Submission to the Australian Law Reform Commission

National Classification Scheme Review

Bravehearts inc.
Educate. Empower. Protect.

15th July 2011

About the Authors

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Hetty Johnston is Founder and Executive Director of Bravehearts Inc., whose purpose is to provide therapy, support and advocacy services to survivors of child sexual assault. Hetty is the author of the national awareness campaign, "White Balloon Day", the "Sexual Assault Disclosure Scheme", the "Ditto's Keep Safe Adventure!" child protection CD-Rom and her autobiography, "In the best interests of the child" (2004). In 2005, Hetty was announced one of 4 Queensland finalists for the 2006 Australian of the Year Awards.

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About Bravehearts Inc.

Bravehearts Inc remain Australia's leading child protection advocates in the area of child sexual assault and are recognised as such nationally by governments, media and the community at large. We remain the only registered PBI dedicated holistically and specifically to the issue of child sexual assault.

Founded in 1997 by Hetty Johnston, Bravehearts Inc. has evolved into an organisation whose purpose is to provide therapeutic, support and advocacy services to survivors of child sexual assault. We are also actively involved in education, prevention, early intervention and research programs relating to child sexual assault.

Bravehearts operates at a National level, from our Head Office on the Gold Coast, advocating and lobbying across the country, with a physical presence in three States: Queensland (Gold Coast, Brisbane and Cairns), New South Wales (Sydney and Shoalhaven), Tasmania (Launceston) and Victoria (Shepparton).

Bravehearts makes a difference in child protection by:

- Assisting children and their non-offending family members to recover from the trauma of child sexual assault through therapy, advocacy and support;
- Raising awareness via initiatives such as the 'White Balloon Campaign' - a public awareness and child protection initiative;
- Protecting survivors and providing them with avenues of redress through projects like the 'Sexual Assault Disclosure Scheme' (SADS) – a means for anonymous yet official disclosure of assault;
- Providing and developing effective education and prevention programs (Ditto's Keep Safe Adventure) to empower children and young people and increase their resiliency to child sexual assault;
- Provision of professional training and workshops; including specialised training for therapists and professional development for organisations that work with, or who's core business involves children;
- Advocating for survivor's rights through participation in legislative review and reform (successful campaigns include: the introduction in Queensland, New South Wales, Western Australia, Victoria and South Australia of Continuing Sentences for dangerous paedophiles; the closure of Queensland's Department of Family Services; the introduction of Section 189, the right for children and their families to speak publicly; the introduction of the Amber Alert system in Australia; the instigation of various formal Inquiries; and successful amendments to legislation);
- Proactive involvement in cyber-safety initiatives, including a presence on the Federal Government's Cyber-Safety Consultative Working Group;
- Raising community awareness through participation in public debate and in the accumulation, production and dissemination of relevant research material; and
- Supporting the work of other agencies (government and non-government) and individuals in their work around child sexual assault.

Responses to Review Questions

Approach to the Inquiry

Question 1. ***In this Inquiry, should the ALRC focus on developing a new framework for classification, or improving key elements of the existing framework?***

Bravehearts support the ALRC focussing on improving key elements of the current classification system, whereby the State and Territories implement enforcement legislation based on legislative framework set out in the Commonwealth *Classification Act* and the National Classification Code and Classification Guidelines.

We advocate that the key elements that need to be addressed and strengthened are clarification and consistency within the legislative framework and the Codes and Guidelines in relation to child protection concerns, specifically child exploitation, child pornography material, images and representations.

In line with this view, we would like to draw the Commission's attention to the need to distinguish between child sexual assault as distinct from other forms of child abuse and neglect. Bravehearts' long held position is that the issue of child sexual assault and those of child abuse and neglect are discernibly different and require discernible responses.

In working with the Federal Government's Working Party in the development of a national framework for the protection of Australia's children, and in what we believe is an international first, Bravehearts successfully lobbied to have child sexual assault recognised as distinct from child abuse and neglect and requiring of a distinct response and specific resourcing. The signing of the COAG Agreement means this distinction will now be echoed across child protection systems in every State and Territory around the Nation, with the "Protecting Children is Everyone's Business: National Framework for Protecting Australia's Children 2009-2020" (COAG, 2009) forming the basis of child protection agendas over the next decade. Outcome Six of this document outlines the way forward for finally dealing with child sexual assault. Governments across the country are now finally committed to recognising and responding to child sexual assault.

