

Standing Committee on Social Issues

**Inquiry into Classification
(Publications, Films and
Computer Games)
Enforcement Amendment
Bill 2001**

Interim Report: Off-line
Matters

Ordered to be printed according to Resolution of the House
dated 14 March 2002

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Terms of Reference

INQUIRY INTO THE CLASSIFICATION (PUBLICATIONS, FILMS AND COMPUTER GAMES) ENFORCEMENT AMENDMENT BILL 2001

TERMS OF REFERENCE

1. The Standing Committee on Social Issues is to inquire into and report upon the scope and operation of the Classification (Publications, Films and Computer Games) Enforcement Amendment Bill 2001 with regard to:
 - (a) Whether the provisions of the Bill meet its stated policy objectives,
 - (b) Whether the provisions contained in Schedule 2 of the Bill provide an effective and enforceable regime for the regulation of on-line material,
 - (c) The social and legal impact of the on-line regulation of offensive material, and its implications for fair reporting of news and current affairs and legitimate Internet use, and
 - (d) Any related matter.
2. That the Committee provide a final report to the House by 7 June 2002.¹

Committee Membership

Jan Burnswoods MLC Australian Labor Party Chair

The Hon Doug Moppett MLC National Party Deputy Chair

The Hon Dr Arthur Chesterfield-Evans MLC Australian Democrats Member

The Hon Amanda Fazio MLC Australian Labor Party Member

The Hon Ian West MLC Australian Labor Party Member

¹ Referred by the Hon Bob Debus MP, Attorney General, Minister for the Environment, Minister for Emergency Services, and Minister Assisting the Premier on the Arts on 5 December 2001.

Chair's Statement

I present this report to the House in accordance with the resolution of the Committee dated 14 March 2002.

Jan Burnswoods, MLC

Chair

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Chapter 1 Schedule 1: Off-line Matters

Introduction

- 1.1** The Committee has decided to release this interim report in response to concerns about the effect of delay in the commencement of Schedule 1 of the *Classification (Publications, Films and Computer Games) Enforcement Amendment Act 2001* (NSW).² Schedule 1 does not relate to Internet content.
- 1.2** The Committee reserves any comment in their report on the appropriateness or otherwise of proposals for regulation of Internet content. These proposals, which are contained in Schedule 2 of the Act, will be considered in our final report.

Background

The Amending Act

- 1.3** The *Classification (Publications, Films and Computer Games) Enforcement Amendment Act 2001* (NSW) (the Amending Act) contains proposed changes to the *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (NSW) (the Principal Act) which forms part of the national co-operative scheme for classification of publications, films, computer games. Under the co-operative scheme, classification decisions are made by the Commonwealth and enforcement of these decisions is the responsibility of States and Territories. The Principal Act therefore outlines a range of classification offences such as failing to display a notice explaining the classification of items, or the exhibition of an unclassified film.
- 1.4** The Amending Act is divided into two distinct sections:
- *Schedule 1* contains a range of largely technical and procedural amendments to the Principal Act dealing with classification of publications, films and computer games. These amendments do not apply to on-line content.
 - *Schedule 2* establishes a range of offences in relation to the provision of material over the Internet that is, or would be, classified R, X or refused classification (RC).
- 1.5** The Amending Act passed both Houses of the NSW Parliament in late 2001 and has received the Governor's assent. However it will not come into effect until a date for commencement is set by Proclamation. The Government has undertaken to ensure that the Act will not be proclaimed until the Committee has released the final report of this inquiry. In effect, this means that the existing law in New South Wales will not change

² The Committee's terms of reference and the title of the inquiry refer to the *Classification (Publications, Films and Computer Games) Enforcement Amendment Bill 2001*. However the Bill became an Act on receipt of the Governor's assent on 11 December 2001.

until the Government has had an opportunity to consider this Committee's recommendations.

