CI 235 R Nelson

First name: Robert
Last name: Nelson

Q1:

From the point of view purely of the visual arts, the existing framework is not bad and could certainly be a lot worse. As a sign of its quality, we have only to look at the recommendations to reform it. In particular the Senate Inquiry into the Australian film and literature classification scheme has yielded a clumsy and dysfunctional template to replace the existing provisions, which would have a damaging effect on national creativity. We would be much better off with the current system. From what I gathered by reading the Senate report, the worst criticism of the existing system is that there are some 'inconsistencies'; but if the many subtle differences have developed for good legal and cultural reasons, the attempt to blot them out is imprudent. My defence of the alleged inconsistences in relation to the visual arts is presented under Q3. I am especially grateful for the current system because it does not contemplate works in the visual arts unless they are specifically brought to the attention of the Film and Literature Classification Board, either through a complaint or, more recently, a pre-emptive move by an artist to forestall allegations of improper imagery. In such cases, the judgements have been wise and consistent with fair criteria. Against much uproar, fomented by politicians and media in the naked child debates of 2008, the Board stuck to its excellent methods and provided a sage opinion on the material which had an excellent effect in mediating public discussion. The question (Q1) is being asked in the context of whether or not a system should be developed which might (a) require artworks to be included in its purview and (b) judge images with naked children with greater severity than the Board has done, because children are a special case and the Board has not acknowledged it. These are broadly the suggestions of the Senate Inquiry into the Australian film and literature classification scheme. Almost the only governmental regulatory body that has shown any logic or reasoned consideration of artistic production is the Film and Literature Classification Board. Most other instrumentalities have imposed prohibitive rules around the inclusion of children in art. This large and shaggy body of regulation—which mostly aims to protect children from abuse or exploitation during production (as if any were likely or had ever occurred)—has had the consequence of crippling artists who want to include children in their work; and consequently, with the exception of a few hardy and highly organized artists, children have been banished from Australian iconography. The basis of discouragement is detailed in my submission to the Senate Inquiry in my section 1.2. Unfortunately, the Senate Inquiry showed greater responsiveness to

the voices clamoring for higher levels of governmental intervention. In a discussion on Radio National with Paul Barclay, Robyn Ayres and me (http://www.abc.net.au/rn/australiatalks/stories/2011/3257924.htm?site=melbourne), the Chair of the Senate Inquiry Committee, Guy Barnett, seemed to reveal that he was either oblivious to, or in denial of, the negative impact that the regulatory framework had already had on the inclusion of children in Australian art. Against our testimony and without evidence of his own, he dismissed the observations as vastly exaggerated. So with whatever imperfections have been alleged, the current system is hugely superior to various ideas for a replacement, which seem to be predicated on incuriosity for the cultural effect of law.

Q2:

The primary objective of a national classification scheme should be to provide useful information to cultural consumers which does not adversely affect genuine creative output and artistic curiosity in the fields which are viewed as controversial. The ALRC has already contemplated three roles of classifying creative works, which are (a) providing advice to consumers to help inform their viewing choices, including warning them of material they might find offensive, (b) protecting children from harmful or disturbing content; and (c) restricting all Australians from accessing certain types of content. Of the three, I only support the first. The idea of consumer advice is helpful on every level. Meanwhile, the protection of children from harmful or disturbing content is largely subsumed in the first; and insofar as it is not implicitly enfolded in the motif of giving families the information that they need to protect their kids, it is officious and patronizing, because it implies that families are not sufficiently responsible to protect their kids for themselves. Children are exposed to realities in radically different ways according to their cultural background. In some households, any mention or sight of sexual themes is an abomination, whereas in other households, topics like masturbation may be talked about openly, and children between such households—knowing one another's liberality—compare notes on their experiences, feel little repression and gain from one another's candour. There is no way in which a superior governmental wisdom would productively seek to limit the cultural growth of awareness within families; because this cultural pattern is constantly altering and we would be unwise if we think that legislators can prefigure the shape of family freedoms in the future. If a family feels strongly that it has to limit the artistic or filmic experience of its children, then that is a task best left to that family. Beyond the idea of giving advice, it is retrograde to allow a governmental authority the right to override the judgement of families as to the taste or extent of awareness that they are happy to cultivate through art. The only

circumstance in which the state must intervene is where tangible and real abuse occurs and children are sexually assaulted or fiddled with, which has nothing to do with art, film, literature or music. Alas, this happens all too frequently and is a serious problem; but it has nothing to do with a classification system, let alone a prospective classification system for the visual arts. There is no evidence of a link between such criminality and representations in the visual arts or other arts. It strikes me as much more likely that the visual arts contribute to a healthy and rounded educational view of sexuality, which is highly verbalized and infused with critical values. That is undoubtedly why Bill Henson's photography became a favourite topic in Australian high schools. If anything, the visual arts—which are frank and in the open, with nothing to hide—would function as an educational antidote to the secretive practices of paedophiles and add to the protections that children cultivate for themselves in knowing their rights and recognizing an attempted transgression. The final rubric considered by the ALRC, which I guess means RC ratings, I have less sympathy for, because I would prefer to think that the community marginalizes ugly or egregious content by shunning it rather than by its legislators banning it.