Traditionally, child sexual assault has been 'lumped in the same pot' as child abuse and neglect. However, while all forms of abuse and assault are harmful to children it is important to take child sexual assault 'out of the 'pot' as the dynamics are fundamentally different.

Some of the important differences include:

- Acts of ***child abuse and neglect*** are generally unplanned, re-active and are generally aligned with socio-economic and/or family dysfunction issues and are comparatively predominant in areas of social disadvantage.

  Sexual assaults against children are almost always pre-meditated, involving predatory acts of grooming, manipulation, self-gratification and exploitation, and occur widely across the various socio-economic areas.

- ***Child abuse and neglect*** more commonly involve the infliction of pain, violence and aggressive force.
  Child sexual assault more commonly involves manipulation, intimidation and sexual contact.
- ***Child abuse and neglect*** are nearly always perpetrated by a parent or primary caregiver (in an estimated 90% of cases).
  Child sexual assault is generally perpetrated by a male (in excess of 90% of cases) and more likely to be perpetrated by someone known to the child or their family (research varies but commonly finds between 85% and 95% of the time). Of those offenders known to the child most commonly the offender is <u>not</u> living with the child (approx 70%).
- ***Child abuse and neglect*** offences are almost always intra-familial.
  Child sex assault offences are commonly extra-familial as well as intra-familial.
- ***Child sexual assault*** always involves the three S's: Shame, Silence and Secrecy

Recognising the differences between these offences against children is necessary to effectively address, respond to and prevent child sexual assault at all levels. The differentiation underlies the importance in ensuring that when responding to child protection concerns in relation to the National Classification Scheme, child sexual assault issues are considered separately.

Why classify and regulate content?

Question 2. *What should be the primary objectives of a national classification scheme?*

Bravehearts position is that the primary objective of the National Classification Scheme must ultimately be the protection of children by implementing clear and consistent laws, guidelines and policies. The recent Senate Legal and Constitutional Affairs References Committee's report "*Review of the National Classification Scheme: Achieving the right balance*" provided a list of positive and strong recommendations, however, we have some concerns in relation to Recommendation 1.

Recommendation 1 states:

> The committee recommends that an express statement should be included in the National Classification Code which clarifies that the key principles to be applied to classification decisions must be given equal consideration and must be appropriately balanced against one another in all cases. Currently, these principles are:
> • Adults should be able to read, hear and see what they want;
> • Minors should be protected from material likely to harm or disturb them;
> • Everyone should be protected from exposure to unsolicited material that they find offensive;
> • Community concerns should be taken into account in relation to:
> • depictions that condone or incite violence, particularly sexual violence; and
> • the portrayal of persons in a demeaning manner.

Our concern with this Recommendation, as they relate to the current submission, is specifically with the first principle that "adults should be able to read, hear and see what they want".

We believe that this principle must include the caveat "within the bounds of the law". As it currently reads, the principle could be interpreted to assert the right of adults to read, hear and see material which is illegal, including but not limited to child pornography and child exploitation material.

In addition, we advocate that the qualification that these principles should be given "equal consideration and must be appropriately balanced against one another in all cases" should be replaced to ensure that *the protection of children is foremost*. As a signatory to the United Nations Convention on the Rights of the Child, Australia is committed to upholding all Articles in the Convention including:

> Article 3: In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
>
> Article 17(e): (e) Encourage the development of appropriate guidelines for the protection of the child from information and material injurious to his or her well-being, bearing in mind the provisions of articles 13 and 18.
>
> Article 34: States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:
> (a) The inducement or coercion of a child to engage in any unlawful sexual activity;
> (b) The exploitative use of children in prostitution or other unlawful sexual practices;
> (c) The exploitative use of children in pornographic performances and materials.
>
> Article 36: States Parties shall protect the child against all other forms of exploitation prejudicial to any aspects of the child's welfare.

The National Classification Scheme needs to include adequate monitoring and enforcement policy guidelines that are consistent across the country. As we continually observe, differences between legislation across jurisdictions continues to be problematic for law enforcement.

What content should be classified and regulated?

Question 3. ***Should the technology or platform used to access content affect whether content should be classified, and, if so, why?***

Where possible the technology or platform used to access material should not impact on whether or not contents should be classified. However, we acknowledge that difficulties exist in classifying online material

The development of home video equipment and computer technology has revolutionised the international production and distribution of child pornography.