The Inquiry

- 1.6** While the entire Amending Act has been referred to the Committee, this inquiry arose out of concerns about the proposed model for regulation of on-line content contained in Schedule 2. The terms of reference, which require an examination of the social and legal impact of the regulation of the on-line regulation of objectionable material, are directed largely towards Schedule 2.
- 1.7** The committee has received 37 submissions and has held two initial public hearings on 5 and 6 March 2002 at Parliament House in Sydney. The overwhelming majority of submissions received deal solely with Schedule 2 and related issues arising out of the regulation of on-line content. Similarly, most evidence taken to date has focused on Schedule 2.
- 1.8** However, the undertaking to defer proclamation of the Amending Act until this Committee reports will delay the commencement of Schedule 1. Concerns have been raised about the consequences for regulators of off-line material and for affected community members such as retailers and distributors of delaying the proclamation of Schedule 1 until this inquiry is finalised.
- 1.9** The Committee therefore deals only with Schedule 1 in this interim report. Issues relating to regulation of on-line content as proposed by Schedule 2 will be dealt with in the final report.

Description of Schedule 1

- 1.10** Schedule 1 contains a range of provisions that complement the Commonwealth *Classification (Publications, Films and Computer Games) Amendment Act (No 1) 2001*. These amendments have been agreed to by the Standing Committee of Attorneys-General representing Commonwealth, State and Territory censorship Ministers. Similar amendments have been passed by legislatures in all States and Territories except Western Australia, where they are still before the Parliament.³
- 1.11** In the main, these provisions are designed to ensure that the co-operative classification scheme works effectively. They deal with issues such as the power of the Director of the OFLC to call in publications, films and computer games for classification; the establishment of a period of grace for reclassification of publications, films and computer games; obtaining copies for review and conditions for sale of publications. Apart from the two matters outlined below, inquiry participants have raised no substantive issues regarding Schedule 1.

³ Mr Des Clark, Director of the Commonwealth Office of Film and Literature Classification (OFLC) told the Committee in evidence that the Western Australian amendments are expected to pass both Houses of Parliament in the near future: Clark, evidence, 5 March 2002

Consequences of delays in commencing Schedule 1

- 1.12** The complementary amendments to Schedule 1 in other States and Territories and the Commonwealth will commence operation on 22 March 2002. The Director of the OFLC, Mr Des Clark, advised the Committee that if Schedule 1 does not commence at the same time as in other States and Territories then there will be difficulties for the enforcement of some aspects of classification law. These include the enforcement of conditions set by the OFLC relating to sale of restricted publications or decisions by the Director to call in items for reclassification. Delay in commencing Schedule 1 would also make NSW law inconsistent with Commonwealth law in certain areas.

Exemption provisions for films and computer games

- 1.13** An important feature of Schedule 1 is that it will enable certain types of films and computer games to be exempted from the operation of the Principal Act. A proposed change to Section 4(1) of the Principal Act will mean that exempt films and computer games will not need to be classified prior to their publication or release in New South Wales.
- 1.14** Exempt films and computer games are currently defined in Section 5B of the Commonwealth *Classification (Publications, Films and Computer Games) Act 1995* and include:
- business, accounting, professional, scientific, educational, current affairs, hobbyist, sporting, family, live performance, musical presentation, religious and community or cultural films and business, accounting, professional, scientific and educational computer games.⁴
- 1.15** Under the Commonwealth Act, films are not exempt if they contain material that would be likely to be classified M or higher. Similarly computer games are not exempt if they contain material that would be likely to lead to a classification of MA(15+) or higher.
- 1.16** The Committee was told that recognition of these exemptions in New South Wales will be particularly valuable for films and computer games that are non-commercial or have marginal commercial value. They will also be relevant for cultural events like the Sydney Film Festival.
- 1.17** Currently, the Principal Act places a blanket prohibition on the sale or exhibition of unclassified films and computer games in New South Wales. Films and computer games must therefore be submitted for classification at the producer's or distributor's expense prior to release. The Australian Visual Software Distributors Association noted that, even for large organisations, the associated costs and delay can restrict the range of product that is available to residents of NSW.