Q3:

Yes, some distinctions must be made if 'technology or platform' means medium, which is the word more commonly used in artistic language. I can see the appeal of a homogeneous classification system which treats all media as equal, because this appears more conspicuously to recognize the principles of classification, which might indeed remain invariable. But achieving uniformity is impossible and, arguing from the basis of what our culture ultimately wants to achieve, I feel that it is rather a pointless shibboleth that we would not contemplate in any other circumstance. Art should not be treated in the same way as film, because the terms of artistic production and distribution neither indicate the need nor afford the practical opportunities for review. Art is not presented in a package with cellophane wrapper (as with the inscrutable packaging of films), where the basis of consumer choice is otherwise weak and might need clarification. Art is advertised, often with a sample image, and only entices people to visit a gallery who already have a good inkling of the contents. The moment they dislike what they see, they are welcome to leave instantly and this decision inconveniences nobody, unlike in a film theatre, where they might feel inhibited fleeing, because they have to clamber over other people and wreck the intensity of their cinematic experience. One is never trapped in a gallery in the way that is easily felt in the highly controlled circumstance of a film, where the social expectation is that a person, once having sat down in the cinema, will sit there for the duration of the film, possibly enduring

material that is distasteful. Further, art belongs to a fragile economy which is unable to withstand administrative costs, not just financial imposts of fees but the equally significant cost of time. Most artist work on the breadline and sustain their practice through other forms of work: it is a self-subsidized culture, which is easily discouraged by bureaucratic requirements of any kind. If you're faced with a great deal of paperwork to make an image, you'll probably think of doing something else that doesn't involve such paperwork. In the topical case of children in art—which has partly inspired the current inquiry—the added layers of paperwork imposed by the several state jurisdictions and monitored by the Australia Council have had a catastrophic effect on the inclusion of children in Australian iconography. Effectively, children have been banished from art, which permanently cripples the national patrimony that our decades contribute and leaves our culture without an artistic reflection of its children. What, apart from the rhetorical appeal of consistency, would suggest that a uniform classificatory model would suit the circumstance? In few other fields does the law function in this way; and the aspiration to achieve homogeneity in the heterogeneous sphere of the arts, of all places, is especially illogical. Take the example of the relatively inflexible hard-and-fast system of road laws. These are broadly consistent across the nation and are strictly enforced. A red light has universal meaning and must be observed by all humans who move on our streets and highways. But that does not mean that in all other circumstances bikes are treated in the same way that cars and lorries are. First, I can chain my pushbike on a post on the footpath, a privilege over which motorists may well feel envious. Second, I don't need a licence to ride my bike; nor do I need registration and nor do I need a seatbelt. Third, there is a tacit public agreement that it is reasonable to pass motorists on the left without indicating, which is strictly illegal for cars. Cyclists do this often, blithely rolling past Police cars, and all with implicit assent. So general has this practice been over the 35 years of my cycling life that the road system now recognizes the separate needs of cyclists and sometimes provides lanes so that their superior pace around traffic lights is afforded and of course legalized. The reason for this tolerance within the notionally uniform road laws is simple: the benefit of the several inconsistences outweighs the risks. Bicycles are light, relatively harmless, occupy little space and alleviate congestion, are ecologically-friendly and promote healthy activity which can be enjoyed by children as well as adults. So all the rigours that apply to cars, but which would heavily discourage cycling, are not applied to bikes. The community is keen to encourage cycling and therefore avoids compromising an otherwise delicate mode of transport, which already faces major disadvantages relative to other modes of transport due to discomforts and hazards. The analogy holds good for art, which is relatively vulnerable to all kinds of discouragement; and in the present matter of children

in art, we have witnessed a sharp decline in the presence of kids in Australian iconography, to the point that they are barely visible. A raft of governmental provisions has already had a withering effect on children in art, as the several laws related to child employment create prohibitive administrative burdens for artists to include children in their works. If we want children to return to our reflective museums—instead of relegating them to the globalized promotional din of commercial media—then we do have to treat art differently. Though it is not directly related to classification, this topic usefully draws out another distinction between film and art, which indicates different regulatory treatment. Throughout the history of film, actors are employed by the producer; but the history of art, which is anterior by many millennia, rather has things the other way around. Before the intervention of the Australia Council, visual artists (like photographers and painters who exhibit in galleries) did not believe that state child-employment laws had application to art, because they had never thought of themselves employing the people in their pictures. The Arts Law Centre of Australia had already pondered the problem: 'Whether or not the law considers that you are "employing a child" will vary depending on where you reside. Importantly, you may be subject to these laws even if you are not actually paying a child to work.' For Victoria, it says: 'You will be regarded as employing a child if the child takes part in any business, trade or occupation carried on for profit, irrespective of whether the child is paid or not and regardless of the type of arrangement you have with the child.' If I make a loss, it seems that I am not employing a child, whereas if I net $5, I become an employer, even though the nature of the product is identical in both cases. This is legal nonsense, and the protocols, which supposedly guide artists, contribute no clarity. To the crucial question 'do the employment laws apply to me as an artist who includes a child in a picture?', the protocols provide neither an answer nor a method for reaching an answer, in the same way that they provide no guidance as to definitions of exploitation. Australian law generally does not run counter to common sense. Up to 2008, artists believed common sense would prevail. As noted above, laws are defined around intentions. If you do not intend to employ a child—but just to paint a picture of one—you ought logically to be seen in the same way as a poet who writes a poem about a child. Artists seldom have the intention of employing their subject matter. If your friend agrees to sit for a portrait, it is not to be employed but to be in an artwork. If anything, you could say that the model employs the artist, not the other way around. When both parties simply want the artwork to happen for cultural reasons, the relationship is clearly not intended to be employment. So, too, a parent might approach an artist and ask for a child to be painted or photographed. Parent, child and artist would then make a picture without conceiving of the event as employment. The term employment offends the very nature of the relationship and

