he or she is absent from Australia.

(2) A person appointed to act during a vacancy may not continue to act for more than 12 months.

(3) Anything done by or in relation to a person appointed or purporting to have been so appointed is not invalid merely because:

- (a) the occasion for the appointment had not arisen; or
- (b) there was a defect or irregularity in connection with the appointment; or
- (c) the appointment had ceased to have effect; or
- (d) the occasion for the person to act had not arisen or had ceased.

48. Periodic reports

The Convenor is to give to the Attorney-General a report, for each year ending on 30 June, for presentation to the Parliament, relating to the activities, operations, business and affairs of the Review Board during the preceding 12 months.

Note: For periodic reports see *Acts Interpretation Act 1901* section 34C.

49. Exercise of powers etc. of Review Board

(1) The Review Board, for the purposes of a particular application or matter, is to be constituted by at least 3 members, nominated by the Convenor.

(2) Where the members of the Review Board dealing with a matter are divided in opinion, but not equally divided, the decision of the majority is to prevail.

(3) Where the members of the Review Board are equally divided in opinion:

- (a) if the Review Board constituted for the purposes of the application or matter includes the Convenor — the Convenor is to have a casting vote as well as a deliberative vote; and
- (b) in any other case — the Convenor is to vary the constitution of the Review Board by adding 1 or more other members and the matter is to be considered again.

PART 5 — MISCELLANEOUS

50. Service of notices

A notice that is to be given to a person under this Act may be given:

- (a) by delivering it to the person personally;
- (b) by sending it by post addressed to the person at the person's place of residence or business last known to the Director; or
- (c) by leaving it at the person's last known place of residence or business with a person apparently over the age of 16 and apparently living or employed at that place.

51. Power to determine fees

(1) The Attorney-General may, by notice in the *Gazette*, determine fees for the purposes of this Act.

(2) The Director may, in his or her discretion, waive the payment of the determined fee in particular cases on the ground that:

- (a) it is in the public interest to do so for public health or educational reasons; or
- (b) the person or body who will use the publication or the film is an agency of the Commonwealth or of a State or a Territory, or is a non-profit organisation.

Transitional provisions to be added here.

52. Regulations

The Attorney-General may make regulations, not inconsistent with this Act, prescribing all matters that:

- (a) by this Act are required or permitted to be prescribed; or
- (b) are necessary or convenient to be prescribed, for carrying out or giving effect to this Act.

Schedule

National Classification Code

Principles

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

- (a) adults should be able to read, hear and see what they want;
- (b) children 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.

Publications

Publications are to be classified in accordance with the following Table:

Table 1 – Publications

Description of publication	Classification
<p>1. 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 child who is, or who appears to be, below the age of 16 years (whether the child is engaged in sexual activity or not); or (c) promote, incite or instruct in matters of crime or violence. 	RC
<p>2. 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; or (c) are unsuitable for a child to see or read. 	Category 2 restricted
<p>3. Publications (except RC publications and Category 2 restricted 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 	Category 1 restricted

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- that is likely to cause offence to a reasonable adult; or
- (c) are unsuitable for a child to see or read.

4. All other publications.

G

Films

Films are to be classified in accordance with the following Table:

Table 2

Description of film	Classification
1. Films that:	RC
(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	
(b) depict in a way that is likely to cause offence to a reasonable adult a child who is, or who appears to be, below the age of 16 years (whether or not engaged in sexual activity); or	
(c) promote, incite or instruct in matters of crime or violence.	
2. Films (except RC films) that:	X
(a) explicitly depict sexual activity between adults, where there is no sexual violence, coercion or non-consent of any kind, in a way that is likely to cause offence to a reasonable adult; and	
(b) are unsuitable for a child to see.	
3. Films (except RC films and X films) that:	R
(a) depict, express or otherwise deal with matters of sex, drug misuse or addiction, crime, cruelty, violence or revolting or abhorrent phenomena in a way that is likely to cause offence to a reasonable adult; or	
(b) are unsuitable for a child to see.	
4. Films (except RC films, X films and R films) that cannot be recommended for viewing by persons who are not yet 15 years old.	M
5. Films (except RC films, R films, X films and M films) that cannot be recommended for viewing by persons who are not yet 15 years old without the guidance of their parents or guardians.	PG
6. All other films.	G

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Note: RC stands for refused classification; R stands for restricted; M stands for mature; PG stands for parental guidance; G stands for general exhibition.

Explanatory Memorandum

Draft legislation

Classification Bill 199?

OUTLINE

1. The Bill establishes the Classification Board and the Classification Review Board, and enables the Classification Board to classify both films and publications. The procedures for classification, reconsideration of decisions, reclassification after two years and notification of decisions are provided for.

NOTES ON CLAUSES

PART 1 —PRELIMINARY

Clause 1 — Short title

2. This clause provides for a short title to the Bill.

Clause 2 — Commencement

3. This clause provides for the Act to commence six months after it has received the Royal Assent, if it has not been proclaimed before that time.

Clause 3 — Interpretation

4. Clause 3 defines certain terms used in the Bill. Most are self-explanatory. The definition of 'advertisement' includes clothing on which there appears writing or pictures advertising a publication or film. Clause 3(2) makes RC a classification: presently in many jurisdictions material which is refused classification is taken to be unclassified. Clause 3(3) ensures that copies of classified publications and classified films will have the classification of the original publication or film.

Clause 4 — Films — order of classifications

5. Clause 4 ranks the classifications for films in ascending order from G to RC. This ranking has relevance for clauses 15 and 21(3).

PART 2 —CLASSIFICATION

Division 2.1 —Classification to be according to the code

Clause 5 — Classification

6. This clause provides that publications and films are to be classified in accordance with the code. A copy of the code, which is not part of the Bill, is included for information in the Schedule.

Clause 6 — Matters to be taken into account

7. Clause 6 lists matters to be taken into account in classifying publications and films. They include the classification guidelines, the standards of morality generally accepted by reasonable adults and the literary, artistic or educational merit of the publication or film. Clause 6(2) provides for the Attorney-

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General to issue guidelines after consulting the State and Territory Ministers responsible for censorship matters.

Clause 7 — Director to determine markings

8. Clause 7 provides for the Director to determine markings, to give information about each classification. They are to be published in the *Gazette*. In some instances the determined markings will specify not only the information required but where it must be displayed, for example, in what position on a video cover.

Division 2.2 — Procedure for classifying publications

Clause 8 — Board to classify publications

9. Clause 8 provides that the Classification Board is to classify publications, either on its own motion or an application.

Clause 9 — Applications for classification

10. Clause 9 provides that an application for classification of a publication is to be in writing and accompanied by the determined fee and a copy of the publication. The applicant need not be the distributor or owner of the publication. See clause 51 for the determination of fees.

Clause 10 — Classifying periodicals

11. Clause 10 provides for the Classification Board to give a continuing classification to a periodical. The Board may revoke such a classification at any time and must then classify the most recent issue of the periodical.

Division 2.3 — Procedure for classifying films

Clause 11 — Board to classify films

12. Clause 11 provides that the classification of films is to be by the Classification Board. The classification must be written.

Clause 12 — Application for classification

13. This clause provides that an application for classification of a film must be in writing and accompanied by a synopsis of the film, in English, and the determined fee. Clause 12(2) provides that the application may be accompanied by a copy of an advertisement to be used to advertise the film.

Clause 13 — Screening of films

14. This clause provides for the screening of films before the Classification Board. The Board may decline the deal further with an application if it is of the opinion that the copy is inadequate or incomplete. Clause 13(4) limits the liability for loss of or damage to the film caused by the screening. Clause 13(5) allows the Director to keep the copy of the film for as long as he or she directs.

Clause 14 — Board to decide consumer advice for films

15. Clause 14 requires the Classification Board to determine consumer advice for all films classified PG, M, R or X.

Clause 15 — Classification of videos containing advertisements

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16. Clause 15 prohibits the classification of a video which contains an advertisement for an unclassified film or a film classified higher than the film on the video.

Division 2.4 — Approval of advertisements for publications and films

Clause 16 — Board to approve advertisements

17. This clause provides for the Classification Board to approve advertisements for publication and films, either on application or on its own motion. The criteria on which an advertisement is to be refused approval are the same as the criteria on which publications and films would be classified RC. The Board must also consider the general principles set out in cl 6. Clause 16(6) provides for a limited number of approvals for advertisements for unclassified films.

Division 2.5 — Reclassification etc, after 2 years

Clause 17 — Limit on re-applying for 2 years

18. Clause 17 prevents an application for classification being made to the Classification Board before two years have passed since a previous classification.

Clause 18 — Reclassification etc, after 2 years

19. Clause 18 allows the Classification Board to reclassify a publication or film after two years have passed since a previous classification. The method of applying for a reclassification, including the payment of a fee, is the same as for an initial classification. The Classification Board can act on its own motion or at the request of the federal Attorney-General, who must apply for a reclassification if asked to do so by a State or Territory Minister (18(5)).

Clause 19 — Notice of intention to reclassify

20. Clause 19 obliges the Director to notify the person on whose application the original decision was made and any other person he or she believes has an interest in the matter. The notice is to invite submissions about the reclassification.

Clause 20 — Powers and duties on reclassification

21. Clause 20 provides that the Board is to classify the publication or film in accordance with procedures which apply to initial classifications. Clause 20(2) requires the Classification Board to take into account any submissions made on the matter.