Rapidly expanding international access to increasingly inexpensive technology has transformed child pornography into a sophisticated industry. This poses formidable challenges for courts and law enforcement officials, as well as for legislators and classification laws.

In addressing these difficulties, we applaud the Federal Government's push for an ISP level filtering scheme. It is our position that Internet filtering is a critical component of any response to the issue of online safety, and in fact, could become a flag for content that needs to be classified.

Question 4. ***Should some content only be required to be classified if the content has been the subject of a complaint?***

Bravehearts supports this option as a mechanism for assisting in the regulation of online material.

Question 5. ***Should the potential impact of content affect whether it should be classified? Should content designed for children be classified across all media?***

The regulation of what material is accessible online is crucial in relation to child protection issues and at the heart of this are the concerns around the potential and real impacts of this material.

Child sex offenders use pornography in a variety of ways (Healy, 2004):

1. Arousal and gratification: Individuals use pornography to stimulate their sexual drive and to aid in sexual stimulation. Some may only fantasise and others may use it as a prelude to actual sexual activity with minors.
2. Validation and justification of paedophile behaviour: The paedophile uses pornography to convince him/her self that their behaviour or obsession is not abnormal, but is shared by others.
3. To lower a child's inhibitions: Child abusers use pictures of other children having sex to assist in the seduction of a child and encourage reluctant children to freely participate. Images are often used as a way to show a child what the offender wants the child victim to do. Pornography may be used under the guise of "sex education" to create sexual arousal in the child.
4. Preservation of the child's youth: Child pornography ensures that there will always be an image of the child at the age of sexual preference.
5. Blackmail: Sexually explicit images are used to ensure the lifelong silence of the victimised child by threatening to show the pictures to parents, peers or others.
6. A medium of exchange: Child pornography is used as a means of establishing trust and camaraderie with other paedophiles and molesters and as proof of their good intentions when establishing contact with other exploiters. It is a medium of communication with fellow exploiters in public and private sex markets.
7. Access: Some exploiters exchange pornography to gain access to other markets and to other children.

8. Profit: Although most do not sell child pornography, there are some paedophiles and child molesters who sell home-made videos and photos on a one-to-one basis.

Child pornography does not only involve the sexual assault of an individual child victim, but can be used to perpetuate the sexual assault of other children. Furthermore, child pornography serves to desensitise society and to send a message that normalises child sexual assault.

Aside from the obvious issues around production, publication and sharing of child pornography and child exploitation material online, there are also impacts on our children and young people.

Many have argued that the distribution of obscene adult material is a victimless crime, that no one gets hurt and that what one does privately in his or her own home is their own business. In the case of child pornography, however, where a real child is videotaped or photographed, there is always a victim. The distribution of that depiction repeats the victimisation over and over again, long after the original offence took place.

A 2006 United States study (National Centre for Missing and Exploited Children, Crimes Against Children Research Centre and Office of Juvenile Justice and Delinquency Prevention, 2006) found that here has been an increased proportion of youth Internet users who were encountering unwanted exposures to sexual material and online harassment. The study found that more than one-third of youth Internet users (34%) saw sexual material online they did not want to see, an increase from a 2000 study that found 24% had been exposed to unwanted material. The increase in exposure to unwanted sexual material occurred despite increased use of filtering, blocking, and monitoring software in households of youth Internet users. More than half of parents and guardians with home Internet access (55%) said there was such software on the computers their children used.

Question 6. ***Should the size or market position of particular content producers and distributors, or the potential mass market reach of the material, affect whether content should be classified?***

Bravehearts' position is that classification laws should take into consideration the size, market position and market reach of producers and distributors.

Question 7. ***Should some artworks be required to be classified before exhibition for the purpose of restricting access or providing consumer advice?***

Bravehearts advocates that artworks including naked or explicit images of children and young people should be illegal. Various child employment laws around the nation already makes it illegal to use naked children in art and this should be expanded nationally. For those other artworks not originating in Australia, these laws should be viewed as a guide to suitability and classification.

Bravehearts has proactively participated in the debate surrounding the classification of artwork and in responding to this Question we have attached our submission to the Select Legal and Constitutional Committees' *Inquiry into the Australian Film and Literature Classification Scheme* (Attachment A).