the art. The state laws on child employment did not contemplate spontaneous artistic production any more than they did happy snaps. The laws were not formulated around disinterested intellectual image-making but were designed to cover commercial activity such as advertising, where models may be industrially exploited. These important legal distinctions have been obscured by the assumptions within the Australia Council protocols. To paint your picture, you now have to inform the ministry and get police checks and contact school principals, specify dates and other things that only big-business entertainment would have the administrative resources to manage. Once you have booked all these people in, you have to hope that the weather will be good and no one has a sore throat, because you are not at liberty just to select another day of your choosing: that would break the law. Unless you have legal training, you will give up. Further, interpreted in the way that is now accepted, the law in the populous states forbids employing a child in the nude; so, if we believe that artists employ children in their pictures, no naked child can ever appear in art again in Victoria, NSW, Queensland and WA. (Some of the paragraphs above have been grafted from my submission to the Senate Inquiry, where acknowledgement of earlier publications is given.)

Q4:

Yes, and I think that this is a fair method for all content in the visual arts. If someone complains, I believe that it should be heard and the basis of the complaint looked into, which means scrutinizing the content. If no one complains, an expensive classification process is clearly not indicated. People have a right to complain about art and therefore it is only fair that someone listen, beyond the artist or gallery. Classifying the work, I guess, would be one way of listening to the complaint in good faith. But it is misleading to think that this classification will be decisive in altering the opinion of various members of the public. Under Q29, I am also proposing that there should be a method for complaints. To forestall frivolous complaints which are based purely on taste, I suggest that all arguments for classification and censorship must include (a) a statement identifying the persons who need to be protected (b) an argued statement identifying the risks to such persons, remembering that risk is defined, as in all OHS cultures, as the severity of impact multiplied by the likelihood of the event occurring (c) an evidential analysis comparing the risks thus identified with other risks in the community which are conventionally tolerated and viewed as responsible, (d) a faithful acknowledgement of the people who would be disadvantaged or aggrieved by the censorship going ahead and the work being stripped of a public life; and (e) compelling arguments intended to refute their rights to produce and enjoy the work in question. Unless all

five can be satisfactorily presented, the complaint should not be heard by the classification body.

Q5:

It may be a fair principle to invoke classification on the basis of potential impact, but I would prefer the term ‘risk’, because it is much more scientifically measured. ‘Potential impact’ sounds as if the content simply strikes a large number of people, irrespective of any imputed damage. The word impact lends no clarity and much confusion. It would be better if we could get rid of the term impact and speak instead of risk. If so, the issue of children—into which the motif of impact is folded by the double question above—becomes much easier to handle. I am in favour of the community and its individuals controlling risk. But this means understanding risk and the processes of risk evaluation. To know if a fear is worthy and significant, the recognized method is to conduct a risk evaluation. In the case of letting a child see other children naked in an artwork, for example, I would argue that it is necessary to compare the risks involved with those in other areas of life where parents subject their children to certain risks. The concept of risk is more or less quantifiable according to the OHS culture that is embedded in workplaces throughout the developed world. Risk is computed as the severity of any possible damage multiplied by the likelihood of the event occurring. We judge, for example, that driving a car or riding a bike is an acceptable risk. We say this even though the possible damage is extremely severe. You can be killed. There is proof, because lots of people get killed on the roads each week. But given the number of total motor journeys, it isn’t very likely that you will have a serious accident on any given day. So you declare the risk worth taking and drive (with children in the cabin) or ride the bike every day. The risks to a child on apprehending an artwork with another naked child in it are extremely low and fall well within acceptable limits. Any possible damage to a child caused by an artwork needs to be compared with the possible damage in other activities which are commonly considered acceptable. It should be compared with sport, for example; because though seen as a kind of archetype of health and youth, implanted in us as wholesome from early education, sport is in fact the source of permanent injury, where people wreck their knees, break necks and spines and encounter other corporal disasters that cripple them for life. Every weekend yields a fresh harvest in our hospitals. Notwithstanding, children in our community face immense pressure—not just from parents but also teachers and junior associations—to entertain the sporting spirit in a fierce degree, to strive to win with all energy, to take on feverish enthusiasm, bravely to overcome all fear of risk, and trounce the opposition. I am personally relieved that our son has rejected Australian rules football for this reason, because I feel sure that one day, were he to be a football player, he would return

home via the surgery, as I once did in competition sport, with a permanent disability. The physical and psychological damage to the child in these instances is not just likely but widespread. In any given street, each family is likely to be affected, because the massive societal endorsement makes sport unavoidable. So on a social level, these activities are a much greater worry, because the serious damage that they cause is constant and ubiquitous. Parents make decisions on their children's behalf, either by forcing them, brow-beating them, shaming them, or (we hope) by lovely encouragement and sweet blandishments to implore them benignly. Yet the result is the same: we expose them to risk. So why not institute some super-parental discouragement? Why not invoke anti-football protocols and demand identification for when it is ethically appropriate for children to be allowed to participate in these tangibly damaging activities? The only reason we do not think this way in relation to sport—but do when it comes to nudity in art—is just that sport is common, usual, accepted. It is valorized by custom and, because it is mainstream, it is unchallenged. Parents absolutely enjoy the right to decide and bring on these risks for their children. Yet according to certain commentators, and without analysing the reasons, the risks to a child faced with an artwork are unacceptable. It strikes me as illogical and hardly a view to institutionalize through law. The idea that art will damage children (and therefore requires regulation) strikes me as bizarre. It seems to me that a risk to kids is accepted if institutionalized and maintained by custom, even when the risks are substantial. But art is less institutional and is based on individual choice rather than convention in a way that makes the responsibilities more conspicuous. It seems easier to accuse the parental influence of being irresponsible, even though it exposes children to much lower levels of risk—next to nothing, if the truth be told—than socially normalized leisure activities. While other forms of risk-taking are programmed in conformity to expectations, art is not. So it is targeted, all for cultural reasons and never with a scientific view of risk. (Some of the paragraphs above have been grafted from my submission to the Senate Inquiry, where other sources are also given.)

