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Censorship: Law and Administration

by

Gareth Griffith

Background Paper

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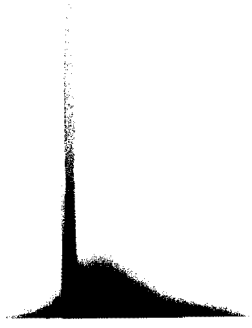

The Author

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In 1993 Routledge published Gareth's study of Bernard Shaw's political ideas entitled *Socialism and Superior Brains: the Political Thought of Bernard Shaw*.

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Abbreviations

ACT Ordinance	-	Classification of Publications Ordinance (1983) (ACT).
FCB	-	Film Censorship Board.
FLBR	-	Film and Literature Board of Review.
OFLC	-	Office of Film and Literature Classification.

1 Introduction

The main purpose of this Background Paper is to offer an account of how the system of censorship operates in Australia today. The focus is on the legal and administrative framework. The paper deals therefore with processes before outcomes, with public administration more than public philosophy.

The substantive issues of censorship, notably pornography and violence will be dealt with later in a separate Background Paper.

In this paper an account of the legal and administrative framework and processes is developed in relation to the censorship of films, videos and literature. 'Literature' is used here more or less interchangeably with 'publications' which is the term preferred in the statutes.

The paper starts with a brief historical overview and analysis of the censorship system, followed by sections outlining the current framework of law and administration in this field. It is written in the context of the likely implementation of the recommendations of the Law Reform Commission's 1991 Report on Censorship Procedure.

2 Historical Perspective

Overview: Federal, State and Territory Governments all have powers over the censorship of films and publications. From this division of power has developed a complex network of laws. As is to be expected these have changed considerably over the years as new technologies have emerged and shifts in community standards have posed novel problems for regulation.

What has remained relatively constant is the broad division of labour between the Commonwealth and State authorities. Whilst the Commonwealth has no direct head of power over censorship, the fact that most films and publications are imported has given it an important role in the field. At the Federal level censorship is maintained under Regulations passed pursuant to the Customs Act and by various arrangements with the States. Delegation to the Commonwealth of film censorship functions, including classification, occurred in the late 1940s and early 1950s.[1] The relevant authority was the Film Censorship Board, first established in 1917. After 1956 the Board also examined and classified films for

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[1] Film Censorship Board, *Report on Activities 1980*, at 3. The Report states that, 'In 1949, Western Australia, Queensland and Tasmania signed agreements with the Commonwealth which delegated their film censorship powers and functions to the Commonwealth. The other States eventually followed suit'.

television applying the Program Standards of the Broadcasting Control Board, a function it retained till 1986. In 1988 the Film Censorship Board was incorporated for administrative purposes into the Office of Film and Literature Classification. At present the statutory functions of the Board are broadly these:

- registering or refusing to register films for public exhibition under the *Customs(Cinematograph Films) Regulations*;
- making decisions relating to the prohibition of films under Regulation 4A of the *Customs(Prohibited Imports) Regulations*;
- classifying or refusing to classify films and videos for sale or hire under the ACT *Classification of Publications Ordinance 1983*;
- by nomination under State Acts exercising film and video classification functions on behalf of the States; and
- approving or refusing to approve advertising material for films and videos.

Decisions of the Film Censorship Board (the FCB) are reviewed on appeal by the Film and Literature Board of Review (formerly the Films Board of Review). Since 1991 only two States, South Australia and Western Australia, have provided for the possibility of independent review.