Question 8. ***Should music and other sound recordings (such as audio books) be classified or regulated in the same way as other content?***

Bravehearts agrees that music and other sound recordings (such as audio books) should be classified and regulated in the same way as other content.

Question 9. ***Should the potential size and composition of the audience affect whether content should be classified?***

The potential size and composition of the audience should not impact on whether or not content should be classified. Bravehearts believes that introducing such conditions will only create loopholes that may be exploited.

Question 10. ***Should the fact that content is accessed in public or at home affect whether it should be classified?***

Whether or not the content is accessed in the public or private sphere should not impact on whether or not content should be classified. Bravehearts believes that introducing such conditions will only create loopholes that may be exploited.

Question 11. ***In addition to the factors considered above, what other factors should influence whether content should be classified?***

As mentioned above, we strongly advocate that the foremost consideration for the classification of material must be the protection of the most vulnerable members of our communities, our children. In line with this and with Australia's commitment to the United Nations Convention on the Rights of the Child, we reiterate the relevant Articles of the Convention:

Article 3: In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

Article 17(e): (e) Encourage the development of appropriate guidelines for the protection of the child from information and material injurious to his or her well-being, bearing in mind the provisions of articles 13 and 18.

Article 34: States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:
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Article 36: States Parties shall protect the child against all other forms of exploitation prejudicial to any aspects of the child's welfare.

It is Bravehearts position that we all have a moral obligation to act in the best interests of the child. We would advocate that the UNCROC be used as the measure by which decisions are made. Therefore, in determining whether a form of content needs to be subject to classification the decision must take into consideration potential and/or real harm that the content could cause to children and young people.

How should access to content be controlled?

Question 12. ***What are the most effective methods of controlling access to online content, access to which would be restricted under the National Classification Scheme?***
Question 13. ***How can children's access to potentially inappropriate content be better controlled online?***

Bravehearts supports an holistic approach to the critical issue of online safety. This includes not only the ISP filter, but the resourcing and expansion of Federal and State Police online investigation units, education and awareness campaigns, research, as well as the continuation of the Consultative Working Group on Cyber-Safety (made up of government, industry and NGO's, including Bravehearts Inc) and the adjunct Youth Advisory Group.

Online safety should be part of the personal safety curriculum taught to children in schools. Components of cyber-safety curriculum should include:

- Unwanted contact
- Inappropriate content
- Safe behaviour online and protecting personal identity information
- Cyberbullying

Education and awareness campaigns need to be focused on children and young people, but also on parents. We know that while children and young people can be incredibly technologically savvy, the disengagement and lack of knowledge of their parents and carers can place children at risk.

Question 14. ***How can access to restricted offline content, such as sexually explicit magazines, be better controlled?***

National legislation must include that restricted offline material, such as sexually explicit magazines and DVDs, must be out of sight and out of reach of children.

Question 15. ***When should content be required to display classification markings, warnings or consumer advice?***

Classification markings, warnings and consumer advise should be visible when the materials are on public display. At the very minimum content should be required to display classification markings, warnings and consumer advice when the material is likely to offend or contains restricted category material.

Who should classify and regulate content?

Question 16. ***What should be the respective roles of government agencies, industry bodies and users in the regulation of content?***

We believe the role of government in the regulation of content is to:

- Develop the legislation and set of standards in collaboration with industry bodies, relevant non-government organisations (such as child protection agencies and child and youth experts) and users; and
- Monitor and enforce the legislation and standards.

We believe the role of industry bodies includes:

- Advise in the development of legislation and standards;
- Self-assess and monitor compliance with legislation and standards; and
- Respond to recommendations for ensuring best practice.

We believe the role of users includes:

- Informal monitoring of compliance through complaint mechanisms; and
- Informal mechanism to ensure that standards and legislation are in line with community standards and expectations.

Question 17. ***Would co-regulatory models under which industry itself is responsible for classifying content, and government works with industry on a suitable code, be more effective and practical than current arrangements?***

Question 18. ***What content, if any, should industry classify because the likely classification is obvious and straightforward?***

Bravehearts are aware of the problems with self-classification as discussed in the Senate Report. However, we note that the television industry appears to operate successfully under a Code of Conduct and this should be used as the model with severe penalties if breached.