Q6:

Because art is a small economy and is seen as a boutique culture, it would suit me to agree with the suggestion here and say, yes, size matters: art is very small, only affects the learned and consensual adult community and should therefore be left to its own devices. It's too tiny and safe to have to worry about. But though it would suit the arts to slip under the radar, as it were, I personally would prefer that neither legal nor cultural judgements be based on numbers. My preferred position is to accept an image on the basis that it can be viewed by any number of people and poses little risk

to anybody, even if it is confronting or challenging. It is possible that few people will ever look at any given painting exhibited in a gallery; but if the same picture happens to become a signature image on the internet, suddenly millions of people get to see it. While there is much panic about this possibility, I fail to see the problem. Granted that there have to be some caveats, such as warnings about content, an image displayed in a gallery—which is a form of publication—should not depend on its intimacy with an exclusive audience. As an art critic, I would rather that artists say: if it is good enough to show in a gallery, it should be morally robust enough to be trafficked wherever it may end up. Although it might be expedient in some circumstances for galleries to claim exclusivity of images, I do not like any system of classification that is predicated on an exclusive few seeing pictures and hence limiting the spread and the consequent harm. This strikes me as philosophically dubious. I would rather argue that it is incumbent on a person complaining to demonstrate that there are substantial risks in seeing the work by any single individual. The complainant must demonstrate that the risks involved are genuine and not an expression of personal taste to which allegations of turpitude or harm are gratuitously attached. But in all of this, the number of people who see the image is immaterial.

Q7:

No, they should not. It is fine for artists to take up this prerogative, as Bill Henson seems to have done, if this makes the exhibition smoother in a climate of moral panic; however, this pre-emptive act of caution or risk management should not be mandatory in perpetuity. I prefer the idea of a complaint triggering the process, where it is necessary for a person who complains to demonstrate that there are tangible risks for an individual if he or she is exposed to the artwork. As noted above under Q4 and explained in greater detail in Q29, the complainant ought to be able to demonstrate that the risks involve damage to persons and are not merely a frivolous expression of personal taste.

Q8:

I am reluctant to say yes if it means (a) denying the distinctions among media, which are discussed in Q3 and (b) bringing less liberality to music and other sound recordings. However, clearly music has words and these can be lubricious, blasphemous or offensive as much as the images in any artwork, and of course they can be transmitted virally. However, music and other sound recordings probably also entail very little risk to individuals. I feel that they should be treated in the same way as art, with the necessary exemptions that fit the medium.

Q9:

Not really, though I understand the case that art is always harmless when it is directed exclusively to the people who are already sympathetic with its contents. As stated in Q6 above, however, I do not personally believe that either legal or cultural matters should be based on the size of the audience. As a critic, I prefer to think that whatever we make and exhibit in good faith should be viewed by any number of people, given some caveats such as warnings where an image is likely to give offence; and it is entirely immaterial how big the audience is, because each person (or his or her guardian) can read the warnings and make an appropriate decision. As suggested above, an image in a secluded gallery can suddenly become viral on the internet; and we shouldn't blanch at that either. It is possible that some artists create an image and display it in a gallery—which is a form of publication—in the expectation that it will be contained to a gallery audience; however, I prefer to think that images should not depend on this intimacy. The only item of legal interest in the calibre of images is the risk that they may pose to a given individual. In this discourse, the size of the audience is immaterial. Otherwise, we would have to judge that a lewd poem written in English is 1,000 times more dangerous than the same poem written in Icelandic, because there are only half a million Icelandic speakers, whereas there are 500 million English speakers. This argument strikes me as arbitrary and no basis on which to formulate law, because the same could be said of Icelandic murder or anything else; and that would have little appeal to the Icelandic legislature.

Q10:

Again, it would suit me to agree to this, because it offers an 'out' for artists and their galleries, who might be able thus to argue that the material is inherently restricted by virtue of being locked up in a gallery. It is up to galleries, of course, either to publish or to forbear from publishing on the internet; and if they avoid publication on the internet, they can legitimately restrict the audience. But I would prefer to think that this does not need to happen. Given that warnings are now conventional, I struggle to think of an image shown in any Australian gallery that would need to be concealed from anyone anywhere, even though many are confronting and people will decide for themselves if they want to look for more than a split second. The deletion of pictures from the web occurred at the height of the Henson controversy, where images were removed from the websites of commercial galleries representing Henson; but the same removal also occurred in various galleries out of fear, and the situation is hardly very telling. It may also be that selection of images for the internet will be restricted; however, if so, this is an example of the industry self-censoring. In general, galleries

do not enjoy the prospect of trouble or controversy and polemic. They operate to minimize unwanted attention; and even if, like me, they feel that it should be unnecessary, they do use the twin mode of display—the wall and the screen—with discretion so as not to upset people or arouse hostile reactions.