Division 2.6 — Reconsideration of decisions by Review Board — publications, films and advertisements

Clause 21 — Application for reconsideration of decisions

22. Clause 21 provides for the reconsideration of decisions of the Classification Board by the Classification Review Board. Clause 21(1) provides for the Attorney-General, the applicant and the distributor of the publication or film to apply for a reconsideration. Clause 21(2) obliges the Attorney-General to make an application if requested by a State or Territory Minister responsible for censorship to do so. Clause 21(3) provides for 'any other person' to apply for a reconsideration in limited circumstances. Those circumstances do not include an appeal from a merely advisory classification to another advisory classification. The Review Board may decline to deal with the application if it is of the opinion that the applicant is acting in bad faith or is merely meddling. Clause 12(5) lists factors which will not qualify a person as a mere meddler. The Attorney-General can make an application at any time. Other applicants

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must apply within 30 days of the decision being notified in the *Gazette*, but the Review Board may extend this period. The application must be in writing and, unless the applicant is the Attorney-General, accompanied by the determined fee.

Clause 22 — Dealing with applications for reconsideration

23. Clause 22 provides that the Review Board is to deal with the application as though it were the Classification Board doing an original classification.

Division 2.7 — Notification of decisions

Clause 23 — Notice of classification and advertising approvals

24. Clause 23 requires the Director to issue a classification certificate for each publication or film that is classified. The certificate must include the determined markings and, for a film, the consumer advice. If there is no applicant, the Director is to notify the applicant of a decision within 30 days of its making. Clause 23(6) states that a copy of the classification certificate is sufficient notice. The Director is also required to give notice of a decision to any person he or she thinks may have an interest in the matter. Clause 23(7) requires decisions to be notified in the *Gazette*.

PART 3 —THE CLASSIFICATION BOARD AND THE DIRECTOR

25. Part 3 establishes the Classification Board and provides for its staffing and administrative arrangements. Members are to be appointed by the Governor-General for up to five years. In making appointments to the Board, the government is required to try to ensure that the Board is representative of community standards. The Board is to be headed by the Director with a maximum of 15 members. Clause 36 allows the Director to delegate his or her powers to certain officers. He may also delegate the powers of the Board, but only to persons employed in positions which the Board has approved as being suitable. Clause 38 provides that the constitution of the Classification Board on each occasion is to be determined by the Director. This Part also provides conditions of employment of Board members and provides for acting appointments and short-term appointment of extra members.

PART 4 —THE CLASSIFICATION REVIEW BOARD

26. Part 4 establishes the Classification Review Board and provides mechanisms for appointment, dismissal and remuneration of Review Board members. The maximum period of appointment is to be five years. Clause 47 provides for acting appointments. The Review Board must comprise at least three members for consideration of an application. Clause 50 details voting procedures.

PART 5 —MISCELLANEOUS

Clause 50 — Service of notices

27. Clause 50 details what constitutes the giving of notice.

Clause 51 — Power to determine fees

28. Clause 51 provides for the Attorney-General to determine fees for the purposes of the Act. Clause 51(2) enables the Director to waive the payment of the fee if it is in the public interest to do so, for public health or educational reasons or because the person or body who will use the publication or film is an agency of a government or is a non-profit organisation.

Clause 52 — Regulations

29. Clause 52 provides the Attorney-General with power to make regulations under the Act.

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The schedule

30. The schedule reproduces the National Classification Code. It contains the criteria for classification of publications and films.

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PRELIMINARY

1. Interpretation

(1) In this Act, unless the contrary appears:

"**advertisement**" for a publication or for a film means an advertisement for the publication or film in any form, whether visual or audible, whether in the form of written or spoken words or other sounds and whether in a book, paper, magazine, poster, photograph, sketch, program, film or slide, and includes in particular:

- (a) writing or pictures in or on a container or wrapping that encloses the publication or the film; and
- (b) an item of clothing on which there appears writing or pictures advertising a publication or a film;

"**child**" means a person below the age of 18 years;

"**child pornography**" means a publication or film that describes or depicts, in a way that is likely to cause offence to a reasonable adult, a child who is, or who appears to be, below the age of 16 years (whether the child is engaged in sexual activity or not);

"**classification certificate**" for a publication or for a film means the certificate issued in relation to the publication or the film under the Commonwealth Act section 23;

"**classified**" means classified under the Commonwealth Act;

"**Commonwealth Act**" means the *Classification Act 199?* of the Commonwealth as in force for the time being;

"**determined markings**", in relation to a publication or to a film, means:

- (a) the markings determined for the publication or for the film under the Commonwealth Act section 7;
- (b) if the publication or the film was classified before the Commonwealth Act commenced -- the markings (if any) determined for the publication or for the film under the *{insert reference to appropriate previous local law}*;

"**Director**" means the Director under the Commonwealth Act;

"**film**" means a recording in any form from which a visual image can be produced, whether or not by means of a device, and includes:

- (a) a cinematograph film; and
- (b) a slide, a video tape and a video disc;

but does not include:

- (c) a disc or tape so far as it contains a computer program; or
- (d) an advertisement for a publication or for a film;

"**judicial officer**" means *{insert reference to appropriate local judicial officers}*;

"**police officer**" means *{insert appropriate reference to local police}*;

"**premises**" includes land and a vessel, and part of premises;

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"**prescribed film**" means a film that has not been classified and that would, if classified, be classified RC, X or R;

"**prescribed publication**" means a publication that has not been classified and that would, if classified, be classified RC, Category 2 restricted or Category 1 restricted;

"**public place**" means any place open to the public, whether on payment of money or not, and includes a place or structure where goods are sold or offered for sale to the public or to a part of the public;

"**publication**" means any written or pictorial matter, and includes:

- (a) a book, a paper and a magazine;
- (b) a disc or other device that contains a computer program or a sound recording; and
- (c) an item of clothing with writing or pictures on it;

but does not include:

- (d) a film; or
- (e) an advertisement for a publication or for a film;

"**publish**" includes:

- (a) sell;
 - (b) display or offer for sale;
 - (b) distribute to the public or a section of the public; and
 - (c) in relation to a film -- screen in a public place;
- and also includes cause to be published;

"**restricted publications area**" means a place constructed and managed in accordance with the prescribed requirements.

"**sale**" means sale by retail or hire:

"**screen**" means to project onto, or display on, a screen (however described);

"**seller**" of a publication or of a film includes a person who holds himself or herself out as a seller of the publication or of the film;

(2) A film that is altered after it has been classified is to be taken to be an unclassified film unless the alteration was approved by the Director in writing.

(3) A reference to:

- (a) a publication as an RC publication, a Category 2 restricted publication, a Category 1 restricted publication or a G publication; or
- (b) a film as an RC film, an X film, an R film, an M film, a PG film or a G film;

is a reference to a publication or a film so classified under the Commonwealth Act.

Note: For the definition of "Director" in subsection (1) see the *Classification Act 199?* (Cth) section 25.

2. "Short forms" -- defences and fault

(1) If a short form of defence (indicated by the word "**Defence:**") is near the end of a section or subsection, it is a defence to a prosecution for an offence against or arising under the section or subsection if the matter set out in the short form after the word "**Defence:**" is proved.

(2) In a prosecution for an offence against or arising under this Act, it is enough if a defence raised by the defendant is established on the balance of probabilities.

(3) If the word "**Fault:**" appears near the end of a section or subsection of this Act creating an offence, then, in a prosecution for the offence, except as indicated, the matters specified after the word "**Fault:**" as irrelevant are irrelevant in determining whether the defendant is guilty of the offence.²²⁸

3. Order of classifications

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(1) The order of classifications of publications is RC, Category 2 restricted, Category 1 restricted and G, with G the lowest classification.

(2) The order of classifications of films is RC, X, R, M, PG and G, with G the lowest classification.

4. Act not to apply to broadcasting or television service

This Act does not apply to a broadcasting or television service provided by:

- (a) the Australian Broadcasting Corporation; or
- (b) the Special Broadcasting Service; or
- (c) a licensee under the *Broadcasting Act 1942* of the Commonwealth.

PUBLICATIONS

Offences relating to the sale of publications

5. Sale of prescribed publications

(1) If a prescribed publication or an RC publication is displayed for sale, or sold, the seller is guilty of an offence.

Penalty: ?.

Fault: The defendant's state of mind, intentions and beliefs and the degree of care if any that the defendant exercised are irrelevant.

(2) In this section, "sale" includes sale by wholesale.

6. Sale of Category 1 restricted publications

(1) If a Category 1 restricted publication is displayed for sale, or sold, in a public place, the seller is guilty of an offence.

Penalty: ?.

Defence: The publication was in a sealed package and:

(a) if the package was transparent -- the publication bore the determined markings or, if a reclassification of the publication under the Commonwealth Act section 18 or 22 had taken effect within the previous 30 days, the publication bore either the determined markings or the determined markings relevant to the previous classification;

(b) if the package was a plain brown wrapper -- both the publication and the package bore the determined markings or, if a reclassification of the publication under the Commonwealth Act section 18 or 22 had taken effect within the previous 30 days, the publication bore either the determined markings or the determined markings relevant to the previous classification.

Fault: The defendant's state of mind, intentions and beliefs, and the degree of care, if any, that the defendant exercised, are irrelevant.

(2) If a Category 1 restricted publication is sold or delivered to a child, the seller, or the person who delivered it to the child, respectively, is guilty of an offence.

Penalty: ?.

Defence: All the following:

(a) before the publication was given to the child, an official document that might reasonably have been taken to identify the child was produced to the defendant;

(b) the document apparently showed that the child was of or over the age of 18 years;

(c) the defendant believed that the child was of or over 18 years.

Fault: Except as provided in the defence, the defendant's state of mind, intentions and beliefs, and the degree of care, if any, that the defendant exercised, are irrelevant.

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Notes

1. The defence to subsection (1) gives 30 days grace to change the markings.
2. An official document would include a passport or a driving licence.

7. Sale of Category 2 restricted publications

(1) If a Category 2 restricted publication is displayed for sale, or sold, in a public place, the seller is guilty of an offence.