For example Warner Music does a lot of music product and a lot of it is pretty marginal. The cost of classification makes it not viable to sell, ... that limits the

⁴ Classification (Publications, Films and Computer Games) Enforcement Amendment Bill 2001, *Explanatory note*, p.3

range of product that they can sell. Being able to avoid the \$2,000 classification fee is a big deal. Often we tend to think that a fee of a couple of thousand dollars will be nothing to a multinational company, but it is the difference between making a range of products available to the consumer or not.⁵

- 1.18** The Committee notes that the type of material covered by the exemptions is unlikely to raise concern in any sector of the community, and there are important cultural benefits in ensuring that these types of exemption are available to exhibitors and distributors in New South Wales.

Concerns with Schedule 1: Penalty Notice provisions

- 1.19** Only one significant objection was raised in relation to a provision of Schedule 1. The Schedule proposes to insert a new section 61A into the Principal Act that would enable a penalty notice, or fine, to be issued for some classification offences. According to the second reading speech these are intended for minor classification offences and would improve the enforcement of the Principal Act by attaching immediate financial penalties such offences:

Presently offences under the Act must be prosecuted through the court system when enforcement action is undertaken. This can be a time-consuming and costly process. Under the proposed scheme, offenders who receive a penalty notice will have the option of paying a fine rather than having to attend court. A person who disputes the allegation will, of course, be able to put the prosecution to proof in the ordinary way.⁶

- 1.20** Under the proposed amendment it will be open to any person who receives a penalty notice to not pay the fine. The person who issues the notice will then have to commence court proceedings to enforce the Act.
- 1.21** Proposed section 61A does not specify the offences for which a penalty notice could be issued or who will be authorised to issue these notices. These matters are left for the regulations which are not yet available for comment.
- 1.22** The Arts Law Centre of Australia and Electronic Frontiers Australia have raised concerns that section 61A could enable a person to be penalised for a classification offence before the material is actually classified. According to the Arts Law Centre, this could result in people without specialist classification skills, such as police officers, making classification decisions and issuing fines. The Arts Law Centre suggested that this is not a suitable way of dealing with alleged classification offences:

Allegations of classification offences are markedly different from more factually simple offences where penalty notices are regularly used (such as parking

⁵ Simes, Australian Video and Software Distributors Association, evidence, 5 March 2002

⁶ Second Reading Speech, *Classification (Publication, Films and Computer Games) Enforcement Amendment Bill*, Legislative Assembly, 7 November 2001

infringements). In comparison, the issues that are required to be considered in classifying material are discretionary and complex.⁷

- 1.23** The Arts Law Centre noted that the classification guidelines can be difficult to apply, particularly in matters relating to the fine arts.
- 1.24** Electronic Frontiers Australia also raised a concern about the use of regulations to determine what matters would be subject to a penalty notice. According to Ms Irene Graham from Electronic Frontiers Australia, this would take the matter out of the scrutiny of Parliament. The Committee acknowledges these concerns, but notes that regulations in New South Wales are subject to scrutiny by the Regulation Review Committee. Regulations may also be disallowed by either House of Parliament. This provides sufficient opportunities for parliamentary oversight of any regulations.
- 1.25** The concerns of the Arts Law Centre are potentially more significant. Some types of offence under the Principal Act do not require any classification decision to be made in order to prove the offence. These include matters such as failure by cinema owners to display an approved notice about the classification scheme from films.⁸ Other offences relate to material that has already been classified for example, screening an unclassified film, or failure to ensure that previously classified films, publications and computer games are properly packaged. In these cases, it is a simple question of fact as to whether or not the offence has occurred. Police, or other approved officers, would not need to exercise subjective judgement about the potential classification of material and the offences are relatively minor. Such minor offences, based on clear determinations of fact, like parking fines, are appropriately dealt with by penalty notices.
- 1.26** However, the Principal Act also includes offences that relate to material that has not been classified, but would, if classified, be restricted in some way. These include the sale, delivery or display of 'submittable publications'. Submittable publications are publications that are not classified, but which are likely to cause offence to a reasonable adult to the extent that the publication should not be sold as an unrestricted publication.⁹ Under the existing scheme of the Principal Act proceedings for an offence involving such unclassified material cannot commence until the material has been classified. Section 59 relevantly provides:

59 Commencement of proceedings

- (1) proceedings for an offence under this Act in relation to a film, publication or computer game that is unclassified at the time of the alleged offence:
- (a) are not to be commenced until the film, publication or computer game has been classified, ...