Classification fees

Question 19. ***In what circumstances should the Government subsidise the classification of content? For example, should the classification of small independent films be subsidised?***

Bravehearts recommends that costs should be kept to a minimum so that costs of classification could reasonably be incorporated into the production budgets. However, we would support the subsidy of classification of content for small independent films etc., if necessary in special circumstances.

Classification categories and criteria

Question 20. ***Are the existing classification categories understood in the community? Which classification categories, if any, cause confusion?***

Bravehearts believes that existing classification categories are clearly understood by the community and that information is readily available for those seeking clarification. This

is one of the reasons we believe building on these rather than introducing a new regime is more favourable.

Question 21. ***Is there a need for new classification categories and, if so, what are they? Should any existing classification categories be removed or merged?***

We do not believe that there is a need for new classification categories or for the merging of current categories as we believe current classification categories are clearly understood.

Question 22. ***How can classification markings, criteria and guidelines be made more consistent across different types of content in order to recognise greater convergence between media formats?***

Classification markings, criteria and guidelines should be made consistent across different types of content. Utilising the same symbol and ratings would make it easier for consumers to be able to immediately recognise the classification level. We note, for example, that currently each of the classification categories for film and computer games are coloured (green for general, yellow for parental guidance, blue for mature, red for MA 15+ and black for R and X rated content) and accompanied by a classification description/consumer advice.

Question 23. ***Should the classification criteria in the Classification (Publications, Films and Computer Games) Act 1995 (Cth), National Classification Code, Guidelines for the Classification of Publications and Guidelines for the Classification of Films and Computer Games be consolidated?***

Bravehearts would support the consolidation of these classification criteria, with the inclusion of the various broadcasting industry codes and standards (e.g. the commercial television and radio standards).

The greater the consistency across the codes, the greater the effectiveness of the National Classification Scheme.

Refused Classification (RC) category

Question 24. ***Access to what content, if any, should be entirely prohibited online?***

Any material that is illegal for sale should be entirely prohibited online, for example material refused classification. Bravehearts believes that the ISP level internet filtering scheme will assist in regulating such material.

Question 25. ***Does the current scope of the Refused Classification (RC) category reflect the content that should be prohibited online?***

As far as we are aware the scope of the Refused Classification category reflects content that should be prohibited online, however we are not specialised in this area. We do believe that the current scope of the Refused Classification category should be a 'living document' that must continually be monitored and revised in light of community values and expectations.

Reform of the cooperative scheme

Question 26. ***Is consistency of state and territory classification laws important, and, if so, how should it be promoted?***

Bravehearts believes that 'consistency is key' to child protection legislation. We would suggest that consistency across State and territory classification legislations or the eventual replacement with Commonwealth legislation would be one of the most important outcomes of this review.

Question 27. ***If the current Commonwealth, state and territory cooperative scheme for classification should be replaced, what legislative scheme should be introduced?***

If the current Commonwealth, State and Territory schemes should be replaced, we would advocate that a single Commonwealth legislation would provide consistency of standards and a single overarching legislative body responsible for the National Classification Scheme.

Question 28. ***Should the states refer powers to the Commonwealth to enable the introduction of legislation establishing a new framework for the classification of media content in Australia?***

Bravehearts would support the States and Territories referring powers to the Commonwealth to enable the introduction of legislation establishing a new framework for the classification of content across Australia.

Other issues

Question 29. ***In what other ways might the framework for the classification of media content in Australia be improved?***

Please refer back to our response to Question 11. As stated under this Question, Bravehearts advocates that the classification of content will be immensely improved when the primary consideration for the classification of material is focussed on the protection of the most vulnerable members of our communities, our children.

References

Healy, M (2004). *Child Pornography: An international perspective*. Presented at the World Congress against Commercial Sexual Exploitation of Children

National Centre for Missing and Exploited Children, Crimes Against Children Research Centre and Office of Juvenile Justice and Delinquency Prevention (2006). *On-Line Victimisation of Youth: Five years later*.

Bravehearts' Submission to the Select Legal and Constitutional Committees' *Inquiry into the Australian Film and Literature Classification Scheme*

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- Provision of professional training and workshops; including specialised training for therapists and professional development for organisations that work with, or who's core business involves children;
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- Proactive involvement in cyber-safety initiatives, including a presence on the Federal Government's Cyber-Safety Consultative Working Group;
- Raising community awareness through participation in public debate and in the accumulation, production and dissemination of relevant research material; and
- Supporting the work of other agencies (government and non-government) and individuals in their work around child sexual assault.