Penalty: ?.

Defence: The place was a restricted publications area.

Fault: The defendant's state of mind, intentions and beliefs, and the degree of care, if any, that the defendant exercised, are irrelevant.

(2) If a Category 2 restricted publication is sold or delivered to a child, the seller, or the person who delivered it, respectively, is guilty of an offence.

Penalty: ?.

Defence: All the following:

- (a) before the publication was given to the child, an official document that might reasonably have been taken to identify the child was produced to the defendant;
- (b) the document apparently showed that the child was of or over the age of 18 years;
- (c) the defendant believed that the child was of or over 18 years.

Fault: Except as provided in the defence, the defendant's state of mind, intentions and beliefs, and the degree of care, if any, that the defendant exercised, are irrelevant.

(3) If a Category 2 restricted publication is displayed for sale or sold or delivered to a person (except a child), the seller or the person who delivered it, respectively, is guilty of an offence.

Penalty: ?.

Defence: All the following:

- (a) the publication bore the determined markings or, if a reclassification of the publication under the Commonwealth Act section 18 or 22 had taken effect within the previous 30 days, the publication bore either the determined markings or the determined markings relevant to the previous classification;
- (b) the person to whom it was sold or delivered asked specifically for it;
- (c) except in the case of discs or tapes containing a computer program or from which sounds alone can be reproduced by using a device -- the publication was delivered to the person in a plain brown wrapper.

Fault: The defendant's state of mind, intentions and beliefs, and the degree of care, if any, that the defendant exercised, are irrelevant.

Note: An official document would include a passport or a driving licence.

8. Misleading or deceptive markings on publications

(1) If a publication is published with markings, or in a wrapper with markings, that are misleading or deceptive as to whether the publication is classified, or as to its classification, the publisher is guilty of an offence.

Fault: The defendant's state of mind, intentions and beliefs and the degree of care if any that the defendant exercised are irrelevant.

(2) If:

- (a) a publication is reclassified under the Commonwealth Act section 18 or 22; and
- (b) the publication is published with the markings, or in a wrapper with the markings, relevant to the previous classification;

then, for 30 days after the reclassification takes effect, the previous markings are not to be taken to be misleading or deceptive for the purposes of subsection (1).

9. Leaving restricted publications and prescribed publications in public places

A person must not leave or display a prescribed publication, a Category 1 restricted publication, a Category 2 restricted publication or an RC publication, in a public place or so it can be seen from a public place.

Defence 1: The publication was a Category 1 restricted publication or a Category 2 restricted publication and the defendant believed on reasonable grounds that the place was a restricted publications area.

Defence 2: The publication was a Category 1 restricted publication, the public place was a shop and the publication was displayed in accordance with the conditions imposed by this Act on the display for sale of Category 1 restricted publications.

Note: For the conditions for the display of Category 1 publications see section 6.

10. Leaving restricted publications and prescribed publications on private premises

A person must not leave a prescribed publication, a Category 1 restricted publication, a Category 2 restricted publication or an RC publication on private premises without the occupier's permission, knowing that it is such a publication.

Penalty: ?

Offences relating to the possession or copying of publications

11. Possession of prescribed publications

A person must not have in his or her possession, or on premises under his or her control, a prescribed publication, or an RC publication, if the person intends to publish it.

Penalty: ?

Defence 1: The publication has since been classified Category 2 restricted or lower.

12. Copying prescribed publications

A person must not make a copy of a prescribed publication, or of an RC publication, if the person intends to publish it.

Penalty: ?

Defence 1: The publication has since been classified Category 2 restricted or lower.

FILMS

Offences relating to screening films

13. Classification to be screened first

If:

- (a) a classified film is screened in a public place; and
 - (b) an image or images that show:
 - (i) the determined markings and consumer advice for the film; and
 - (ii) a list of the symbols used in the determined markings to indicate the classifications of films;
- is not screened immediately before the film's screening starts;

the occupier of the premises in which the film is screened is guilty of an offence.

Penalty: ?.

Fault: The defendant's state of mind, intentions and beliefs, and the degree of care, if any, that the defendant exercised, are irrelevant.

14. Unclassified etc, films not to be screened

If a film that is not classified G, PG, M or R is screened in a public place, the occupier of the premises on which it is screened is guilty of an offence.

Penalty: ?.

Fault: The defendant's state of mind, intentions and beliefs, and the degree of care, if any, that the defendant exercised, are irrelevant.

15. Screening of certain films so they can be seen from a public place

A person must not screen a prescribed film, or an RC film, an X film or an R film so that it can be seen from a public place.

Penalty: ?

Note: The screening of prescribed films and RC and X films in a public place is prohibited by section 14.

16. Screening advertisements

If:

- (a) an advertisement for an M film is screened in a public place with a G film; or
- (b) an advertisement for an X film is screened in a public place;

the occupier of the premises on which the film is screened is guilty of an offence.

Penalty: ?.

Fault: The defendant's state of mind, intentions and beliefs, and the degree of care, if any, that the defendant exercised, are irrelevant.

Note: Section 37 prohibits all advertising for RC films.

17. Advertisements for R films

If an advertisement for an R film is screened in a public place, the occupier is guilty of an offence.

Penalty: ?

Defence 1: The advertisement was screened with an R film.

Defence 2: The place was a restricted publications area.

Defence 3: The advertisement was screened after 8 pm and was not screened with a G, PG or M film.

18. Children not to be present at R films -- offence by occupier

If an R film is screened in a public place and in the presence of a child, the occupier of premises on which the film is screened is guilty of an offence.

Penalty:

Defence: All the following:

- (e) before the child was admitted to the place, an official document that might reasonably have been taken to identify the child was produced to the defendant or an employee of the defendant;
- (f) the document apparently showed that the child was of or over the age of 18 years;
- (g) the defendant or an employee of the defendant believed that the child was of or over 18 years.

Fault: Except as provided by the defence, the defendant's state of mind, intentions and beliefs, and the degree of care, if any, that the defendant exercised, are irrelevant.

19. Children not to be present at R films -- offence by child

A child of or over the age of 15 years must not be present at the screening, in a public place, of an X film or an R film, knowing that he or she should not be present.

Penalty: ?.

20. Children not to be allowed to see R etc, films

A person who:

- (a) is a parent of a child, or who has the care, custody or control of a child; and
- (b) knows that a prescribed film, or an RC film, an X film or an R film is to be screened in a public place; must not permit the child to be at the place while the film is being screened.

Penalty: ?.

21. Screening of films before children other than in a public plac

A person must not screen in a place other than a public place, and in the presence of a child, a prescribed film or an RC film, an X film or an R film.

Penalty: ?

Defence: The defendant reasonably believed that the child was of or over the age of 18 years.

Offences relating to the sale of films

22. Films to bear determined markings

(1) If a film is displayed for sale, or sold, without the relevant determined markings and consumer advice being displayed as specified in the classification certificate applicable to the film, the seller is guilty of an offence.

Penalty: ?.

Fault: The defendant's state of mind, intentions and beliefs, and the degree of care, if any, that the defendant exercised, are irrelevant.

(2) For 30 days after a reclassification of the film under the Commonwealth Act section 18 or 22 has taken effect, the previous markings and consumer advice may be used.

23. Notice about classifications to be displayed where films sold etc.

(1) If:

- (a) films are displayed for sale, or sold, on premises; and
 - (b) a notice about classifications in the approved form is not displayed in a conspicuous place on the premises;
- the seller is guilty of an offence.

Penalty: ?.

Fault: The defendant's state of mind, intentions and beliefs, and the degree of care, if any, that the defendant exercised, are irrelevant.

(2) The approved form of notice is the form approved by the Director and notified in the Commonwealth of Australia *Gazette*.

24. Unclassified etc, films not to be sold

(1) If a film that is not classified G, PG, M or R²²⁹ is displayed for sale or sold the seller is guilty of an offence.

Penalty: ?.

Fault: The defendant's state of mind, intentions and beliefs, and the degree of care, if any, that the defendant exercised, are irrelevant.

(2) If:

- (a) a film that is not classified G, PG, M or R²³⁰ is displayed for sale, or sold, on premises; and
 - (b) the occupier of the premises knew that the film was being displayed or sold, and that it was so classified;
- the occupier is guilty of an offence.

Penalty: ?.

(3) In this section, "sale" includes sale by wholesale.

25. Misleading or deceptive markings on films

(1) If a film is displayed for sale, or sold, with markings, or in a container with markings, that are misleading or deceptive as to whether the film is classified, or as to its classification, the seller is guilty of an offence.

Penalty: ?.

Fault: The defendant's state of mind, intentions and beliefs, and the degree of care, if any, that the defendant exercised, are irrelevant.

(2) If:

- (a) a film is reclassified under the Commonwealth Act section 18 or 22; and
- (b) the film is displayed for sale, or sold, with the markings, or in a container with the markings, relevant to the previous classification;

then, for 30 days after the reclassification takes effect, the previous markings are not to be taken to be misleading or deceptive for the purposes of subsection (1).

(3) In this section, "sale" includes sale by wholesale.

26. Keeping unclassified etc, films with other films

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If a film that is not classified G, PG, M or R is kept on premises where films that are classified G, PG, M or R are displayed for sale or sold, the seller, and the occupier of the premises, are each guilty of an offence.²³¹

Penalty: ?.

Defence: The defendant did not know and could not reasonably have known that the film was on the premises.

Fault: Except as provided in the defence, the defendant's state of mind, intentions and beliefs, and the degree of care, if any, that the defendant exercised, are irrelevant.

27. Sale of X or R films to children

If an X film or an R film is sold or delivered to a child, the seller or the person who delivered it, respectively, is guilty of an offence.