Five categories of classification apply to films and videos. The 'G' classification is for General Exhibition and encompasses both children's films and such adult material as *Driving Miss Daisy* and *Howard's End*. The 'PG' classification advises parental guidance for children under 15. From a developmental standpoint this is of course a very broad class of persons. As a result films in this category tend to be equally broad in their scope and nature, from something as innocuous as *Hook* to such a powerful drama as *The Power of One*. The 'M' classification advises that the film is not recommended for viewing by those under 15. The restricted categories are 'MA' and 'R', the first requiring children under 15 to be accompanied by a parent or guardian, the second being restricted to persons over 18. The 'MA' was introduced in 1993 primarily as a response to the violence found in the former, very broad 'M' classification. However neither the 'MA' nor the 'R' categories are concerned exclusively with violent material. An additional category operates for videos, namely the 'X' classification under the ACT *Classification of Publications Ordinance 1983*, again restricted to persons over 18 and only available in the States by mail-order. The material in this category can be characterised as hard core non-violent erotica or pornography.

Historically, the situation as regards literature censorship was more complex and in some respects remains so today. Similar importation

Regulations apply, namely the *Customs (Prohibited Imports) Regulations*, and again these have allowed the Commonwealth to participate in this field of censorship. Running parallel to the Commonwealth regulations were State laws. The result was the creation of a two-tier system where publications which had survived one hurdle could fall at the next.[2] Proposals to introduce uniform censorship for literature were put forward in the late 1960s. The same proposal is found in the Australian Law Reform Commission's 1991 Report on Censorship Procedure.[3]

At present the bulk of literature classification is undertaken by Publications Officers working in the Office of Film and Literature Classification, an agency of the Commonwealth Government. It would seem that their decisions tend to be accepted by those States participating in the scheme as a matter of course. However two States, Western Australia and Tasmania, continue to operate their own schemes and all States provide independent statutory mechanisms for classification and review. For example, New South Wales has its own Publications Classifications Board.

Publications are classified under three categories, namely, Unrestricted, Category 1 and Category 2. The last two are restricted to persons over 18. Category 1 material can only be exhibited in a public place if contained in a sealed package; Category 2 material can only be exhibited or displayed in a 'restricted publications area'.

Whereas publications are classified at present on a voluntary basis in the sense that publishers are not compelled by law to submit material for classification, the classification of films and videos is compulsory. Publications not submitted for classification may run the risk of prosecution.

The role of the courts: A major difference between film and literature censorship in Australia is that the courts have played almost no part in the regulation of films. This contrasts with the more active judicial role in relation to literature. It is in this context therefore that the legal tests applying to censorship in Australia have been developed. Traditionally these were based on concepts derived from nineteenth century England. Most important was the following definition of obscenity formulated by Chief Justice Cockburn in *Hicklin's Case* of 1868:

> I think the test of obscenity is this, whether the tendency of the matter charged as obscene is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall.[4]

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2 An example was the banning by a Victorian magistrate in 1960 of Erskine Caldwell's *God's Little Acre*.

3 The Law Reform Commission, *Report No 55: Censorship Procedure*, 1991.

4 (1868) LR 3 QB 360.

Regarding the 'deprave and corrupt' test, commentators note that it has been treated by the courts as a legal fiction.[5] The point is reflected in Windeyer J's judgement from the landmark 1968 High Court case of *Crowe v Graham* where his Honour states:

> Courts have not in fact asked first whether the tendency of a publication is to deprave and corrupt. They have asked simply whether it transgresses the bounds of decency and is properly called obscene. If so, its evil tendency and intent is taken to be apparent.[6]

The community standards test: On this basis Windeyer J went on to formulate the alternative 'community standards' test. The core elements of the judgement are:

- obscenity is merely an intensified form of indecency,
- obscenity is used to describe things which are offensive to current standards of decency and not things which may induce sinful thoughts,
- the law will abandon the paternalistic attempt to protect morality in relation to literature and film, confining itself instead to the protection of decency,
- the standard of decency is the contemporary standard which 'ordinary decent-minded people accept',
- obscenity/indecency is a question of fact to be decided upon by the relevant Tribunal on the evidence of the publication itself,
- extraneous matters are to be treated with caution by the Tribunal, including decisions made in other countries and the opinion of experts,
- the intended audience is important in as much as the Tribunal is to have regard to the question of 'the persons, classes of persons and age groups to whom or amongst whom the matter was published', and
- following from this the standard of decency is one which varies with the circumstances. As Dr J J Bray, then Chief Justice of South Australia explained, 'a book which would offend community standards of decency if displayed in the bookshop might escape if it were kept under the counter and sold only to a genuine adult enquirer'.[7]

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5 G Williams, *Criminal Law: The General Part* (2nd ed 1961) at 7.