While we are aware the issues raised being considered in the current Inquiry into the Australian Film and Literature Classification Scheme are far wider and have far broader implication than those confined to the recent Bill Henson debate, we have never the less used the Henson situation as the basis for our feedback. I think it is fair to say that it was this debate that sparked this legislative reform agenda and that as a result, our position in using the Henson situation as our example is not unreasonable.

In doing so we are aware that we are canvassing the questions of the creation (in Australia) of this type of material and not the possession and/or dissemination of such material that has origins outside Australia.

We would also like to note that of concern to us are the processes and guidelines involved in the decision making process of the Classification Board. It would appear that both in current and proposed legislations, despite the illegality of taking images of naked and semi-naked children in Australia, a simple G, PG rating by the Classification Board will (and has) render, by virtue of its rating, images of naked children as inoffensive '*in all circumstances*' to '*reasonable*' persons and therefore legal. This is a dangerously powerful and (by our advise) unconstitutional position for a Board to hold.

Deferring such critical decisions to a panel of selected individuals in a separate process is, in our view, not only unfair and unwise - it is dangerous. The Henson debate proved that.

Bravehearts Recommendation One
That the processes and powers of the Classification Board be reviewed to properly reflect the legal implications and limitations affecting the rating of images of naked or semi-naked children in 'artistic material'.

Bravehearts Recommendation Two
That 'artistic merit' is deleted as a consideration and/or defence in matters before the Courts in relation to material depicting naked or semi-naked children and that the definition of what constitutes 'the 'public benefit test' be clearly articulated to omit 'artistic merit'.

Artistic Merit Defence

We support the examination of how to remove the 'artistic merit' defence without infringing on the rights of journalists and artists (and presumably scientists and educators) to depict valid situations involving children.

Images of naked or semi naked children that are designed, produced, manufactured, posed or created images should remain illegal. Images of children that may well hold artistic merit but that are real life depictions of un-orchestrated true events, fall into

another category. The determination of the motivation for taking the photo and the context of the image is critical.

The scrapping of the defence of 'artistic merit' in the use of child pornography images is welcomed. Most determinations of what is, and what isn't, child pornography is abundantly clear and logically assessable. For matters such as these we believe the changes will bring clarity, certainty and brevity to the system.

However, in many instances the determination of what is, and who decides what is, and what isn't, child pornography remains the vexed question. The removal of artistic merit as a defence only has direct implication for what are clearly child pornography images and does not provide the same clarity in circumstances such as that which arose during the Bill Henson debate.

This lack of clarity around the Henson images took place despite the fact that the taking of the photos in question was and remains illegal.

Taking images of naked or semi naked children, manufactured and created for the purposes of 'art' is illegal in NSW – end of argument. As such, there is no place for any consideration of 'artistic merit'. There should be no further opportunity in law, either by the allowance of the introduction of 'expert evidence' or by a rating obtained from a 'Classification Board' or by any other means or individual - or group of individuals - that would weaken that position.

Proposed adoption of the Commonwealth Legislation

In terms of future legal arguments such as the Henson matter, 'artistic merit' appears to remain alive and well as an admissible consideration before the court under Commonwealth legislation.

Our concern remains that 'artistic merit' can still be argued at all and further, that testimony from an 'art expert' or Classification Board will have the same weight in the decision making process as is currently the case despite the fact that the taking of these images is illegal.

Our understanding is that the tests to be used under Commonwealth law in determining whether the images are offensive are:

- the ***generally accepted standards*** of morality, decency and propriety
- what a ***'reasonable person'*** would regard as being, '***in all the circumstances',*** offensive.

However we are concerned that there remains no unambiguous guidance on what actually constitutes these terms.

What are the '*generally accepted standards of morality, decency and propriety*' – Which of us reflects most commonly *'a reasonable person'*? Who decides?" Is it Bill Henson or Hetty Johnston? Is it the Prime Minister or the 'Art expert'? Is it the Classification Board or our Religious leaders?

Each State and Territory in Australia places varying prohibitions or restrictions on the engagement of children in employment while the majority, NSW, Vic, Qld and WA specifically prohibit the use of naked or semi naked children in art.

