NSWCCL
New South Wales Council for Civil Liberties

NSW Council for Civil Liberties Inc.

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Submission to the Australian Law Reform Commission concerning its Discussion Paper, released as part of its inquiry into the national classification scheme

The New South Wales Council for Civil Liberties (CCL) is one of Australia's leading human rights and civil liberties organisations. Founded in 1963, NSWCCL is a non-political, non-religious and non-sectarian organisation that champions the rights of all to express their views and beliefs without suppression. The NSWCCL believes that freedom of expression (and freedom of political communication in particular) is fundamental to the functioning of a successful democratic society and an Australian ideal upheld by both tradition and law. A citizenry well-informed by a range of competing ideas and a variety of information will always be better equipped to deal with challenges posed by people who oppose Australia's liberal democratic tradition. To this end the NSWCCL attempts to influence public debate and government policy on a range of human rights issues by preparing submissions to parliament and other relevant bodies. For the past forty-five years the NSWCCL has monitored censorship in Australia and spoken out when paternalistic determinations threaten to prevent people in Australia from viewing material available in countries around the world.

CCL thanks the Law Reform Commission (ALRC) for the opportunity to make input provided by its release of the Discussion Paper (the Paper).

Overview

CCL endorses the ALRC proposal at 4.16, that adults should not only be able to read, see and hear what they want, but that this principle should extend to a more general right to communicate, which includes the right to participate in the media of their choice and to be the producers and senders as well as the receivers of information and media content. This principle should inform the law.

In general, the CCL supports the proposal for a new National Classification Scheme, based on a new Classification of Media Content Act (the new Act).

We agree with the arguments supporting a single national scheme with a uniform set of requirements and penalties across all states and territories, for the reasons set out in the Paper. We find it unsatisfactory that activities that are acceptable in one state or territory are illegal in another.

We accept, reluctantly, that the proliferation and convergence of media requires that a common set of criteria for classification be adopted across present and future media types.

Our principal concerns, as a Council for Civil Liberties, are with the restrictions to be placed upon adults' access to media, and especially with the criteria for the RC category and the arrangements for review of classification decisions.

Recommendations

1. Unless the making of a film or other item involves the makers inflicting grave harm upon the actors or actual child abuse, adults should be able to view it.

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2. If other criteria are to be used, classification should not be refused to works which are of substantial and serious intent merely because of the presence of a relatively small amount of material. Rather, it is the overall intent and effect of the works that should be given primary consideration during classification.

3. The Classification Review Board should be retained.

4. There should continue to be the opportunity for persons aggrieved by a decision to appeal to the Review Board.

5. Research on community standards should examine whether there is a common community understanding of the relevant facts and principles, not emotional reactions.

The Classification Review Board

The CCL is appalled at the proposal to abolish the Classification Review Board. In our experience, the Review Board has served a vitally important function.

The Classification Board wields considerable power, and will continue to do so if the ALRC proposals are adopted. It must be possible for its exercise of that power to be properly reviewed on the merits of the cases. This role cannot possibly be performed by members of the Classification Board.

The Classification Review Board is not merely there to look out for mistakes in the application of the law, but to provide independent input into the interpretation of the Act—input which reflects community standards.

The members of the Classification Board are full time officials. They work together. They do an important job, carefully, but it is inevitable that, over time, they develop a culture which affects their decisions. A review of a decision carried out by members of the Classification Board itself, however faithfully and carefully it is done, must tend to adopt the reasoning of the original decision.

The ALRC Discussion Paper attempts to answer this with the assertion that if the legislation gives the Board multiple roles, this will exclude the application of the legal rule concerning the apprehension of bias. This however misses the point. The concern is not the legal matter, but a real moral concern about real human failings. Tricking up the legislation to avoid judicial censure does not make this problem go away—it only makes it harder to solve. The problem is to have reviews that are independent of the original decision makers, and, as far as possible, are independent of the Attorney General's Department. And they should be seen to be so independent.

The problem of obtaining independent members of the Classification Board to sit as a review panel is compounded if it is borne in mind that it is the practice, properly, to seek the views of an augmented

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number of assessors whenever a ground-breaking or otherwise contentious film or publication is being considered.

The Discussion Paper tells us that reviews take a long time. Collectively we have had some experience with reviews. It is not our experience that the time is excessive; and where an urgent resolution was needed, the Review Board has been accommodating. In any case, given the importance of the issues involved, nobody would want ill-considered decisions.

The Discussion Paper avers that the members of the Review Board, being employed part time, do not develop expertise—especially in that they have limited exposure to certain kinds of content. The Guidelines tell a different story:

> The Review Board is intended to be a team of people who can reflect the opinions of ordinary members of the community, articulate their views, appreciate the views of others and be flexible enough to modify those views as a result of discussion with colleagues. The Review Board is not intended to be a team of classification experts.[1]

It is the job of the Review Board to provide a different kind of expertise—their ongoing knowledge of the world outside the confines of officialdom. It is important, for this reason, that the members of the Review Board include people with a broad range of backgrounds—a factor which should be, and is, taken into account when they are chosen. And they can, and perhaps should, include persons with extensive knowledge of one of the media they have to judge and especially of the audience for that medium. (The Australian Council of Film Societies, for example, might be requested to nominate an appropriate person.)