⁷ Submission 35, Arts Law Centre of Australia, p 2

⁸ Principal Act, Section 8

⁹ Principal Act subsections 19(1)(a); s 25(1)(a). The definition of 'publication' in the Act includes any pictorial matter other than films, computer games or advertisements for publications, films or computer games.

- 1.27** Given the complexity of some classification decisions, this requirement ensures that the prosecution has proper evidence before proceeding with the prosecution. The expense of classification is also borne by the prosecution. Prior classification of material avoids the expense and inconvenience of litigation for all parties.
- 1.28** This position could be reversed in relation to the issue of penalty notices for these offences. There is nothing in proposed section 61A that would preclude the issue of a penalty notice for material that is yet to be classified. If the person who received the notice elected to have the matter heard by a court, then the material would have to be classified before the commencement of proceedings. If the classification decision showed that the material was not in any way restricted, then the person would theoretically not be any worse off. However, many people may be unaware that an election to have the matter heard by a court would entitle them to have the material classified before the prosecution commences.
- 1.29** For many, court proceedings are daunting and the prospect of court action could act as an incentive to pay the fine in order to finalise the matter. According to the Arts Law Centre, these concerns may be particularly significant for artists who deal with controversial themes:
- [T]he issuing of a penalty notice based on judgmental error in applying the guidelines, has the potential for inconvenience, expense and humiliation both to a defendant individually and to the arts community as a whole.¹⁰
- 1.30** The Committee is not sure that there was ever any intention for offences involving unclassified material to be subject to penalty notices. This intention does not seem to be reflected in the stated policy objectives in the Bill's second reading speech. The overall scheme of the Act provides that material must be classified before a person is subject to sanctions for the inappropriate publication of restricted material.
- 1.31** The Committee is aware that difficulties with proposed section 61A are likely to be of concern only to people working in the visual or literary arts who deal with controversial subject matter. However, they could act as a deterrent to legitimate creative activity. It would be a relatively simple matter to amend the proposed section to ensure that it is consistent with the existing requirement in section 59(1)(a) of the Act that material be classified before a prosecution commences.
- 1.32** We appreciate that it would not be possible to amend proposed section 61A before 22 March 2002 yet delaying the proclamation of Schedule 1 beyond that date will have other consequences. We therefore suggest that 61A be amended at a later date. The Committee also recommends that no offences relating to unclassified material be set out in the regulations until the amendment to Section 61A commences.

¹⁰ Submission 35, Arts Law Centre of Australia, p 2

Conclusion

- 1.33** While noting concerns about the operation of section 61A, the Committee is persuaded that it is in the public interest to ensure that Schedule 1 of the Amending Act commences operation as soon as possible. The Committee considers that proposed section 61A of the Principal Act should be amended so that a penalty notice cannot be issued in relation to unclassified material. Until such an amendment comes into effect, the Committee considers that no regulations should be proclaimed that allow penalty notices to be issued in respect of unclassified material.

Recommendation 1

Schedule 1 of the *Classification (Publications, Films and Computer Games) Enforcement Amendment Act 2001* (NSW) should be proclaimed to commence by 22 March 2002 or as soon as practicable thereafter.

Recommendation 2

Proposed section 61A of the *Classification (Publications, Films and Computer Games) Enforcement Act 1995* should be amended in terms similar to existing Section 59(1)(a) so that penalty notices cannot be issued for unclassified publications, films or computer games.

Recommendation 3

No regulations relating to the issuing of penalty notices for unclassified publications, films or computer games should be proclaimed until after the proposed amendment to Section 61A in Recommendation 2 commences.