Q11:

If it is really art, but the fear is that it might be pornography, the image does not need to be classified. I would say the same about ‘child abuse images’ or ‘child exploitation images’, which are softer terms that have been used deviously to induce the opprobrium of child pornography upon all contemporary artistic images of naked children which are clearly innocent. If the work is really art, there is no need to classify it by some pornographic measure, because the two entities are antithetical. The difference between art and pornography is huge: art is thoughtful and reflective, while pornography is contrived for an instantaneous thrill against which thoughtfulness and reflexion are undesirable. Images of naked people and pornography are sometimes confused because they have a lot in common. Both obviously involve nudity and beauty and both are capable of giving offence. The fact that there are features in common, however, doesn’t mean that you can’t make a clear distinction between them. It’s helpful to analyse three elements in looking at any picture. First, there’s subject matter, let us say the person depicted. Second, there’s the address of the image, that is, where the picture seems to be directing itself. And finally, there’s the subjectivity of the artist, the position or personality that the artist conveys by making the image in a certain style. When we look at pictures impatiently, we sometimes only consider the first of these, that is the subject matter. This is unfortunate in our case, because the difference between art and pornography seldom lies with the subject matter. In both art and porn, the depicted person can be idle or forceful, active or passive, scornful or come-hither, vulnerable or triumphant, blissful or dour, totally exposed or partly shrouded. You cannot distinguish between art and porn simply by looking at the subject matter. Not even when some kind of violation is suggested can you declare that it’s necessarily porn. Some classics like the the Graeco-Roman *Flaying of Marsyas* or Titian’s *Tarquin and Lucretia* involve nakedness coupled with violence; and these have never been considered porn. Even if you see erections, it won’t suffice to identify the work as porn. For many centuries, Graeco-Roman Priapic statues have been considered art and haven’t been condemned since the days of religious zealotry, when so many penises were lopped off by righteous bigots. The distinction is better revealed in the address of the picture. This is a subjective quality of an image constituted by the picture as a whole, including the composition, the point of view, the style and the kind of access that the image gives you. All images address themselves to a

spectator; but the question is what part of the spectator's consciousness does it speak to? Does the image address itself to a speculative part of our imagination, a sense of wonder through moody suspension? Or does it exclusively go to a spectator who is already hungry, who only wants to satisfy a sexual appetite? Porn is incapable of addressing itself to the disinterested wonder of the spectator. It cannot sublimate erotic feelings but trades in the promise of carnal gratification. Porn has no power of sublimation and cannot rise above the theme of eyeing off, or being the target of a thrill. Art never gets stuck there, even when it has an erotic dimension and even when it involves adolescents. Canova's *Cupid and Psyche* would be an example. The sculpture is more than its bodies, because the embrace has to be seen in somewhat godly, auratic terms, not completely chaste, but curiously awesome at the same time. The third element is the artist's share. How prominent is the artist's subjectivity, his or her fingerprint? In art, you have the sense that the image is made by an individual who seeks to express something, a vision unique to that artist and not confined to the subject matter. In pornography, meanwhile, the creator is effaced and hardly exists as a separate person in the image. As much as possible, the creator of porn is collapsed into the identity of the spectator. The purpose of porn is uniquely to arouse and promise fulfilment. The spectator will therefore not welcome any intermediary. It will be a turn-off if the fantasy of possessing the model is interrupted by the presence of an artist. Pornographic imagery proposes direct access to the flesh, as if the figure were naturally in your space, available and customized to your desire. A third person in the room—the presence of an author—would not enhance this illusion and would disappoint the fantasy. It wrecks the pornographic immediacy. The best way to recognize this presence is how the art medium has been treated. If the medium has no presence of itself and transparently gives onto the model, it errs to porn, as the artist's authorial position is denied. As the artist's subjectivity recedes, the model is projected as real in your fantasy, and the work becomes pornographic. But if the medium is conspicuously expressed through the artist's style—with a consistent sense of artifice—the picture remains art. Art, if it is really art, carries a thoughtful self-reflexive element which guarantees that it is not pornography. And if it is not pornography, then why would we have to classify it? (Some of these paragraphs have been grafted from my article 'Saving Art's Face', *Arena Magazine*, no. 95, June–July 2008, pp. 45–46.)

Q12:

If this question concerns children, the most effective way of achieving this control is parental guidance. I am very uneasy about other systems which leap-frog parental responsibilities.

Q13:

The best strategy for this is education. Promoting knowledge rather than promulgating regulations is the answer. Apart from any self-regulating work on the part of ISPs or technologies like Net Nanny, I think that the construction of mighty firewalls against undesirable content is patronizing, paranoiac and messy. To achieve results beyond the vigilance of families and providers strikes me as misguided and a case of putting resources into the wrong end of a problem.

Q14:

I worry about questions like this. They presuppose that there is a kind of epidemic which needs treatment. But is there any evidence that anyone is suffering from ill-controlled sexually explicit magazines? I feel that questions like this carry an implicit assumption that our society requires greater control, that the public is entitled to a world free of filth and that innocent eyes, especially, have to be protected against rampant pornography. If you offer the community greater control over filth, it is sure to welcome it; and legion demagogues will profit from this sanitizing reflex and try to sell greater levels of cleanliness and security, and never mind at what cost. The degree of public assent to tighter levels of security does not mean that the steps were either necessary or justified; nor does it mean that they will be at all effective in purging our society of lewd pictures, perversity or anything else. Although ideologically I am sympathetic to the feminist disapproval of female objectification, I am very worried that the case of limiting freedom to achieve iconographic cleansing replicates a fascist motif of the ends justifying the means. On the whole, our economy of images works well: people who want filth can mostly gain access to it (provided that it isn't illegal) and people who don't want to look at it are under no obligation. It is true that there may be a penumbra of curious adolescents who are tempted to dip into it; but how else should they grow up? Even some adventurous junior kids, given access to a cache under an elder sibling's bed, will think that it's a colossal hoot to obtain dirty pictures. Has anyone of any age been damaged by such encounters? Is it a societal problem of any substance? Where is the scientific literature that attests to injury? Do people become depraved by looking at the kind of lubricious rubbish that you can see even in petrol stations? Or is this all a kind of beat-up, driven by a misguided desire for a nanny state? I feel that the reactions to some imputed epidemic of porn are artificially propagated by people who, one way or another, have an interest in protectionist discourse.