The Review Board decisions have to do with contentious material—and the contention may be because the cases are marginal, because the material excites passions, or because there are differences of view about the facts—the likely impact and the effects of refusing classification. A special kind of expertise and a special kind of person are needed.

The Discussion Paper also notes that organising meetings of part-time members takes time and costs money, especially since they come from different states and territories. The Review Board considers only a few items each year. It is surprising then to learn from the Discussion Paper that it is so expensive. It may be that the processes could be done more efficiently—perhaps by having a range of people from one state selected by different organisations. At any rate, the focus should be on efficiency, rather than abolishing the Review Board.

We understand that the reason for selecting the members from different states and territories is political—to secure the cooperation of the various governments. Is it hoped that the cooperation will continue without the representation?

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[1] Guidelines for the Selection of Members of the Classification Review Board

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Who may apply for a review of classification?

The Classification (Publications, Films and Computer Games) Act 1995 (Cth) (the existing Act) allows a person aggrieved by a decision of the Classification Board to seek a review of that decision (in addition to the Minister responsible for that act, the publishers of the material classified and the applicants for its classification).

The Paper proposes[2] that that category should be restricted 'to defer potentially vexatious or speculative applications that may compromise the review process or result in delays that adversely affect the original applicant'.

The Paper declares that the narrowing would have to have regard to natural justice and procedural fairness to those 'who may be affected by a decision'.

Now the existing Act specifies that, without limiting the class of persons affected, '(a) a person who has engaged in a series of activities relating to, or research into, the contentious aspects of the theme or subject matter of the publication, film or computer game concerned' and '(b) an organisation or association, whether incorporated or not, whose objects or purposes include, and whose activities relate to, the contentious aspects of that theme or subject matter' are taken to be persons aggrieved by a restricted decision.[3] Those permissions should remain.

But *everyone* is affected by a decision to prohibit adults from seeing a film or reading a book. This is especially the case when the material has to do with political ideas, such as injunctions to commit crimes based on religious or ideological positions. As CCL argued to the Review Board in 2006, 'A citizenry well-informed by a range of competing ideas and a variety of information will always be better equipped to deal with challenges posed by people who opposed Australia's liberal democratic tradition. Trying to fruitlessly repress access to political opinions, however disturbing they might be, not only limits the rights of people in Australia to see and hear what citizens in democracies around the world might see and hear, but ultimately makes Australia less safe by keeping people informed as to what motivates others' view[s to be] different from our own…. Throughout the last century, open and honest discourse triggered by controversial films and literature have only served to strengthen the liberal Western tradition in the face of competing views from other societies.'[4]

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[2] at 7.96

[3] Subsection 42 (3). A restricted decision is a classification which restricts the audience that may view a film or read a book, participate in a web based discussion or play a game. CCL's principal concern is with the classification of items RC.

[4] Stephen Blanks, June 2006: Submission for CCL to the Classification Review Board in relation to the classification of two items of Islamic literature, p1ff.

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It is crucial therefore that challenges can be made to a Review Board by organisations whose functions include defending the right to see and hear controversial material, and by persons concerned to do the same.

Under the present Act, the Review Board has the power to declare an application for review frivolous or vexatious; and it must make a decision within twenty business days of receiving an application.[5] There is also a limitation of thirty days after a decision by the Classification Board within which a submission for review must be lodged. That is the way to avoid an excess of applications, and to ensure that delays do not unduly adversely affect the original applicant. It appears to be working.

Reviews of Community Standards

CCL supports the proposal that there be regular reviews of community standards. For while community standards are not a good indication of what should be made available—for one thing, like "common sense", they are likely to be informed by beliefs that have not been proven or have been disproven—they are commonly appealed to support classification policies. We might as well at least find out what they are.

We caution however that such reviews should not be centred on what people in sample groups find offensive. That is too subjective a standard.[6] They might rather be asked if there are good reasons for objecting to content, what they are and what should follow about access restrictions.

Refusal of Classification

(i.) Criteria

It is CCL's view that unless the making of a film involves the filmmakers inflicting grave harm upon the actors (snuff movies or movies involving real child sex abuse being the obvious examples), adults should be able to view it.

If this recommendation is rejected and current criteria remain, them since refusing classification is such a serious matter, CCL submits that classification should not be refused to works which are of substantial and serious intent merely because of the presence of a relatively small amount of material. Rather, it is the overall intent and effect of the works that should be given primary consideration during classification.[7] Each book, film, website, game or other item should be analysed as a whole in order to maintain justice and fairness in classification.

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[5] Section 87B

[6] CCL does not take a stand on whether or to what extent moral and other value judgements are subjective. We note however that they can be argued for, and the arguments can be poor, good or conclusive.