Penalty: ?.

Defence 1: All the following:

- (a) before the film was given to the child, an official document that might reasonably have been taken to identify the child was produced to the defendant;
- (b) the document apparently showed that the child was of or over the age of 18 years;
- (c) the defendant believed that the child was of or over 18 years.

Defence 2: The offence is one of delivery, the film is an R film and the child to whom the film was delivered is an employee of the defendant or is an employee of the defendant's employer.

Fault: Except as provided in defence 1, the defendant's state of mind, intentions and beliefs, and the degree of care, if any, that the defendant exercised, are irrelevant.

Note: An official document could include a driver's licence and a passport.

28. Children not to buy X or R films

A child of or over the age of 15 years must not buy an RC film, an X film or an R film, knowing that he or she should not do so.

Penalty: ?.

29. Leaving certain films in public places

A person must not leave a prescribed film, or an RC film, an X film or an R film, in a public place.

Penalty: ?

30. Leaving certain films on private premises

A person must not, without the occupier's permission, leave a prescribed film, or an RC film, an X film or an R film, on private premises.

Penalty: ?

Offences relating to possession or copying of films

31. Possession of prescribed films etc.

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A person must not have in his or her possession, or on premises under his or her control, a prescribed film, or an RC film or an X film,²³² if the person intends to publish it, whether in the State or elsewhere.²³³

Penalty: ?.

Defence: The film has since been classified R²³⁴ or lower.

32. Copying prescribed films etc.

A person must not make a copy of a prescribed film, or of an RC film or of an X film,²³⁵ if the person intends to publish it, whether in the State²³⁶ or elsewhere.

Penalty: ?

Defence: The film has since been classified R²³⁷ or lower.

ADVERTISEMENTS

33. Advertisements to be submitted if required

(1) The Director may require an advertisement for a publication or for a film to be submitted to the Classification Board for approval.

(2) The requirement is to be in writing, and given to:

- (a) the distributor of the publication or the film; or
- (b) a person screening the film in public.

(3) A person given such a notice must comply with it within a reasonable time.

Penalty: ?.

34. Publication of advertisements

(1) A person must not publish an advertisement for a publication or for a film knowing that the advertisement has been refused approval under the Commonwealth Act.

Penalty: ?.

(2) If an advertisement for a publication or for a film has been approved under the Commonwealth Act, a person must not publish it in an altered form.

Penalty: ?.

(3) If the advertisement was conditionally approved, a person must not publish it except in accordance with the conditions.

Penalty: ?.

Note: Advertisements are approved under the *Classification Act 199?* (Cth) subsection 16(1).

35. Advertisements to bear determined markings

(1) If an advertisement for a publication or for a film does not bear the relevant determined markings and consumer advice, the publisher of the advertisement is guilty of an offence.

Penalty: ?.

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Fault: The defendant's state of mind, intentions and beliefs, and the degree of care, if any, that the defendant exercised, are irrelevant.

(2) For 30 days after a reclassification of the publication or of the film under the Commonwealth Act section 18 or 22 has taken effect, the previous markings and consumer advice may be used in the advertisement.

36. False advertisements for publications or films

A person must not publish an advertisement for a publication or for a film if the advertisement is misleading or deceptive as to whether the publication or the film is classified, or as to its classification.

Penalty: ?.

Fault: The defendant's state of mind, intentions and beliefs, and the degree of care, if any, that the defendant exercised, are irrelevant.

37. Advertisements for unclassified etc, film

If an advertisement for a film that is not a G film, a PG film, an M film or an R film²³⁸ is published, the publisher is guilty of an offence, whether or not the advertisement specifies the classification of the film.

Penalty: ?.

Defence: For films not classified -- the advertisement is exempt under the Commonwealth Act subsection 16(5).

Fault: The defendant's state of mind, intentions and beliefs, and the degree of care, if any, that the defendant exercised, are irrelevant.

38. Advertising prescribed publications and RC publication

A person must not publish an advertisement for a prescribed publication or for an RC publication.

Penalty: ?

Fault: The defendant's state of mind, intentions and beliefs, and the degree of care, if any, that the defendant exercised, are irrelevant.

39. Advertising restricted publication

(1) If an advertisement for a Category 2 restricted publication is published, the publisher is guilty of an offence.

Penalty: ?

Defence: The advertisement is published in a restricted publications area.

(2) If the advertisement is published on premises that are not a restricted publications area, the occupier of the premises is also guilty of an offence.

Penalty: ?.

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Fault: The defendant's state of mind, intentions and beliefs and the degree of care if any that the defendant exercised are irrelevant.

(3) If an advertisement for a Category 1 restricted publication is published in an unclassified publication or a G publication, the publisher is guilty of an offence.

Penalty: ?.

Fault: The defendant's state of mind, intentions and beliefs and the degree of care if any that the defendant exercised are irrelevant.

40. List of classification symbol

If a publication which advertises the sale of publications or films is published without including in it a list of the classification symbols and determined markings for publications or for films, the publisher is guilty of an offence.

Fault: The defendant's state of mind, intentions and beliefs, and the degree of care, if any, that the defendant exercised, are irrelevant.

CHILD PORNOGRAPHY

41. Producing etc, child pornograph

A person must not knowingly produce, copy or possess child pornography, whether a publication or a film.
Penalty: ?

MISCELLANEOUS

42. Restricted publications area

(1) The regulations may prescribe requirements to be complied with for the construction and management of restricted publications areas.

(2) If a child enters a restricted publications area, the occupier of the area is guilty of an offence.

Penalty: ?.

Defence: All the following:

(a) before the child entered the area, an official document that might reasonably have been taken to identify the child was produced to the defendant or an employee of the defendant;

(b) the document apparently showed that the child was of or over the age of 18 years;

(c) the defendant or an employee of the defendant believed that the child was of or over 18 years.

Fault: Except as provided in the defence, the defendant's state of mind, intentions and beliefs, and the degree of care, if any, that the defendant exercised, are irrelevant.

(3) If a notice in the prescribed form is not displayed at each entrance to a restricted publications area, the person in charge of the area is guilty of an offence.

Penalty: ?.

Fault: The defendant's state of mind, intentions and beliefs, and the degree of care, if any, that the defendant exercised, are irrelevant.

43. Seizing publications and film

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(1) A police officer may enter any place and search for a publication or a film if he or she suspects on reasonable grounds that an offence against or arising under this Act has been, is being or is likely to be committed in relation to the publication or the film.

(2) The officer may seize any publication or film found in the place if that or some other police officer believes on reasonable grounds that an offence against or arising under this Act has been, is being or is likely to be committed in relation to the publication or the film, or that the publication or film will afford evidence of such an offence.

(3) If the occupier of the place does not consent to the entry or search, the entry, search and seizure are to be authorised by a warrant issued by a judicial officer.

(4) A judicial officer is not to issue a warrant unless satisfied that there are reasonable grounds to believe that an offence against or arising under this Act has been or is likely to be committed in respect of the publication or film.

(5) A warrant is not necessary if the police officer believes on reasonable grounds that immediate entry into the place, or immediate seizure of the publication or film, is needed to prevent the destruction of evidence of an offence against or arising under this Act or a repetition of such an offence.

44. Applying for warrants -- the usual procedure

(1) An application for a warrant is to be in writing by a police officer to a judicial officer.

(2) It is to be accompanied by a statement in writing setting out information in support of the application.

(3) All information, whether oral or in writing, given in support of the application is to be given on oath or affirmation.

45. Applying for warrants -- urgent case

If it is impracticable to apply according to section 44, the application may be made by radio, telephone or other appropriate means. In such a case, if the judicial officer issues the warrant:

(a) the judicial officer is to prepare and sign the warrant and tell the applicant its terms; and

(b) the applicant is to prepare an instrument in the same terms and write on it:

(i) the time at which and the day on which the warrant was signed; and

(ii) the name of the judicial officer; and

(c) the applicant is to give the judicial officer, not later than 24 hours after it was signed, the statement mentioned in subsection 44(2) and the instrument mentioned in paragraph (b); and

(d) while the warrant remains in force, the instrument may be used instead of the warrant; and

(e) a court is not to find that what was done was authorised by the warrant unless the warrant signed as mentioned in paragraph (a) is admitted in evidence.

46. Forfeiture of publications and films

If a person is convicted or found guilty of an offence against or arising under this Act in respect of a prescribed publication, a prescribed film, an RC publication or an RC film, the court may, on convicting, order that the publication or film is forfeit to the Crown.

47. Prosecution to be commenced within 12 months

(1) If a prosecution for an offence against or arising under this Act in respect of a particular publication or film is not commenced within 12 months after the publication or film is seized, the publication or film is to be returned to the person from whose possession it was seized, or to the owner of the publication or film.

(2) A publication or film does not have to be returned if it contains child pornography.

(3) A prosecution for an offence against or arising under section 41 may be commenced at any time.

Note: Section 41 relates to child pornography.

48. Exemptions

(1) The Minister may, by notice in the *{insert reference to local Gazette}*, exempt a person or body, or a person or body of a class description of persons or bodies, specified in the notice from the operation of a specified provision of this Act or of the regulations. An exemption may be conditional.

(2) The Minister may authorise the Director to exercise his or her powers under subsection (1) in circumstances specified in the instrument of authority.

49. Evidence -- certificates

In a proceeding for an offence against or arising under this Act, the court is to presume, unless the contrary is proved, that:

(a) a publication or a film described in a certificate signed or purporting to be signed by the Director, the Acting Director, the Deputy Director or the Acting Deputy Director has been classified as specified in the certificate; or

(b) a publication or a film described in such a certificate has not been classified, or has not been classified at a specified classification; or

(c) a publication, or a film, described in the certificate contains material that would lead to its being classified as specified in the certificate; or

(d) advertising matter described in the certificate has not been approved under the Commonwealth Act; is admissible as evidence of the facts stated in the certificate.