Q15:

I love consumer advice. The more information that labels carry the better. Admittedly, there will be some films and the like which are marketed with an air of mystery; and producers may be afraid that some of the dark mystique and tense surprise will be compromised by disclosure of content and a list of things to expect. But for all that, I feel overall that information is good. If families are to be empowered to make decisions for themselves, they need to be given the facts; and so to maintain good faith through self-regulation, marketing does indeed have to yield information and not just hype. In relation to the feminist concerns mentioned in Q14, I feel that it would be reasonable to extend the classifications to include messages about the objectification of women. There are good grounds to resent the dumb-blonde archetype which is so energetically propagated in sexy films. The film industry definitely needs to have the right to represent silly women who are coincidentally pretty and winsome; but often they have the result of valorizing and celebrating the stereotype. A classification dedicated to the intellectually demeaning representation of women would be enlightened; but it should only operate on the level of consumer advice and buyer discretion.

Q16:

The onus, as much as possible, should be on users to decide what experiences they buy and enter; and producers will respond by the normal influence of market forces. Users cannot determine the content of things that are made—and nor should they, outside market forces—but they can spurn it when offered. I have not seen a persuasive argument to support the idea that people are unable to decide for themselves. And the argument that we have to do it for young people discredits the much healthier role of parents and guardians, because their efforts are likely to be educational to some degree, whereas the role of government in removing content is entirely negative.

Q17:

It is a step in the right direction, provided that avant-garde producers are not frozen out by mainstream interests. Different industries function by different energies; and a dire prevalence of conformity could arise through a corporate ethos dominating ‘the industry’. Philosophically, I feel that government should recede as much as possible; however the suggestion of the question is sympathetic and if the guideline concept is interpreted imaginatively, I think that it could be an ideal outcome, guaranteeing the conceptual autonomy of individual avant-garde producers who want, in good faith, to spearhead development and make inventive leaps in the making of cultural capital.

Q18:

The industry would be well advised to classify any production that is likely to be controversial. However, bearing in mind that the purpose of the classification is to provide information to consumers, there should also be assistance given in the possibly or vaguely controversial fields, as when a film has erotic dance moves in it but no sex or violence. A strictly religious family, for example, may feel uncomfortable with such generally sexy content, even though nothing is explicit; and I feel that it is only good etiquette to describe such randy or demonstrative body language with a label.

Q19:

If external classification is required, it should in all cases be paid for by the government. It is unfair on producers to have to bear this cost. They are not asking for the governmental classification, even if technically it is they who lodge the application or organize a pre-emptive valorization in the face of likely hostility. Rather, they are being forced. If the government believes that a governmental classification system is necessary against the belief among professionals that it is unnecessary, it has a moral obligation to pay for it.

Q20:

Yes, even among primary-school children, the categories seem to be broadly understood, except for RC, which is undoubtedly why the ALRC feels a need to explain the abbreviation in Q25. We are not used to seeing that one.

Q21:

I am tempted to say that many should be added, such as ‘dumb’, ‘frivolous’, ‘cliched’, ‘globalized Kitsch’ and so on. Seriously, I feel that far more damage is done to the community psyche by film and television propagating cheap marketable airhead archetypes than we could ever fear from all the nudity in all films and pictures put together. For the next couple of questions, my expertise weakens, as I am not a critic of film and television; so I will leave some of the questions below unanswered.

Q22:

Possibly, but not to be rushed into. Different media have such different conventions. The aspiration to consistency is good; but we must take care to provide for differences when these are rooted in the properties of distinct media.

Q23:
Q24:

The obvious answer to this question is child pornography, because it is illegal. We are in no mind to legalize child pornography. Still, the ALRC is perhaps the only body where I can urge caution about blanket prohibitions of any kind. Child pornography should be illegal, I agree, if for no other reason than that we do not in any circumstance condone the use of children as models for the production of the pornographic content. But surely there always have to be exemptions to any blanket prohibition. An obvious example is forensic research. Clearly the Police need access to all the sites. But it isn't just law enforcers who need to understand these dark and criminalized recesses. I imagine that from time to time it is also necessary, especially from a socially prophylactic point of view, for psychiatrists and psychologists to gain access to the material as researchers. How are these theoretical and clinical scholars to create the necessary taxonomies and advance their science without studying the several perversities and the manner in which they are trafficked? And from time to time, this would also become an essential privilege of anyone studying visual cultures or the topic of pornography itself, which is a legitimate and recognized field of study, as is the sociological or literary topic of perversion. It has no appeal to me as a scholar; but most scholars in cognate fields recognize the validity of studying abject phenomena. Scholarship, and hence the community that ultimately benefits from its insights, would be impoverished if all access were obliterated. If Freud had not speculated about child sexuality (which some people still regard as taboo, hideous and depraved), we wouldn't have psychodynamic theory, which is a bit like saying that we wouldn't have a large part of contemporary consciousness and the promise of further ideas about what accounts for development and motivates behaviour. And finally, there is a question of another breed of researchers, perhaps the earliest researchers of all, namely artists. Artists, like other researchers, seek to understand the world; and even though their methods follow imaginative extrapolations rather than analysis, artistic work in the avant garde yields cues and insights which are the equivalent of insight in any other discipline and often inspire other disciplines, which explains why Freud talks often about the visual arts. As the world includes a range of abject perversities, artists too need to be free to explore them (as authors like de Sade and Nabokov did in literature) and reveal whatever they feel needs to be said about them. I don't know any artists who want to explore child pornography, because generally our minds don't go there. But I would also defend the possibility that such curiosity could be legitimate. I don't believe that the law—which is constructed to prevent abuse—should also prevent the speculative study of abuse, because in the longer term, that is the likeliest way to overcome the causes of the