6 (1969) 121 CLR 375.

7 J J Bray,'The Juristic Basis of the Law Relating to Offences Against Public Morality and Decency', (1972) 46 *ALJ* 100 at 107.

One immediate implication of *Crowe v Graham* was that it seemed more consistent with the then statutory test in which a publication was said to be obscene if it 'unduly emphasizes matters of sex, crimes of violence, gross cruelty or horror'.[8]

More important for the future was that the case pointed the way towards reform of the conceptual basis of the censorship system in keeping with trends in society at large. Offensiveness was the key concept within this revised scheme of things, something which was to be understood contextually and judged in terms of the likely degree of offence to the reasonable adult.

The censorship debate in the 1960s: *Crowe v Graham* was part of the wider debate on censorship which occurred in Australia (and beyond) in the 1960s. What developed at that time was widespread criticism of a system perceived by many to be anachronistic and repressive in nature. Critics used such terms as 'cultural despotism'[9] and 'moral protectionism'[10] to describe the outcomes and processes at work in the censorship of films and publications. Outrage was expressed at the banning of works by such authors as Nabokov, Salinger, Lawrence, Mary McCarthy, William Burroughs, Philip Roth and Gore Vidal.[11] One focus of public controversy surrounded the 1965 *Oz Trial* in New South Wales, a case which went to the Court of Criminal Appeal after the Chairman of Quarter Sessions found that the February 1964 issue of the magazine 'contained certain bawdy and indecent words and other material which might well appear to some readers to be offensive, lewd and in bad taste'.[12] The interventionist approach to the censorship of films was encapsulated in the Commonwealth Censor's banning of horror films as 'undesirable in the public interest'.[13]

Competing views were heard as public debate developed; permissiveness

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8 *Obscene and Indecent Publications Act, 1901-1955* (NSW), s.3(2). In *Neville v Lewis* [1965] NSWR 1571 (the Oz Trial) the New South Wales Court of Criminal Appeal held that, as a matter of strict construction, it is not necessary to find that a publication has a tendency to deprave , corrupt or injure morals before it can be found to be obscene by reason of 'undue' emphasis on matters of sex. Anticipating *Crowe v Graham*, it was found that a publication unduly emphasises matters of sex if it 'offends against the standards of the community' (see the editorial comment in 39 *ALJ* 294).

9 G Dutton and M Harris eds, *Australia's Censorship Crisis*, Melbourne 1970, 52.

10 ibid, 96.

11 ibid, 75-96.

12 *Neville v Lewis* [1965] NSWR 1571.

13 ibid, 56.

was decried as much as it was applauded.[14] However the weight of argument seemed to come down on the side of reform.

In their 1966 edition of *Freedom in Australia* Campbell and Whitmore savaged the Film Censorship Board, saying it was a law unto itself, working in secret, free of judicial and political control; they conclude that 'A basic civil right is at the mercy of an administrative body with no responsibility to anyone'.[15] Their appraisal of literature censorship was no less damning: 'Despite the appearance of a legal framework, the Commonwealth system of censorship is merely a facade to cloak the reality of censorship by the Minister and his departmental officials'.[16]

Secrecy and the absence of public accountability were thus seen by many to be the defining characteristics of the censorship system, for both films and literature. As such it held to exemplify a 'closed' model of censorship administration, based on and dedicated to the requirements of bureaucratic control.

Reform of film censorship: Concerted efforts were made in the early 1970s to reform the system of film censorship. In broad terms the intention was to move towards a model maximising the integrity and accountability of the decision making process.