50. Evidence -- Gazette notices

In a proceeding for an offence against or arising under this Act, a copy of a Commonwealth of Australia *Gazette* in which is published a notice purporting to be a notice under the Commonwealth Act section 23 is admissible as evidence of the matters stated in the notice.

Appendix 3

List of written submissions

MA Adams	25 Jun 1991
Albany Christian Action Group	14 Jun 1991
R Allison and others	5 Jun 1991
Rev L Armstrong, MHA (Tas)	11 Jul 1990
Attorney-General (ACT)	28 Aug 1990
Australian Broadcasting Tribunal	15 Apr 1991
Australian Catholic Bishops Conference	17 May 1991
Australian Community Action Network	19 Jun 1991
Australian Council for Children's Films and Television	21 May 1991
	21 Jan 1991
	13 May 1991
Australian Customs Service	17 May 1991
Australian Family Association	21 Aug 1990
Australian Federal Police	11 Jun 1991
	23 Jan 1991
Australian Film Commission	6 May 1991
Australian Government Solicitor	21 May 1991
Australian Parents Council Inc	5 Jun 1991
Australian Software Distributors Association	29 May 1991
B Bailey, Government Law Office (ACT)	20 May 1990
Rev S Bajema	26 Oct 1990
Baptist Union of Tasmania	11 Jun 1991
Baptist Union of New South Wales	1 Jul 1991
E Barkla	Jun 1991
SJ Barry	1 Jun 1991
BM Bates	25 Jun 1991
K Bendall	28 Jun 1991
R Bennett	14 May 1991
KM Beswick	Jun 1991
M Blee	Jun 1991
	3 Jun 1991
	17 Aug 1990
R Bradshaw, Registrar-General (NT)	25 Oct 1990
	20 Dec 1990
	2 Apr 1991
	13 May 1991
JR Broadbent	30 Jun 1991
E Brooks	17 Jun 1991
M Burgess	25 Jun 1991
EE Burgess	7 Jun 1991
N Burley	May 1991
H Butler-White	23 May 1991
N Byfield	22 May 1991

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Canberra Rape Crisis Centre	16 May 1991
A Carnelutti	15 May 1991
H Caterer	25 Jun 1991
GL Chadwick	23 May 1991
NM Chegwiddden	30 Jun 1991
MS Chester	11 Jun 1991
Child, Adolescent and Family Health Service (SA)	15 May 1991
N Chivers	Jun 1991
Cinematograph Exhibitors' Association	10 May 1991
CM Clarke	16 Jun 1991
EM Clarkson	Jun 1991
BR Cobbledick	22 Jun 1991
Corrective Services, Minister for (NSW)	22 Aug 1990
H Cowan, MLA (WA)	12 Jul 1990
J Cozijnsen	9 Jun 1991
M Dale	31 May 1991
	12 Jun 1991
	26 Jun 1991
R Davies, JP, MLC (WA)	31 May 1991
H De Jonge	11 Jun 1991
J and W De Boer	10 Jun 1991
M De Jong	10 Jun 1991
CH Derrington	26 Jun 1991
N Dykers	8 Jun 1991
Education and Children's Services, Minister for (SA)	14 Jun 1991
Education and Youth Affairs, Minister for (NSW)	17 Jun 1991
O Edwards	23 May 1991
Employment, Training and Industrial Relations, Minister for (Qld)	27 Jun 1990
K Ettershank, Attorney-General's Department (Vic)	22 Nov 1990
	21 May 1991
J Evans	26 Jun 1991
Federation of Australian Commercial Television Stations	17 Jun 1991
Federation of Catholic Parents and Friends' Associations	20 Jun 1991
Festival of Light (SA)	19 Jun 1991
B Figg	Jun 1991
Film/Video Coalition	9 May 1991
Film and Literature Board of Review	8 Nov 1990
	26 Apr 1991
L Fisher	14 May 1991
J Flew	18 Jun 1991
	8 May 1991
P Foss, MLC (WA)	29 May 1991
K Fox	Jun 1991
Fox Columbia Tri-Star Films Pty Ltd	16 May 1991
WB Freeman	24 Jun 1991
DE Gerhardy	25 Jun 1991
D Giddings	18 Jun 1991
Fr C Gleeson, SJ, Xavier College	12 Jun 1991

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M Goldsworthy	22 Jun 1991
	29 Jun 1990
Gordon and Gotch Limited	24 Dec 1990
	15 May 1991
Gosford Woman's Christian Temperance Union	Jun 1991
Goulburn Association of Churches (NSW)	12 Jul 1990
Dr G Griffith	16 May 1991
N Grivell	20 Jun 1991
E Hall	30 Jun 1991
M Hall	1 Jul 1991
M Harry	12 Jun 1991
E Heenan	25 Feb 1991
YG Hemmings	26 Jun 1991
J Henderson	23 May 1991
M Henwood	23 Jun 1991
Horwitz Grahame Pty Ltd	2 Aug 1990
C and B Howard	15 May 1991
B Howe, Deputy Prime Minister and Minister for Health, Housing and Community Services	15 Jul 1991
M Howlett	11 Jun 1991
Information Seminars	10 May 1991
Janet Strickland & Associates	18 Jan 1991
AE Jensen	Jun 1991
L Jensen	Jun 1991
LJ John	16 May 1991
J John	13 May 1991
	16 May 1991
M Kelly	23 Jun 1991
MA Laban	25 May 1991
P Law	23 May 1991
R Lawrence	22 May 1991
S Leggo	24 Oct 1990
L Longbottom	24 Jun 1991
Lysterfield Christian Fellowship	12 Jun 1991
J Majkut	Jun 1991
	14 Jun 1990
P Maloney, Department of Justice (Tas)	28 May 1991
AM Marsh	Jun 1991
MR Martin	22 May 1991
D Mathewson	Jun 1991
H May	30 May 1991
J McArthur	12 Jun 1991
TJ McCallum	28 Jun 1991
G and P McKay	30 Jun 1991
R Menzies	Jun 1991
C and E Miller	Jun 1991
RE Millikin	25 May 1991
J Moore	8 Jun 1991

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N Moore	24 Jun 1991
Motion Picture Distributors Association of Australia	1 Feb 1991
National Committee on Violence Against Women	17 May 1991
National Council of Women of Tasmania	19 Jun 1991
National Viewers & Listeners Association of Australia	13 Jun 1991
L Nebauer	20 Jul 1990
A Noadzy	12 Jun 1991
North Coast Christian Media Council	30 May 1991
Northern Territory Police	13 Jul 1990
NSW Council of Churches	14 Jun 1991
E Oaten	4 Jun 1991
Office of Film and Literature Classification	22 Feb 1991 22 May 1991
DL Oldfield	9 Jun 1991
A Ossevoort	11 Jun 1991
N Owens	12 Jun 1991
T Pearce and L Pearce	Jun 1991
IE Pearce	10 Jun 1991
DI Pearson	4 Jul 1991
G Peers	9 Jun 1991
B Pershouse	24 May 1991
H Petrusma, MLC (Tas)	15 May 1991 30 May 1991
J Poole	24 May 1991
C Porteous	24 May 1991
IR Powell	Jun 1991
Presbyterian Women's Association of Australia	24 May 1991
F Piuk	15 Jun 1991
LA Riches	4 Jun 1991
EA Riggall	27 Jun 1991
Roadshow Home Video Pty Ltd	13 May 1991
B Roberts	27 Jun 1991
M Rodgers	28 Jun 1991
G Rowse	15 May 1991
M Rutherford	22 Jun 1991
G Schubert	Jun 1991
M Schwab	10 Jun 1991
C Smith	Jun 1991
G Somssich	8 May 1991
South Australia Police Department	13 May 1991
R Stein	22 May 1991
L Stephens, Department for the Arts (WA)	12 Jul 1990
A Sullens, Attorney-General's Department (SA)	Nov 1990
M and K Syn	5 Jun 1991
P Talbot	16 Jun 1991
Tasmania Police	20 Jul 1990
Rev P Templeton, Rhema Family Church, Melbourne	14 May 1991

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RJ Tiller	23 Jun 1991
M Topperwien	21 Jun 1991
PE Tucker	Jun 1991
I Tuxworth, MLA (NT)	11 Jul 1990
United Telecasters Sydney Limited	25 Jun 1991
Uniting Church in Australia (NSW Synod)	25 Jun 1991
GK and GW Usher	22 Jun 1991
J and AD Van Bennel	10 Jun 1991
TJ Van Rooyen	7 Jun 1991
Video Industry Distributors Association Limited	4 Feb 1991 13 May 1991
R Walsh and P Walsh	Jun 1991
Senator S Walters	6 Jun 1991
GW Wardle	28 Jun 1991
C Watts	2 Jul 1991
Western Australia Police Department	23 Nov 1990
J Wigg	13 Jun 1991
AN Wilson	15 May 1991
E Wilson	21 Jun 1991
PR Wilson	29 Jun 1991
Mr and Mrs S Winkler	15 May 1991
Woman's Christian Temperance Union of NSW Inc	17 Jun 1991
Woman's Christian Temperance Union of Western Australia Inc	20 May 1991 9 Jun 1991
Women's Action Alliance (Vic) Inc	Jun 1991
AE Young	11 Jun 1991