In the case of another instance such as the Henson matter for example, one could argue that it is the enactment of these legislative restrictions that set the scene for what reflects the 'generally accepted standards of morality, decency and propriety' and therefore the images would fail the artistic merit test. Images of naked children can not be taken legally so how could they be morally acceptable?

However, the Classification Board rated the Bill Henson photo as 'G' – General viewing, no more offensive than images of Mickey Mouse or Donald Duck - and they did this despite the fact that the taking of the photos was in fact illegal. In this case, the Henson images passed the artistic merit test.

State Child Employment Laws	X	FAILS the test of morality
Classification Board Decision	✔	PASSES the test of morality

At the same time, despite the 'G' Rating, as far as we are aware, there were no television or print media who showed the image without black bands covering the breast and vaginal areas.

Is this then evidence of the media self regulating to avoid an expected consumer backlash if they did otherwise. Was this the media not wanting to offend the public by breaching what they perceive as generally accepted standards of community morality, decency and propriety? Is this then the best measure of 'generally accepted community standards'?

The fact that the taking of photos of naked or semi naked children for artistic purposes is already illegal in NSW and other jurisdictions, is, in our view, the truest reflection of what a *'reasonable adult',* '*in all the circumstances'* would find *offensive*.

Breaking of the law should, *in all the circumstances*, be offensive to *reasonable* people. If the behaviour were not offensive then the behaviour should not be illegal.
If the behaviour is illegal by Statute in the States and/or Territories, it should not be possible for an external Classification Board or an 'expert opinion' to then over-ride that legislation and make it permissible.

The Australian Council for the Arts acknowledged true community expectations and standards when they too made the taking of photos or film, for artistic purposes, of naked or semi naked children unacceptable and made artists accountable to the laws governing them in the States and Territories.

So what do the legislative reform proposals recommended by the CPWP do to improve the potential to overcome these inconsistencies?

> *That the NSW definition of child pornography, the factors that determine whether material is offensive, and the defences that are available be amended to reflect the existing Commonwealth legislation and that the definition be renamed to refer to 'child abuse material'.*

Definition of child pornography

We prefer '***child exploitation material'*** as a definition in preference to child pornography. While some images may not be 'pornographic' in the way the term is generally understood, (i.e.: sexual) they may still be exploitative of the child by virtue of many other factors including that they may be breaking the laws in NSW in relation to the taking of photos of naked or semi naked children for art.

We agree with the Commonwealth differentiation between child abuse material and child pornography (exploitation) material.

Bravehearts have long argued the difference between child abuse and neglect and child sexual assault. We have recently been successful in attaining national acknowledgement and agreement in this differentiation during the development and outcome (6) of the COAG Agreement - The National Framework for the Protection of Australian Children 2009-2020.

Child abuse and neglect are very different to child sexual assault – both are equally unacceptable and damaging but they are different. The offenders are different, the motivation (or lack thereof) is different, and the behaviour is different (see Attachment 1).

Failure to acknowledge this in any new legislative reform would, in our view, represent a regressive step.

Factors that determine whether the material is offensive

Presently NSW legislation allows for the Classification Board to over-ride the intention of it's own child employment laws which prohibit the taking of photos of naked or semi naked children for the purpose of art.

We object strenuously to this situation and believe there should be no consideration of 'artistic merit' as being of more importance or demanding greater consideration than that of the enforcement of child protection laws.

The Commonwealth law provides that matters to be taken into account in deciding....."whether reasonable persons would regard particular material....as being, in all the circumstances", offensive include:

(a) the standards of morality, decency and propriety generally accepted by reasonable adults; and

(b) the literary, artistic or education merit (if any) of the material; and
(c) The general character of the material (including whether it is of a medical, legal or scientific character).

(a) Again the question of whose 'standards of morality, decency and propriety do we accept as generally applicable to 'reasonable adults'. It is not clear that material created illegally (such as the Henson images) would not still be permitted under this legislation.
(b) Bravehearts oppose any inclusion of 'artistic merit' as a legitimate exemption to the laws protecting children from exploitation.

In addition, the Commonwealth legislation provided for the introduction of 'expert opinion' to argue the Propriety of the material. Again, we object to any incursion into the illegality of the taking of the images in the first place. It would be unacceptable for a person or persons (art expert or Classification Board) to, by expressing an opinion, change what was illegal, to legal.

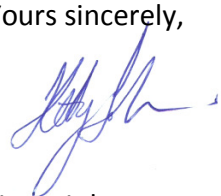
As such, we would object strenuously to the verbatim adoption of these conditions.