The lead was taken by Don Chipp, Commonwealth Minister for Customs and Excise (1969-1972). He inaugurated a reporting mechanism requiring the Film Censorship Board to publish which films it had cut or banned in the Commonwealth Gazette. By agreement with the States the 'R' classification was introduced in 1971 along with the compulsory display of film classifications in advertising material. In January of the same year the part-time Films Board of Review was established, replacing the single appeal censor.[17]

Emphasised in the Minister's statement of June 1970 to the House of Representatives was the importance of the twin ideas of public accountability for the decision makers, on one side, and the role of parental responsibility within the community, on the other.[18]

By 1973 the Film Censorship Board was a full-time nine member Statutory Board made up of the Chief Censor, the Deputy Chief Censor and seven

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14 I Bertrand, *Film Censorship in Australia*, St Lucia 1978, 190-98.

15 E Campbell and H Whitmore, *Freedom in Australia*, Sydney 1966, 137.

16 ibid, 152.

17 Bertrand, op cit, 185-88.

18 Cth Parl Debs, HR, 11 June 1970 at 3372.

Board members, all appointed for limited terms by the Governor General. The basic philosophy underlying the FCB is that it is in some way representative of the community.[19] In that respect it is not so much a panel of experts, but more akin to a jury, making informed decisions on a basis of reasonableness. Its function, as explained by the then Deputy Chief Censor, Janet Strickland, in a speech from 1976 was to implement, within the limits of the legislation, the policies developed by the major political parties at this time. These are encapsulated in the following propositions:

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

These themes were developed in Strickland's first speech as Chief Censor in 1980 where the emphasis was very much on extending public communication and accountability. This was to be achieved by the publication of a brochure explaining how the system worked, the publication of an Annual Report, and the publication, on a monthly basis, in the Commonwealth Gazette of all the decisions made on films, accompanied by coded reasons for decisions beyond a 'G' classification. The philosophy behind this stated that 'If citizens are to play an active part in their community, then they must be given meaningful information and be engaged in an on-going dialogue'; 'to share knowledge is to share power'.[20]

Not every aspect of this agenda was implemented. Nevertheless it was an indication of a changing managerial philosophy, moving away from a 'closed' towards an 'open' model of censorship. The Annual Reports which appeared after 1981 included the curricula vitae of Board members and a breakdown in statistical terms of the Board's work. In addition the names of the deputy censors operating from the regional censorship offices were cited in the Reports of 1986 and 1987. By this time the emphasis was very much on classification not censorship. The Film Censorship Board's decisions were supported by reasoned argument. Its reports on individual

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[19] OFLC Annual Report 1989-90, 4-6. The Deputy-Chief Censor comments that, 'We, the Board members, are members of the community; when we are appointed to the Board it is as representatives of that community....it means that we represent the reasonable adult person'.

[20] J Strickland (then J Duckmanton), "Film Censorship in the Eighties", Convention of Motion Picture Exhibitors Association of Queensland, 21 July 1980.

films were available under the *Freedom of Information Act 1982 (Cth)*.[21] After 1984 decision making was undertaken on the basis of Guidelines agreed to by State and Federal Ministers. After 1986 the full text of the decisions of the Films Board of Review were published in the Annual Report, thus offering at last a substantive insight into the work of a censorship authority.

These administrative changes represented steps, albeit tentative at times, along the road to the community having the information it needed if it was to make informed judgments about the system of film censorship. In contrast with this the legislative framework remained substantially unaltered. One result was that important differences operated in the definition of key terms. For example, two States (Victoria and Tasmania) directed the Censor not to register 'disgusting' films; three States (New South Wales, Western Australia and Queensland) prohibited films 'undesirable in the public interest'. The one avenue of appeal was through the Films Board of Review.