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- 1 Customs (Cinematograph Films) Regulations, in force under the *Customs Act 1901* (Cth).
2 Customs (Prohibited Imports) Regulations, reg 4A, in force under the *Customs Act 1901* (Cth).
3 eg child pornography.
4 eg R films.
5 *Seat of Government (Administration) Act 1910* (Cth) s 12(1)(b); *Australian Capital Territory (Self-Government) Act 1988* (Cth) s 23(1)(g).
6 See *Classification of Publications Ordinance 1983* (ACT).
7 See *Classification of Publications Ordinance 1983* (ACT) and amendments to the Customs (Cinematograph Films) Regulations and to the Customs (Prohibited Imports) Regulations.
8 Under the Customs (Cinematograph Films) Regulations.
9 With the exception of G and PG videos in New South Wales: *Film and Video Tape Classification Act 1984* (NSW) s 32(2).
10 Federal Parliament, Joint Select Committee on Video Material (Dr R Klugman, MHR, Chairman), *Report 1988*, AGPS Canberra.
11 Recommendations III, XXVIII.
12 The requirement for consumer advice to be displayed exists only in the Australian Capital Territory, South Australia and Victoria: *Classification of Publications Ordinance 1983* (ACT) s 35; *Classification of Publications Regulations 1985* (SA) reg 11b, 11c, 13a; *Classification of Films and Publications Act 1990* (Vic) s 28.
13 *Classification of Publications Ordinance 1983* (ACT) s 28A; *Classification of Publications Act 1984* (Tas) s 21A; *Classification of Films and Publications Act 1990* (Vic) s 13.
14 *Film and Video Tape Classification Act 1984* (NSW) s 12; *Censorship of Films Act 1947* (Qld) s 23; Customs (Cinematograph Films) Regulations reg 39(1); *Classification of Films and Publications Act 1990* (Vic) s 11.
15 *Indecent Publications and Articles Act 1902* (WA); *Classification of Publications Act 1984* (Tas); *The Objectionable Literature Act 1954* (Qld)
16 This was criticised in submissions, for example, NSW Council of Churches. It claimed that 'Acceptance of this principle in the 1984 Ordinance provided for the legislation of 'hard core pornography' even though it was not accepted by any of the states. What people see or hear in private may have public consequences such as playing out on an innocent victim the violence seen on the film or video.' *Submission*, 14 June 1991.
17 Because they would be held to 'promote, incite or instruct in matters of crime or violence', that is, inciting violent attacks on members of particular races or religions: see eg *Classification of Publications Ordinance 1983* (ACT) s 19(4)(b), 25(4)(b).
18 See International Covenant on Civil and Political Rights art 20.
19 eg J Vickers-Willis, Information Seminars, *Submission* 10 May 1991; Presbyterian Womens' Association of Australia, *Submission* 24 May 1991.
20 eg O Edwards, *Submission* 23 May 1991; L Longbottom, *Submission* 24 June 1991; B Cobbledick, *Submission* 22 June 1991.
21 eg J Poole, *Submission* 24 May 1991; National Viewers & Listeners Association of Australia, *Submission* 13 June 1991. The Federation of Catholic Parents and Friends' Associations, Sydney Archdiocese, alleged that the underlying principle of current policy (see para 2.2) as practiced is more 'Children have a right to protection from harmful material *only* to the extent that such right does not interfere with the right of adults to read see and hear what they wish': *Submission* 20 June 1991.
22 Festival of Light (SA), *Submission* 19 June 1991.
23 Presbyterian Women's Association of Australia in NSW, *Submission* 24 May 1991
24 Except through Parliamentary oversight of the work of the Boards.
25 For guidelines see para 3.7, 3.8; for review of decisions see para 3.12-3.18.
26 See para 3.10 for further explanation of this recommendation.
27 In 1988-9 1.9% of videos submitted for classification were refused classification, in 1989-90 1.33%. An average of less than four cinema films per year are refused approval: Office of Film and Literature Classification & Films Board of Review, *Report on activities 1989-9*, 28.
28 Recommendation XXVIII.

29 Diagnostic and Creative Workshops Pty Ltd, *Community Attitudes Towards Films and Videos Censorship, Stage One*, mimeo, 9 May 1990.

30 Diagnostic and Creative Workshops Pty Ltd, *Community Attitudes Towards Films and Video Censorship, Stage Two*, mimeo, September 1990, 18.

31 In the Australian Capital Territory, the *Film Classification Act 1971* (ACT) governs the classification and exhibition of cinema films. It is an enactment of the ACT: *Australian Capital Territory (Self-Government) Act 1988* (Cth) s34(4); however, because of s 23(1)(g) of that Act, the ACT Legislative Assembly has no power to amend its classification provisions. This would have to be done by an Ordinance made under the *Seat of Government (Administration) Act 1910* (Cth).

32 eg the agreement in 1987 to empower the Film Censorship Board to review classification decisions after two years have passed since the decision was made has only been implemented in a few jurisdictions.

33 A version of this model was suggested in ALRC DP 47 para 2.5, 2.9.

34 Commonwealth Parliament, Joint Select Committee on Video Material (Dr R Klugman, MHR, Chairman), *Report AGPS 1988, Recommendation XXIX*. The dissenting report did not contain a similar recommendation. Submissions: eg Senator S Walters, *Submission* 6 June 1991, Australian Council for Children's Films and Television, *Submission* 13 May 1991; Australian Family Association, *Submission* 11 June 1991; N Burley, *Submission* May 1991; H Petrusma MLC (Tas), *Submission* 30 May 1991; B Collaery, Attorney-General (ACT), *Submission* 15 April 1991; R Bradshaw (Registrar-General (NT)), *Submission* 25 October 1990; Australian Catholic Bishops Conference, *Submission* 19 June 1991; J John, *Submission* 16 May 1991; B and C Howard, *Submission* 15 May 1991.

35 P Law, *Submission* 23 May 1991.

36 R Bradshaw (Registrar-General (NT)), *Submission* 2 April 1991.

37 This scheme is similar to other schemes, for example, the scheme prescribing national building standards. The Building Code of Australia, published by the Australian Uniform Building Regulations Co-ordinating Council, is (or is to be) adopted by each State and Territory. The scheme is also consistent with H Cowan MLA (WA), *Submission* 12 July 1990.

38 eg the Film Censorship Board has reclassified films under the *Classification of Publications Ordinance 1983* (ACT) s28A yet those reclassifications are not effective nationally as most jurisdictions have not yet amended their legislation to allow the Board to reclassify films on its own motion after 2 years have passed since the original decision was made. See Chapter 1, footnote 15 for details of which jurisdictions have amended their legislation.

39 *Film Classification Act 1974* (SA) s4(3); *Classification of Publications Act 1974* (SA) s15; *Films Act 1971* (Tas) s9A; *Classification of Publications Act 1984* (Tas) s26A-26C; *Censorship of Films Act 1947* (WA) s12B; *Video Tapes Classification and Control Act 1987* (WA) s17.

40 See para 2.4

41 For fees see para 3.41.

42 ALRC DP 47 para 3.11—3.12.

43 *Classification of Publications Ordinance 1983* (ACT) s 24(6).

44 These copies are kept under tight security in a separate locked area within the Office of Film and Literature Classification's bond store.

45 ALRC DP 47 para 3.13.

46 eg Roadshow Home Video Pty Ltd, *Submission* 13 May 1991; Australian Film Commission, *Submission* 21 May 1991.

47 Gordon and Gotch Limited, *Submission* 29 June 1990.

48 eg *Classification of Publications Ordinance 1983* (ACT) s 3.

49 *Classification of Publications Ordinance 1983* (ACT) s 19(5); ALRC DP 47 para 3.10.

50 Presently in State and Territory Acts and the *Classification of Publications Ordinance 1983* (ACT) s 19, 25.

51 G Somssich, *Submission* 8 May 1991.

52 Following a recommendation from the Joint Select Committee on Video Material: see their *Report Recommendation III*.

53 Consumer advice was not regarded as necessary for publications because it is generally easy to see from the cover or from a quick glance through the publication why it received a particular classification.

54 eg V Chadwick, Minister for Education and Youth Affairs, NSW, *Submission* 17 June 1991; M Yabsley, Minister for Corrective Services, NSW, *Submission* 22 August 1990.