abuse. If we grant that the study can occur in science, we have to allow that such study can also be contemplated in the artistic sphere. We cannot absolutely prohibit access to the phenomena that we need to understand. So I would propose that all cases of bona fide analytical and creative research should be authorized to proceed with impunity, even if caveats have to be issued as to the publication of their research and the privacy of their collections. I don't think that as a curious and brainy community we should foreclose on inquiry in any field just because we find it extremely distasteful or repugnant and loathsome or egregious and in every way disgusting. Otherwise we couldn't study rape or genocide, which we clearly need to do, all the more urgently because of their enormity. We cannot simply expunge these phenomena from the eyes and mind because there are good and righteous people around who are eager to stamp them out. The persecution of artists who have been wrongly suspected of creating child pornography is frightening. The prime example is Connie Petrillo in Western Australia, a good artist and mother who photographed her children and ended up under arrest in harrowing circumstances lasting a long time. This was a black moment in Australian cultural history. It is hard to imagine how an artist would ever recover from the trauma; and of course it also has a massively discouraging effect on other artists. Finally, we cannot foreclose on artists, any more than psychologists, who seek to understand under-age sexuality, which has nothing to do with pornography. Denying that children have a form of sexuality—not an active sexuality but a pattern of urges that is proper to their age—is a flat-earth view of humanity that is unlikely to advance the course of science or art. Clearly, there are huge problems in recognizing the theme as a disinterested and legitimate topic of inquiry. The blanket prohibition of child pornography, by virtue of its severity, inspires various sections of the community to believe that all artistic or poetic interpretations of under-age sexuality are criminal; and as a result, artists cannot easily pursue the theme. Perhaps the closest is Bill Henson; but he would not be able to say that his work concerns child sexuality (even if he felt like saying it) because it would be construed as a confession that his images of naked youngsters are sexualized and hence pornographic. The link between nakedness and sex is the technicality that all Henson's antagonists would like to identify in order to classify the work as child pornography. As a result, the work is spoken about in oblique language: they are 'ambiguous' works which explore the mysteries and ambiguities and betweenness of adolescence. The law has played a significant role in creating a repressive culture, where matters of great scientific, spiritual and creative interest cannot be acknowledged or discussed without fear of the most horrific consequences. It irks me greatly, because behind the fear and potential opprobrium lies an enormously rich topic that explains parts of our intellectual and libidinous formation, our drives and fantasies, attachments and ambitions. Should it be forever

disqualified as artistic subject matter any more than in literature? The effective ban on the topic suggests to me a very immature and reactive culture which has no confidence in itself. Artists who end up arraigned by the state to demonstrate that their work is something other than child pornography have traditionally fallen back on the defence of artistic merit. This is no longer available to them in NSW; and the Senate Inquiry recommended that the defence of artistic merit be deleted throughout the nation. But I have urged in any case for a different word to be used, which I think better makes the case on behalf of artists and says what they need to say more effectively in their defence. I am asking for artistic intentions to be the key criterion in all matters of classification rather than artistic merit. Artistic merit is very subjective, since we will always be divided as to which works have what degree of artistic merit. In principle, however, if a work is indeed malevolent in its intention (if you could imagine such a work) artistic merit would compensate for nothing. It may be technically very refined and propose ingenious fantasies with rich subject matter and, in at least those senses, it could be considered to have high artistic merit. But that does not mean that it is not responsible to its intentions; and if these involve purveying some kind of disgusting abuse, we are justified in not excusing them by artistic merit. Within a statement of fascism or bigotry, artistic merit will have no redemptive appeal. It is ethically inadmissible to suggest that the aesthetic should trump the moral, because otherwise we would vouchsafe anything beautiful doing any amount of harm. Instead, in the law, intention is always a critical factor; and however difficult it may be to establish artistic intention, it is much safer and more reliable than merit. In all other circumstances, the law makes decisions about the intentions of a suspected felon; and no one is found guilty unless he or she possess an evil mind (*mens rea*) over the evil deed. I cannot see how art and its legal or classificatory evaluation operate differently and see no basis for appealing to artistic merit as some kind of moral disclaimer. However, I do sympathize when arts organizations call for artistic merit to be taken into account and appreciate the good sense that they intend. They mean, more or less, that the intentions to create something artistically rigorous are reflected in the merit which one detects aesthetically. I suspect that we are essentially saying the same thing: I just wish that we could settle on artistic intention rather than artistic merit.

Q25:
Q26:

If the states could be abolished by referendum, I think that artists would be relieved. But the greatest inconsistencies among state and territory laws do not arise around classification so much as

employment, which regrettably impinges catastrophically on artists who want to include children in their work.