Reform of literature censorship: Satisfactory administrative reform was harder to achieve in the field of literature censorship, if only because it could not build on the operation of a pre-existing national statutory body. The 1960s and 70s saw various concerted State-Commonwealth initiatives designed to establish a less arbitrary approach to the control of literature. This resulted in 1967 in the establishment of the National Literature Board of Review. As Richard G Fox explains, the Board's 'recommendations were advisory only, and were to be made solely in respect of works having some prima facie claim to literary, artistic or scientific merit'.[22]

These reforms failed in part due to the changing nature of material charged with being obscene, there being a change from written to pictorial pornography. The National Literary Board became increasingly redundant therefore and was abolished in 1977.[23]

At the State level New South Wales established in 1967 its own State Advisory Committee designed apparently to deal with the upsurge in pictorial pornography, its brief being to advise the Minister whether a publication should be the subject of criminal proceedings.[24]

The Advisory Committee was itself abolished by the *Indecent Articles and Classified Publications Act 1975 (NSW)* which was part of a raft of

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21 The Freedom of Information Act does not seem to have been used before 1986 and, according to the Annual Reports, only infrequently to date.

22 R G Fox, 'Censorship Policy and Child Pornography'(1978) 52 ALJ 361.

23 ibid, 361-2.

24 Campbell and Whitmore, op cit, 263.

legislation in the States at this time substantially revising the conceptual basis of literature censorship. The tests of obscenity and the tendency to corrupt and deprave were set aside in favour of the concept of indecency, which presumably was to be interpreted in terms of the community standards approach elaborated by the High Court in *Crowe v Graham*. The Act was part of a more general move towards creating a classification scheme based on restricted categories of material, as agreed in principle in January 1974 at a Commonwealth State meeting of Ministers responsible for censorship. 'Restricted' category publications were not to be sold or displayed to persons under eighteen; 'direct sale' category publications were not to be sold at all and to be sold to those over eighteen only on direct personal request. Trial by jury was provided for. The scheme was administered by Commonwealth classification officers in the Attorney General's Department who were responsible for initial classification of both imported and locally produced publications. Review of their decisions was available through the newly created Publications Classifications Board and beyond that by appeal to the District Court.[25] The Act was really a new departure in the regulation of publications. In many ways this forms the basis of the present system, both in terms of administrative detail and underlying philosophy.

Prohibition against child pornography was not provided for. This oversight was remedied by amendment of the principal Act in 1977.[26]

The situation by the early 1980s was as follows. The censorship of literature had undergone significant legislative change at a State level, allowing for an approach concerned more with classification than censorship *per se* and dealing almost exclusively with 'hard' or 'soft' core pornographic materials. Review and appeal mechanisms were available through State Classification Boards and the courts. However the actual process of decision making within the Commonwealth Attorney General's Department remained obscure and undertaken exclusively by anonymous public servants enjoying permanent tenure. Decisions were not reported; nor it seems were they supported by publicly documented guidelines or reasoned argument. From an administrative standpoint the system was substantially beyond public scrutiny and understanding. The community appeared to lack knowledge and power.

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25 R G Fox, op cit, 362-63. Ministers of all States, except Queensland, were a party to this agreement.

26 *Indecent Articles and Classified Publications (Amendment) Act 1977*, s.13A.

3 Legislative Framework

Overview: Censorship law in Australia is a complex network consisting of federal Customs legislation, the ACT *Classification of Publications Ordinance 1983* (the ACT Ordinance), plus a plethora of State and Territory laws. Each of these areas will be examined below in turn.

(i) *films:* The object of the federal Customs legislation is to regulate the importation of material into Australia. For this purpose the *Customs (Cinematograph Films) Regulations* provides for the registration of films for public exhibition, as well as for the refusal of registration under these Regulations, usually in recent times on grounds of indecency. In formal terms therefore the FCB must first register a film and only then proceed to award it a classification. Where cinema films for public exhibition are concerned the classification is determined by the laws of the States and Territories. In New South Wales the relevant Act is the *Film and Video Tape Classification Act 1984*.