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- 55 eg S Leggo, *Submission* 24 October 1990.
- 56 National Council of Women of Tasmania, *Submission* 9 June 1991.
- 57 Recommendation XVI.
- 58 Diagnostic and Creative Workshop Pty Ltd, *Consumer advice as an adjunct to the classification system for films and videos*, mimeo, January 1991.
- 59 Most jurisdictions, however, have not yet amended their legislation.
- 60 ALRC DP 47 para 3.18.
- 61 eg Australian Film Commission, *Submission* 21 May 1991; Woman's Christian Temperance Union of NSW Inc, *Submission* 17 June 1991.
- 62 National Viewers & Listeners Association of Australia, *Submission* 13 June 1991.
- 63 *Classification of Publications Ordinance 1983* (ACT) s 20, 28.
- 64 eg New South Wales: *Film and Video Tape Classification Act 1984* (NSW) s 12.
- 65 eg Victoria: *Classification of Films and Publications Act 1990* (Vic) s 11.
- 66 *Classification of Publications Ordinance 1983* (ACT) s 28A.
- 67 This period can be extended by the Board of Review: *Classification of Publications Ordinance 1983* (ACT) s 28AB(2). The Attorney-General can apply at any time.
- 68 \$350 for a cinema film; \$400 for a video; \$750 for both. The Attorney-General does not have to pay a fee.
- 69 Administrative Review Council, Report 24, *Review of Customs and Excise Decisions: Stage 4: Censorship*, Australian Government Publishing Service, Canberra, 1986 para 48-9.
- 70 eg Australian Parents Council, *Submission* 29 May 1991; National Council of Women of Tasmania, *Submission* 9 June 1991; Festival of Light (SA), *Submission* 19 June 1991; Australian Council for Children's Film and Television, *Submission* 13 May 1991. B Howe, Deputy Prime Minister and Minister for Health, Housing and Community Services, supported widened standing in respect of HIV/AIDS issues: *Submission* 15 July 1991.
- 71 eg Australian Film Commission, *Submission* 21 May 1991.
- 72 eg Janet Strickland & Associates, *Submission* 18 January 1991; Motion Picture Distributors Association of Australia, *Submission* 1 February 1991.
- 73 The Video Industry Distributors Association estimated that the cost of making, distributing and advertising 25 000 copies of a video is over \$500 000. The cost of withdrawing the video and refurbishing it could be another \$200 000. Other videos carrying advertisements for the reclassified video would need to be altered or withdrawn from sale because the advertisements would not display the correct classification markings: Video Industry Distributors Association, *Submission* 13 May 1991.
- 74 Gordon and Gotch Limited, *Submission* 15 May 1991.
- 75 Video Industry Distributors Association Ltd, *Submission* 4 February 1991.
- 76 Office of Film and Literature Classification, *Submission* 22 February 1991.
- 77 Any 'person aggrieved' can also seek review of a decision to register (or refuse to register) an imported film: see Customs (Cinematograph Films) Regulations reg 39; but see para 6.6.
- 78 Office of Film and Literature Classification, *Submission* 22 February 1991.
- 79 eg Janet Strickland & Associates, *Submission* 18 January 1991.
- 80 *Report* vol 1 para 7.31-3; vol 2 para 7.31-3.
- 81 This accords with the view the Commission took in its 1985 report *Standing in Public Interest Litigation* (ALRC 27) para 155-85.
- 82 ALRC 27 para 188-96.
- 83 As one submission suggested might occur: Office of Film and Literature Classification, *Submission* 22 February 1991.
- 84 The Australian Parents Council supported the proposal that widened standing being available only in limited circumstances, *Submission* 29 May 1991; cf Australian Catholic Bishops Conference, *Submission* 19 June 1991.
- 85 ALRC DP 47 para 3.22.
- 86 eg Senator S Walters, *Submission* 4 June 1991 (provided the costs of gazettal are paid by the applicant); Festival of Light (SA), *Submission* 19 June 1991.
- 87 Draft *Classification Act 199?* (Cth) cl 3(1); model enforcement provisions, cl 1.
- 88 ALRC DP 47 para 2.17.
- 89 eg National Committee on Violence Against Women, *Submission* 17 May 1991; Canberra Rape Crisis Centre, *Submission* 16 May 1991.

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- 90 Canberra Rape Crisis Centre, *Submission* 16 May 1991.
- 91 See para 5.14 for discussion of compulsory classification of 'prescribed publications'.
- 92 reg 4A(1A)(b).
- 93 eg a 'concentration camp' game where points are scored for gassing Jews.
- 94 eg *Anti-Discrimination Act 1977* (NSW) s 20C, 20D.
- 95 A bank of computer games to which a person can gain access by paying a fee.
- 96 Some submissions did favour the inclusion of computer games in the definition of films, eg, Australian Family Association, *Submission* 11 June 1991; Australian Catholic Bishops Conference, *Submission* 19 June 1991.
- 97 ALRC DP 47 para 2.18.
- 98 eg Australian Council for Children's Films and Television, *Submission* 13 May 1991; Baptist Union of New South Wales, *Submission* June 1991; Women's Action Alliance, *Submission*, June 1991; Australian Parents Council, *Submission* 29 May 1991.
- 99 See Senator S Walters, *Submission* 4 June 1991.
- 100 See para 5.14.
- 101 Australian Software Distributors Association, *Submission* 20 May 1991.
- 102 eg Fr G Gleeson, Xavier College, *Submission* 12 June 1991.
- 103 *Broadcasting Act 1942* (Cth) s 118.
- 104 *Classification of Films and Publications Act 1990* (Vic) s 3.
- 105 K Ettershank, Attorney-General's Department, Victoria, *Submission* 21 May 1991.
- 106 These are appointed by the federal Attorney-General under the *Classification of Publications Ordinance 1983* (ACT) s 5.
- 107 See para 3.40.
- 108 This was supported by the Joint Select Committee: Recommendation XIV.
- 109 ALRC DP 47 para 2.11.
- 110 eg Baptist Union of New South Wales, *Submission* June 1991.
- 111 Federation of Catholic Parents and Friends' Associations (Sydney Archdiocese), *Submission* 20 June 1991.
- 112 A Cernelutti, *Submission* 15 May 1991; G Griffith, *Submission* 16 May 1991.
- 113 National Council of Women of Tasmania, *Submission* 9 June 1991.
- 114 V Chadwick, Minister for Education and Youth Services (NSW), *Submission* 17 June 1991.
- 115 eg Australian Catholic Bishops Conference, *Submission* 19 June 1991; Presbyterian Women's Association of Australia, *Submission* 24 May 1991.
- 116 Federation of Catholic Parents and Friends' Association (Sydney Archdiocese), *Submission* 20 June 1991.
- 117 See para 2.25, 3.10.
- 118 The Joint Select Committee on Video Material recommended three year appointments with a maximum of six years service: Recommendation XV, vol II.
- 119 In 1985 the Administrative Review Council recommended retention of this system in relation to Customs decisions. Administrative Review Council, Report 24, *Review of Customs and Excise Decisions: Stage Four, Censorship*, 1986, AGPS Canberra.
- 120 ALRC DP 47 para 2.13.
- 121 P Law, *Submission* 23 May 1991.
- 122 Film and Literature Board of Review, *Submission* 8 November 1990. This suggestion was opposed by the Presbyterian Women's Association of Australia, *Submission* 24 May 1991.
- 123 Customs (Cinematograph Films) Regulations reg 7A.
- 124 ALRC DP 47 para 3.23.
- 125 eg A Cernelutti, *Submission* 15 May 1991.
- 126 eg *Classification of Publications Ordinance 1983* (ACT) s 23(3)
- 127 *Classification of Publications Ordinance 1983* (ACT) s 28.
- 128 eg *Classification of Films and Publications Act 1990* (Vic) s 9(4).
- 129 See s 3.
- 130 ALRC DP 47, draft *Classification Ordinance 199?* (ACT) s 3.
- 131 eg B Collaery, Attorney-General (ACT), *Submission* 15 April 1991.
- 132 This, combined with the recommendation that clothing advertising a film or publication should be included in the definition of 'advertisement', and the recommendation that audio material be included in

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the definition of 'publication' will mean that a T-shirt such as the one promoting the record album 'Appetite for Destruction' by the group 'Guns 'n' Roses' would be subject to approval by the Board.

133 eg Film Classification Act 1971 (SA) s 9; Censorship of Films Act 1947 (Qld) s 35(2)(a).

134 Classification of Publications Ordinance 1983 (ACT) s 25(5), (6).

135 ALRC DP 47 para 3.17.

136 eg Child, Adolescent and Family Health Service (SA), Submission 15 May 1991; Australian Council for Children's Film and Television, Submission 13 May 1991.

137 Australian Film Commission, Submission 21 May 1991; Film/Video Coalition, Submission 9 May 1991.

138 See para 5.14 for discussion of prescribed publications.

139 Festival of Light (SA), Submission 19 June 1991.

140 The Film Censorship Board stopped classifying imported television programs in 1986.

141 The Australian Broadcasting Corporation must, however, take account of the Australian Broadcasting Tribunal's standards: Australian Broadcasting Corporation Act 1983 (Cth) s 6(2)(ii).

142 No licensee has yet had its licence revoked or suspended on this ground.

143 Interim Television Advertising Conditions, as at 1 January 1990, condition 6(a), Australian Broadcasting Tribunal Manual, 1990.

144 id, condition 6(c).

145 ALRC DP 47 para 4.5.

146 Federation of Australian Commercial Television Stations, Submission 17 June 1991; United Telecasters Sydney Ltd, Submission 25 June 1991.

147 Federation of Australian Commercial Television Stations, Submission 17 June 1991. The Australian Broadcasting Tribunal recently examined how the classification zones functioned and concluded that the present time zone transitions are satisfactory given Australian viewing habit: Australian Broadcasting Tribunal, TV Violence in Australia, Sydney, January 1990, 78.

148 B Bailey, Government Law Office (ACT), Submission 26 October 1991

149 eg Presbyterian Women's Association of Australia in NSW, Submission 20 May 1991.

150 Australian Council for Children's Films and Television, Submission 14 May 1991.

151 Australian Law Reform Commission, Report 44, Sentencing, Australian Government Publishing Service, Canberra 1988, para 24-5.

152 eg Classification of Films and Publications Act 1990 (Vic) s8(2), 22; Film Classification Act (NT) s3, 4(3).

153 eg Federation of Catholic Parents and Friends' Association (Sydney Archdiocese), Submission 20 June 1991.

154 eg E Heenan, Submission 25 February 1991; Australian Catholic Bishops Conference, Submission 19 June 1991; Goulburn Association of Churches, Submission 12 July 1990; National Council of Women of Tasmania, Submission 9 June 1991; Baptist Union of Tasmania, Submission 1 July 1991.

155 Australian Federal Police, Submission 23 January 1991.

156 eg Film and Video Tape Classification Act 1984 (NSW) s25(1); Classification of Publications Regulations 1985 (SA) reg 18.

157 'A person shall not knowingly ... use a postal or telecommunications service supplied by Australia Post in such a way as would be regarded by reasonable persons as being, in all the circumstances, offensive'.

158 eg clause 21 — screening an R, X or RC film in front of a child, other than in a public place.

159 ALRC DP 47 para 3.43, 3.45.

160 eg Australian Parents Council, Submission 29 May 1991; Presbyterian Women's Association of Australia in NSW, Submission 20 May, 1991; Federation of Catholic Parents and Friends' Association (Sydney Archdiocese), Submission 20 June 1991.