[7] For further discussion of this point see the NSWCCL submission to the review by the Department of Broadband, Communications and the Digital Economy 2010.

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We note that at 10—84, the Paper proposes that when material is classified as RC, the classification decision should state whether its content comprises real depictions of actual child sexual abuse or actual sexual violence. If those were to be the only criteria for the RC classification, that would be a distinct improvement.

The ALRC does not appear to have proposed what other criteria there should be, nor to be sure how to decide. It appears that its final paper will draw on the pilot study of current community attitudes. If that is so, then our comment above about offensiveness takes on added significance.

(ii.) Offense and standards

Attempts are made to reduce the arbitrariness of appeal to offense or offensiveness by reference to reasonableness. Thus the Broadcasting Services Act includes in its objects clause an intention to 'restrict access to certain internet content that is likely to cause offence to a reasonable adult'. The phrase 'reasonable adult' is intended to take account of the fact that people's response to media content can by arbitrary, affected by their most recent experiences, to whom they are talking, their inflamed passions, their rebellious attitudes, moral panic campaigns, or what a radio talkback host has said that morning. Notoriously, criticisms of religious figures or attacks upon religious literature are thought to be offensive by otherwise reasonable people.

We note the ALRC's reference to a remark by The Hon. Daryl Williams that

> the 'reasonable adult' test is used in two different senses—as a measure of community standards and also as an acknowledgment that adults have different personal tastes ... In other words, although some reasonable adults may find the material offensive, and thus justify a restricted classification for it, others may not.[8]

Thus the problem is not resolved by the phrase. What should be required is that offense must be based on reasoning which itself is rational.

Now there can be good reasons why material is found offensive. That is to say, offense may not only be reasonable, but well reasoned. In that case, it is the reasons, and not the offense, not the reaction, which carry weight. Further, a person may think material to be highly morally objectionable without feeling any offense at all.

The Guidelines for the Classification of Films and Computer Games define 'offensive' as 'causing outrage or extreme disgust'. That is better—but even if 'to reasonable adults' were added, similar problems apply. The attempt to resolve moral problems by appeal to the emotions of adults is a

[8] Quoted at 4.23. The notion that plays films or books might be banned because of personal tastes is alarming.

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mistake. Determination of what is to be classified should go to the reasons, not to the effects of the reasons.

The reasons will consist of factual beliefs, and moral principles. An obvious example may make the argument clearer. The depiction of child sexual abuse is to be banned, not because it offends people, but because the abuse causes lasting harm (the factual belief) and doing so is seriously wrong.

As soon as the principles are made clear, exceptions will be able to be found. Depiction of underage sex, even if simulated by actors who are themselves of age, may be objected to. But then Romeo and Juliet would have to be an exception. Arguments urging criminal acts are objected to. But they appear in the movie Snowtown, and are important in its attempt to provide understanding of how a young man could end up involved in multiple murders. Similar points can be made about other proposed criteria.

It is of the nature of moral principles that they have to be balanced against each other; and that sometimes one completely over-rules another. Thus (at least) almost all of them have exceptions. The use of the terms 'offense' and 'offensive' is an attempt to dodge this complexity. It fails.

CCL agrees with the objections to existing criteria on pages 175-183 of the Paper. Rather than repeating the criticisms made there, we would be happy to discuss specific matters, if the ALRC should so desire.

Consistently with what we have argued, we note that that the objection we have to the depiction of real child sex abuse is not that it is 'so contrary to both criminal law and community standards that it should be banned outright'[9], but that child sex abuse has been shown to cause lasting harm to defenceless children.

Exempt Content and Retrospective Criminalisation

CCL applauds proposal 6—3, that the new Act should provide a definition of 'exempt content' which would include, along with the existing exemptions, items shown at film festivals, art galleries and other cultural institutions. These institutions provide important opportunities for adults to see items that are not otherwise available in Australia, but which contain significant ideas or promote empathy and/or understanding of other people and their predicaments. They can play an important civilising and educational role.

We applaud also the proposed requirement (6—6) law enforcement bodies should not be able to charge people with an offence relating to dealing with content that is likely to be RC, to require people to stop distributing content or from adding the content to the RC Content List until it has been submitted for classification. To provide otherwise is, in effect, to permit retrospective criminalisation.

[9] Discussion Paper, at 10.82

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It is important also that law enforcement officers are not involved in decisions about what is to be censored, and what is to be restricted to adults or to young people.[10] The moral panic generated last year about the Bill Henson photographs was largely dissipated once the Classification Board rejected claims that they were pornographic. But by then police had impounded some of these works of art and prevented others from being displayed. What was clear was that police are not experts in classification; nor are they representative of the community.

Decisions about what people are not to be permitted to see, hear, participate in or play with should be made in public, be open to debate, and be able to be challenged. Anything else is a threat to democracy.

Martin Bibby
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[10] persons aged 15 to 17.