Where a film is in the form of a video for sale or hire for personal use then, by Ministerial agreement, it is classified or refused classification under the ACT Ordinance. Classifications for cinema and video release involve separate applications to the FCB; in practice these are often dealt with on a concurrent basis. From a substantive viewpoint the main difference between the ACT Ordinance, on one side, and the corresponding State Acts, on the other, is that the latter do not provide for an 'X' classification which accommodates hard core non-violent pornography (see Appendix 1).

A third arm to the regulation of films and videos is the *Customs (Prohibited Imports) Regulations*, applying to material seized at the customs barrier. The FCB provides an opinion as to whether the material should be declared a prohibited import or released. Exemption is granted to a film previously registered under the Cinema Regulations. Films and videos are not classified under the Prohibited Imports Regulations and therefore, under the compulsory classification scheme, cannot upon release be sold, hired or exhibited in public.

(ii) *literature:* The Prohibited Imports Regulations apply equally to the control of literature. Indeed, in definitional terms, the Regulations deal with 'publications' in a wide sense, including books, magazines, films and videos, plus 'any other goods'. For literature, seized material is considered by publications officers working in the Office of Film and Literature Classification (OFLC). The contrast with film and video is that, under the voluntary classification scheme for literature, material which is released may afterwards be sold through commercial outlets, even though it remains unclassified.

Following agreement between the Commonwealth, New South Wales, Victorian, South Australian and Northern Territory governments, classification of literature is undertaken by OFLC publications officers. Since the legislative reforms of 1991, Queensland has also adopted the

classification decisions of the OFLC. As with videos for sale or hire, literature is classified under the ACT Ordinance, but of course regard is had in this context to the relevant State legislation. For New South Wales this is the *Indecent Articles and Publications Act 1975*. Tasmania and Western Australia operate their own schemes.

(iii) *enforcement:* Enforcement of censorship law is primarily a State and Territory responsibility. This applies across film, video and literature. Prosecution is a matter for the New South Wales Attorney General, therefore, where, for example, a cinema in this State shows an inappropriate film trailer, or a video store sells or hires a hard core pornographic product, or a newsagent fails to comply with the conditions for the display of restricted material.

Legislative reform in 1983-84: The contemporary legal framework was established in 1983-84 in a new round of legislative reform, concerned now with both film and literature censorship. The focus at a Commonwealth level was on the ACT Ordinance, which was seen as the basis for a uniform national scheme.

The video revolution: The main impetus behind this reform was the 'video revolution' of this period. Videos for use in the home increased dramatically in number and availability. Also, with the advent of videos, pornography became as significant an issue in film regulation as it was for publications. Violence in 'video nasties' was another cause of concern. In a speech to the National Council of Women of New South Wales from July 1983 Janet Strickland said: 'We are concerned that women and children do not become the innocent victims of the video revolution'.[27]

A major problem for the Board was that it lacked legislative power to classify videos for sale or hire for private use. The relevant State statutes provided only for the classification of films for public exhibition. Following a meeting of Commonwealth and State Ministers in July 1983 it was agreed to implement a voluntary scheme for the classification of videotapes, similar in fact to the scheme for publications, using the ACT Ordinance as model legislation. The States were to pass laws imposing appropriate points of sale restrictions for videos classified 'R' and 'X' (that is, those videos restricted to persons 18 years and over). The requirement that videos be registered on importation was abolished. On a substantive note, the then Attorney-General, Senator Gareth Evans, stated that, 'Only child pornography and similar very extreme material would be refused classification altogether'.[28]

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[27] Legislative Assembly, Parliamentary Debates, 31 October 1984, p3017.

[28] Press Release,13 July 1983. Subsequently the Attorney-General stated that material refused classification would 'include child pornography and other very extreme material of that order of offensiveness': Senate, Parliamentary Debates, 21 September 1983,

At the same time agreement on a uniform literature censorship system was announced, again based on the ACT Ordinance, involving two categories of 'restricted' publications, roughly corresponding to the 'R' and 'X' classifications for videos. The scheme faced difficulties from the outset. Queensland had already opted out of the system ; Tasmania and Western Australia were to follow suit.