161 Australian Catholic Bishops Conference, Submission 19 June 1991.

162 Federal Parliament, Joint Select Committee on Video Material (Dr R Klugman, MHR, Chairman), Report, 1988, AGPS, Canberra, para 15.36.

163 eg ALRC DP 47, App 1, cl 11.

164 Australian Council for Children's Films and Television Submission, 13 May 1991.

165 eg Films Act 1971 (Tas) s9(3).

166 eg Classification of Film and Publication Act 1990 (Vic) s23.

167 ALRC DP 47 para 3.32.

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- 168 eg South Australia Police Department, Submission 13 May; Australian Council for Children's Films and Television, Submission 13 May.
- 169 Cinematograph Exhibitors' Association, Submission 10 May 1991; K Ettershank, Attorney-General's Department (Vic), also supported the retention of the exemption for children under 2: Submission 21 May 1991.
- 170 Child, Adolescent and Family Health Services (SA), Submission 15 May 1991; Australian Council for Children's Films and Television, Submission 13 May.
- 171 Recommendation X.
- 172 Video Tapes Classification and Control Act 1987 (WA) s29A; Classification of Publications Act 1985 (NT) s36(3).
- 173 Classification of Films and Publications Act 1990 (Vic) s 55; Publications Control Act 1989 (ACT) s 17; Classification of Publications Act 1985 (NT) s 47; Classification of Publications Act 1984 (Tas) s 32.
- 174 Presuming that the marking is legitimate, ie, that the publication has, in fact, been so classified.
- 175 ALRC DP 47 para 2.34.
- 176 eg Gordon and Gotch Limited, Submission 29 June 1990; Festival of Light, Submission 19 June 1991; NSW Council of Churches, Submission 14 June 1991; V Chadwick, Minister for Education and Youth Affairs (NSW), Submission June 1991.
- 177 eg Classification of Films and Publications Act 1990 (Vic) s 43. In several jurisdictions, films classified 'Refused classification' are to be retained by the Board, or returned to the applicant if the Board is satisfied that they will be disposed of: eg Classification of Films and Publications Act 1990 (Vic) s 18.
- 178 Video Tape Classification and Control Act 1987 (WA) s37; in Queensland, it is also an offence to possess films that would be, if classified, RC: Censorship of Films Act 1947 (Qld) s41.
- 179 ALRC DP 47 para 3.59, 3.60.
- 180 The Law Reform Commission Act 1973 (Cth) s7 requires the Commission to ensure that its recommendations are consistent with the ICCPR.
- 181 Except in the case of child pornography, see ALRC DP 47 para 3.61.
- 182 eg J Wigg, Submission 13 June 1991; Presbyterian Women's Association of Australia, Submission 24 May 1991; Australian Catholic Bishops Conference, Submission 19 June 1991.
- 183 G Somssich, Submission 8 May 1991. Mr Somssich did not, however, support the Commission's proposal that child pornography be an exemption to that proposal.
- 184 eg G Crafter, Minister for Education and Children's Services, (SA), Submission 14 June 1991; Fr C Gleeson, SJ, Xavier College, Submission 12 June 1991; Hank Petrusma, MLC, Tasmania, Submission 30 May 1991.
- 185 The need to provide for an offence of procuring a child for the purpose of child pornography will vary between jurisdictions depending on whether such behaviour is prohibited under the relevant Crimes Act. For example, in the Australian Capital Territory, the employment of a person under 16 for pornographic purposes is prohibited under the Crimes Act 1900 (ACT: NSW) s92NA. Victoria, however, prohibits the procurement of a child in the Classification of Films and Publications Act 1990 (Vic) s45, 54. Western Australia does so in the Video Tapes Classification and Control Act 1987 (WA) s36.
- 186 South Australia Police Department, Submission 13 May 1991; Australian Council for Children's Film and Television, Submission 13 May 1991; National Viewers & Listeners Association, Submission 13 June 1991.
- 187 See App 2 cl 11, 12, 31, 32.
- 188 eg Australian Family Association, Submission 11 June 1991; Albany Christian Action Group, Submission June 1991; National Council of Women of Tasmania, Submission 9 June 1991.
- 189 For discussion of the balance in the criminal trial see this Commission's report Evidence (ALRC-38), AGPS Canberra 1987, para 36-46. In particular instances the Commission recommends that this onus be displaced: see para 5.4, which sets out the additional reasons for the recommendation.
- 190 Under the Publications Control Act 1989 (ACT) s 36(1), if a film or publication is seized as an objectionable film or publication, the onus is on the owner of the material to show cause why the material should not be forfeited to the Commonwealth. Similarly, the Classification of Films and Publications Act 1990 (Vic) provides that the owner may apply within 28 days of the seizure for the material to be returned at the end of 6 months after the seizure if no charges have been laid by that time.
- 191 South Australia Police Department, Submission 13 May 1991.
- 192 NSW Council of Churches, Submission 14 June 1991.

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- 193 eg clause 14.
- 194 eg Northern Territory: Classification of Publications Act 1985 (NT) s60(7).
- 195 ALRC DP 47 para 3.6.
- 196 South Australia Police Department, Submission 13 May 1991; Festival of Light (SA) also recommended 12 months: Submission 19 June 1991.
- 197 Presbyterian Women's Association of Australia, Submission 24 May 1991.
- 198 Australian Federal Police, Submission 23 January 1991.
- 199 Review of Commonwealth Criminal Law (Sir Harry Gibbs, Chairman), Fifth Interim Report, Australian Government Publishing Service, Canberra, 1991, 190.
- 200 eg App 2, cl 31.
- 201 Censorship of Films Regulations 1985, under the Censorship of Films Act 1947 (Qld).
- 202 Recommendation XX.
- 203 Business Franchise (X Videos) Act 1990 (ACT).
- 204 Indecent Publications and Articles Act 1902 (WA) s 11.
- 205 National Family Association, Submission 11 June 1991; National Council of Women of Tasmania, Submission 9 June 1991.
- 206 Video Industry Distributors Association Limited, Submission 4 February 1991
- 207 Customs (Prohibited Imports) Regulations reg 4A.
- 208 Customs (Cinematograph Films) Regulations reg 9-10.
- 209 Customs (Prohibited Imports) Regulations reg 4A.
- 210 This reluctance seems to stem from the subjective nature of the classification criteria and the present focus of Customs operations, with its emphasis on drug interdiction and industry protection.
- 211 Recommendation XIX.
- 212 *Customs Act 1901* (Cth) s233.
- 213 The Commission does not recommend that the possession of RC material generally be an offence: see para 5.16.
- 214 See Australian Law Reform Commission, Discussion Paper 45, *Customs and Excise: Draft Legislation*, Australian Law Reform Commission, Sydney, 1990.
- 215 That is, a film to be screened in a cinema, as opposed to a video.
- 216 Customs (Cinematograph Films) Regulations reg 9-10. Analogous restrictions are imposed on the importation of advertising matter for such films: reg 11.
- 217 *Customs Act 1901* (Cth) s33.
- 218 Australian Customs Service, *Submission* 17 May 1991. It was also supported by the National Council of Women of Tasmania, *Submission* 9 June 1991.
- 219 eg Festival of Light (SA), *Submission* 19 June 1991.
- 220 Women's Action Alliance, *Submission* June 1991. Some submissions confused the two sets of Customs regulations and thought the Commission had proposed that the Customs (Prohibited Imports) Regulation be repealed. They opposed the misconstrued proposal.
- 221 See para 6.3.
- 222 No film has been refused registration on the ground of blasphemy in the last 20 years.
- 223 ALRC DP 48 para 4.33.
- 224 The law strictly only protects the customs, usages and practices of the Church of England, not even of all Christian faiths.
- 225 eg Rev P Templeton, Rhema Family Church Melbourne, *Submission* 14 May 1991; L Fisher, *Submission* 14 May 1991; M Dale, *Submission* 12 June 1991.
- 226 Customs (Cinematograph Films) Regulations Pt III.
- 227 eg *Classification of Films and Publications Act 1990* (Vic) s 70
- 228 Provision should be made here to ensure that, even if one or more matters are so specified as irrelevant to a particular offence, the rest of the State or Territory's criminal law with respect to criminal liability (for example, in relation to voluntariness) applies unless expressly excluded. Similar provisions should also be made to preserve the effect of other defences not specified in particular provisions.
- 229 For jurisdictions that do not prohibit the sale of X films, delete 'or R', add ', R or X'. This clause does not take account of the further restrictions imposed on the sale of X films under eg Publications Control Act 1989 (ACT).

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230 For jurisdictions that do not prohibit the sale of X films, delete 'or R', add ', R or X'. This clause does not take account of the further restrictions imposed on the sale of X films under eg Publications Control Act 1989 (ACT).

231 For jurisdictions that do not prohibit the sale of X films, this provision should read:
'If a film that is not classified or is an RC film is kept on premises where films classified other than RC are displayed for sale or sold, . . . '.

232 For jurisdictions that do not prohibit the sale of X films, delete ', or an RC film or an X film', add 'or an RC film'.

233 For Territories omit 'the State' and substitute 'the Territory'.

234 For jurisdictions that do not prohibit the sale of X films, delete 'R', add 'X'.

235 For jurisdictions that do not prohibit the sale of X films, delete ', or of an RC film or of an X film', add 'or of an RC film'.

236 For Territories delete 'the State,' add 'the Territory'.

237 For jurisdictions that do not prohibit the sale of X films, delete 'R', add 'X'.

238 For jurisdictions that do not prohibit the sale of X films delete 'or an R film ' add ', an R film or an X film'