Q27:
Q28:

Anything that wrests power and discretion from the states is a good idea, unless, of course, it makes the provisions less liberal than in the more liberal states.

Q29:

It has to be acknowledged that the classification system that we currently have is fundamentally very good. I especially applaud the way that it does not include artworks, unless these are brought to the Film and Literature Classification Board by suspicious complainants or artists who need a pre-emptive strategy against righteous folk who will accuse them of child pornography or blasphemy or some other charge. So it also has to be acknowledged that all around this pillar of sanity there is a turbulent field of resentful campaigners eager to cleanse culture of content that is not to their taste and who appeal to community standards of decency. Since 2008, the air has been thick with talk of community standards and values being scorned by artists. The import of the discourse is classification at its extreme, that is censorship. Calls have been made from various groups that works displaying naked children should be universally censored; and these calls have had a powerful effect on Australian iconography (noted above), where there is a de facto ban on the subject matter. Similarly arbitrary and prejudicial calls have been made to ban artworks on religious grounds. It is not just a problem of children in art or children looking at art. In a famous case in 1997, Cardinal George Pell aggressively pursued the Andres Serrano exhibition at the National Gallery of Victoria because it contained a work called *Piss Christ*, which he considered blasphemous, invoking the archaic charge of blasphemous libel. Violence erupted and the exhibition was closed. This censorship was not due to classification; and it seems to me that most censorship in the visual arts that occurs in Australia has nothing to do with classification. So I would love it if the ALRC could establish guidelines on censorship, not just classification, because censorial practices are occurring throughout the country and have nothing to do with the Film and Literature Classification Board. Toward the establishment of such guidelines, I would suggest the following principles. All arguments for classification and censorship must include 1. a statement identifying the persons who need to be protected 2. an argued statement identifying the risks to such persons, remembering that risk is defined, as in all OHS cultures, as the severity of impact multiplied by the likelihood of the event occurring 3. an evidential analysis comparing the risks thus

identified with other risks in the community which are conventionally tolerated and viewed as responsible, as with sport 4. a faithful acknowledgement of the people who would be disadvantaged or aggrieved by the censorship going ahead and the work being stripped of a public life; and 5. compelling arguments intended to refute their rights to produce and enjoy the work in question. Until we have such a template, we will have nothing but chaos, in which subjective claims for artistic merit attempt to overcome arbitrary and unscientific claims for community standards. It is not enough to invoke community standards by asserting that a given community is affronted by a work and that the work therefore stands condemned by community standards. Giving offence is neither illegal nor, in any absolute sense, immoral. Any leader of a large group of people, like George Pell, undoubtedly has the authority to say that thousands of people are offended by some work (as Pell did with *Piss Christ*). But that does not constitute a legitimate case for censorship. Offending millions of people is legally no worse than offending one person: it is just that the offensive content is shared among many, which indeed could even lessen the moral impact on any given individual by virtue of the consolations available within the solidarity of a community. Offensive content, like an insult, does not in itself constitute an argument for censorship. We are constantly facing insults which are sometimes horrible; but a part of maturity is to cope with such derogation, perhaps by expressing our feelings in protest or perhaps by cultivating silent reciprocal contempt; because, as grown-ups we have the dialectical powers of language to offset and dismiss the arrogance or common wrong-headedness that is likely to come our way. We have laws to prevent vilification, which is the malicious verbal demotion of a person or community in the esteem of others, as vilification—like slander and libel—can be seen as wilfully harmful, leading to persecution and disadvantage. But we correctly have no laws against insults and most causes of offence, because they fall outside the bounds of regulation and infringe on the rights of other to speak their minds; and to introduce legislation to curb such noise is to infantilize the community. The prior issue in all cases of offence or insult is an estimation of the harm that the words cause; and without possessing evidence of harm, the insult or offensive content is trivial as grounds for censorship. Protocols for censorship should specifically exclude from acceptability any tincture of bullying. While there is political strength in numbers, there is no moral force in them; and claiming numbers has no power to augment the sense of an argument. There is a common misconception about the rights of a large number of people, namely that the preferences of the majority must prevail over the rights of a minority. Gratefully, the law is generally conceived to prevent exactly that motif; and we must follow the same rules with censorship. Unfortunately, censorship is indeed often inspired by the fear that a large number of people is offended; and the reason for this conservative reflex

is that censorship is often imposed reactively by authorities which have a greater interest in representing their local constituencies than the natural rights which all individuals ought to share on the planet. An example is a municipal council closing an exhibition because it fears the disfavour of a disenfranchised part of the electorate. So the council closes the exhibition on the basis that rate-payers' money should not be used to anger the community. Again, unless personal harm can be demonstrably added to the case, the argument on the basis of numbers does not build a compelling moral or legal case for censorship. Even though political motives will continue to flourish in governmental settings, it is important for our national cultural authorities to intercede with the provision of protocols which moderate such political reflexes and demand better reasoning. Governments may still ignore them or overrule the need to follow due process; but at least guidance has been offered where at present we have nothing but the chaos of defining community standards by the loudness of protestations from the largest number of people who can yell.

Other comments:

Dear Members of ALRC Thank you very much for the opportunity to respond to the many searching questions and for seeking public opinion, which is divided and noisy! I hope that my contribution helps. My submission to the Senate Inquiry is no. 68 at http://www.aph.gov.au/senate/committee/legcon_ctte/classification_board/submissions.htm This text gives references to previously published works on the several topics. Thanks again for the opportunity Associate Professor Robert Nelson Associate Director Student Experience Office of the Pro Vice-Chancellor Learning & Teaching Monash University Art Critic, *The Age*