Implementation of the scheme for videos proved just as problematic. Intense public debate and controversy followed its announcement, regarding both the voluntary nature of the scheme and its content. Leading the debate was the New South Wales Parliament, following the viewing by members of a video compiled by the Board. Controversy focussed of course around the 'X' classification and its administration by the Film Censorship Board. The ACT Ordinance came into effect on 1 February 1984. Already in April 1984 it was agreed at a meeting of Commonwealth and State Ministers to make the video classification system compulsory.[29]The outcome of the substantive debate was that the 'X' classification was restricted to the ACT and the Northern Territory.

Continuing the debate, in October 1984 a Senate Select Committee on Video Material was established. It reported in March 1985 recommending, among other things, a moratorium on the sale and hire of 'X' rated videos in the ACT. That Committee's work was continued by the Joint Select Committee on Video Material which reported in 1988.

Every piece of Federal legislation and much of State legislation in this field was altered at this time.

The ACT Ordinance: The ACT Ordinance was the centrepiece of the legislative reform package at the federal level. The fact that it was so important and yet not an Act of the Commonwealth Parliament was commented on at the time and remains a point of some concern, there being only limited opportunity for Parliamentary scrutiny. The Majority Report of the Joint Select Committee On Video Material recommended that as the provisions of the Ordinance 'are matters of major public policy it is more appropriate that they be dealt with by substantive legislation'.[30]

The Ordinance provided for a scheme of classification covering both films and literature (defining both as 'publications'), only literature remained a voluntary scheme whereas the classification of films and videos was compulsory. Further, the actual administration of film and literature

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p857.

29 Press Release, Commonwealth Attorney-General, 6 April 1984. A compulsory scheme for videos was achieved by amendment to the ACT Ordinance made by the Governor General on 4 June 1984.

30 Volume 1, at 301. The proposal is supported by the Law Reform Commission.

censorship remained entirely separate until the establishment of the Office of Film and Literature Classification in 1988. The two systems simply did not connect. Film censorship was under the FCB, an independent statutory body. Literature censorship was undertaken by public servants working in the federal Attorney General's Department and appointed by the Attorney General under the Ordinance. Under the voluntary scheme for literature censorship, it was left to the publishers of mainly soft and hard core pornographic magazines to decide whether they wanted to submit their publications to the Department for classification, thus avoiding risk of prosecution.

Different practices and philosophies informed the administration of literature and film classification. At the same time, under the Ordinance (as well as the Prohibited Imports Regulations discussed below), the conceptual basis for their regulation shared many features in common. This was especially the case in respect to those provisions for the restricted classification of material and for the refusal of classification. For films and videos the restricted categories were 'R' and 'X'; for literature they were Category 1 and Category 2. Fundamental to both, as well as to the refused categories, was the degree of offence material is likely to cause a reasonable adult person. Thus the 'R' and 'X' classifications are designed to accommodate films which are 'likely to cause offence to a reasonable adult person' (s.25 (2)); a film may be refused classification where it offends against the standards of 'morality, decency and propriety accepted by reasonable adult persons *to the extent* that it should not be classified' (emphasis added). Identical provision for Category 1 and 2 publications and for refusal of publication are found in s.19(2) and s.19(3) respectively. In its report of December 1983 the ACT House of Assembly Standing Committee on Education and Community Affairs defined a 'reasonable adult' for the purpose of the Ordinance as 'someone who is independent of extremes or idiosyncrasies and is generally representative of ordinary people'.[31]

Specific prohibitions against child pornography and terrorist manuals were further provided for.