The defences that are available
We support the adoption of the defence provisions under the Commonwealth Code which include the public benefit test but where determination is a question of fact (and does not include artistic merit).

We also support the approach where all other 'public benefit possibilities' require that prior written approval from the Minister has been received for the purposes of conducting scientific, medical or educational research - (but that artistic merit can not recognised as a 'public benefit' possibility).

We take this opportunity to thank you for the opportunity to participate in this vital community debate.

Yours sincerely,



Hetty Johnston
Founder and Executive Director

Attachment 1

How Does Child Sexual Assault Differ from Child Abuse and Neglect?

Bravehearts believe that the issue of child sexual assault and those of child abuse and neglect are discernibly different and require discernibly different responses. This view is borne out by the increasing number of reports, conferences and studies that deal exclusively with the issue child sexual assault in isolation of 'child abuse and neglect'.

We do recognise the equally damaging effects of child abuse and neglect but we believe that bundling 'child sexual assault' in the suite of matters referred to collectively as 'child abuse and neglect' is actually harming efforts to prevent child sexual assault. We believe this occurs in many areas including that of 'child abuse' data collection. This in turn thwarts the development of clear understanding and therefore appropriate responses to the issue.

Terminology:

- The term 'abuse' portrays an extension of a given right or privilege ie: discipline gone too far.
- Neglect suggests the failure to provide basic care and protection.
- Sexual assault is commonly neither of these. The only thing they have in common is that they both involve the harming of children.
- It is interesting to note that an attack against an adult is commonly referred to as an 'assault' but an attack against a child is more commonly referred to as 'abuse';
- The criminal law refers to attacks against both children and adults as 'assaults'. It is telling to note that the Queensland Criminal Code does not include the term 'abuse' in its Code and does not list the term 'abuse' within Schedule 5 – The Codes Dictionary. Child sexual assault is the crime – not child sexual abuse.

Differences in Offending:

1(a) Acts of **child abuse and neglect** are generally unplanned, re-active and are generally aligned with socio-economic and family dysfunction issues and are comparatively predominant in areas of social disadvantage.

1(b) **Sexual assaults** against children are almost always pre-meditated, involving predatory acts of grooming, manipulation, self gratification and exploitation, and occur widely across the various socio-economic areas.

2(a) **Child abuse and neglect** more commonly involve the infliction of pain, violence and aggressive force.

2(b) **Child sexual assault** more commonly involves manipulation, intimidation and unwanted sexual contact.

3(a) **Child abuse and neglect** are generally always perpetrated by a parent, more commonly the female, (parent is the offender in an estimated 90% of cases).

3(b) **Child sexual assault** is generally:

* Perpetrated by a male (in excess of 95% of cases).

* More likely to be perpetrated by someone known to the child or their family (research varies but commonly finds between 80 and 85% of the time) BUT

* Of those offenders known to the child, most commonly the offender is NOT living with the child (between 70 and 75%).

4(a) **Child abuse and neglect** offences are almost always intra-familial.

4(b) **Child sex assault** offences are commonly extra familial as well as intra-familial.

5(a) **Child abuse and neglect** is a domestic issue that can involve criminality.

5(b) **Child sexual assault** always involves criminality and further, involves potential for networking, official corruption and monetary motivations (as per drugs).

Definitions:

Assault

- An unlawful threat or attempt to do bodily injury to another.
- The act or an instance of unlawfully threatening or attempting to injure

Etymology: Old French *assaut*, literally, attack, ultimately from Latin *assultus*, from *assilire* to leap (on), attack. **1:** the crime or tort of threatening or attempting to inflict immediate offensive physical contact or bodily harm that one has the present ability to inflict and that puts the victim in fear of such harm or contact another.

Abuse

- To use wrongly or improperly; misuse: *abuse alcohol; abuse a privilege.*
- To hurt or injure by maltreatment; ill-use.

Source: *The American Heritage® Dictionary of the English Language, Fourth Edition Copyright ©2000 by Houghton Mifflin Company. Published by Houghton Mifflin Company. All rights reserved.*

Bravehearts believes that the offences of child abuse and neglect are different in nature, motivation and victimisation than offences of child sexual assault and that while both are incredibly traumatic for children, their differences dictate they should be addressed separately.

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