All the above provisions are to be read in conjunction with the general principles of interpretation set out in Division 3 of the Ordinance. This includes reference in s.34(3) to a prescribed authority having regard 'to any literary, artistic or educational merit' a film or publication may have, and in s.34(4) to its 'intended or likely' audience. There was in addition an affirmation of the principles that (1) adults are entitled to read and view what they wish and (2) all persons are entitled to protection from exposure to unsolicited material that they find offensive. Censors are to 'have regard to the standards of morality, decency and propriety generally accepted by reasonable adult persons'.

Also provided for in the Ordinance was the formation of a Publications

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[31] *Report No 12, Classification of Publications Ordinance 1983*, December 1983.

Review Board, to be appointed by the Attorney-General. The Films Board of Review continued in operation on a part-time basis.

Legislative reform in the States: The tendency at the federal level to accommodate films and literature under the same legislative umbrella was not followed in the States. For New South Wales therefore the legislative package of 1983-84 involved substantial amendment of the *Indecent Articles and Classified Publications Act 1975,* plus the introduction of a new statute for the regulation of films and videos, namely, the *Film and Video Tape Classification Act 1984.*[32]

In terms of the substantive provisions for refusal of classification a different approach was adopted by the drafters in the two Acts. The film and video legislation adopted the more general language favoured by the ACT Ordinance, while the publications legislation adopted more specifically worded provisions.

(i) *Indecent Articles and Publications Act*: In relation to publications, restricted material was now called Category 1 and 2. Category 1 material was not to be sold or delivered to a person under 18 (other than by a parent or guardian) and was only to be exhibited in a public place if contained in a sealed package. Likewise Category 2 material was restricted to persons over 18 and was only to be exhibited or displayed in 'a restricted publications area'(s.18(b)). A substantially new regime for prohibited publications was introduced which has remained unchanged since. As noted these provisions were couched in specific terms, referring for example in s.13(3)(d) to material containing 'an explicit and gratuitous description or depiction of an act of sexual violence'.

New South Wales continued by agreement to appoint Commonwealth classification officers based in the Attorney-General's Department to classify publications on its behalf. In fact Section 11 of the Act provides that the relevant New South Wales Minister 'may, by order published in the Gazette' designate either a State public servant or, with the consent of a Commonwealth Minister, some other person as a publications classification officer. A Publications Classification Board was further provided for. So too was a further avenue of appeal to the District Court (s.12(4)).

Similar reforms were introduced in Victoria and South Australia. As noted, Queensland, Tasmania and Western Australia continued to operate their own schemes. Under the *Classification of Publications Act 1991* Queensland now adopts the classification decisions of the OFLC.[33]

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[32] Amendment was also made to the *Theatres and Public Halls Act 1908.*

[33] The Act provides for a Queensland Publications Officer, but in practice the decisions of the OFLC officers appear to be adopted as a matter of course. However, it remains the case that neither Category 1 nor Category 2 material can be sold in Queensland.

(ii) *Film and Video Tape Classification Act*: In relation to films and videos, after 1984 the Film Censorship Board continued to act for all jurisdictions. No provision is made for a classification beyond 'R' in the States. In 1984 therefore the operative classifications were 'G', 'PG', 'M' and 'R'. The States differed and continue to differ in their definition of the Refused category of material. Legislation in some States (Victoria and now Queensland) is modelled on the ACT Ordinance, thus incorporating the notion of extent or degree of offence; in New South Wales, however, the criteria for Refusal is expressed simply in terms of a film 'likely to cause offence to a reasonable adult'(s.9(2)(a). This is more akin to the definition of 'R' films under the Ordinance. Arguably, the result of this variation in drafting is to create a lower threshold for refusal of classification in this State than under those which use the Ordinance as a guide. A further difference is that the New South Wales legislation does not include any of the general principles of interpretation set out in Division 3 of the Ordinance. No reference is made therefore to 'artistic merit' or the 'intended or likely audience'.

Otherwise the New South Wales Act follows closely the model of the Ordinance, with some variations in the penalties for breaches. Offences declared in the Act, not found in the Ordinance, include the procurement of a child for the making of a child abuse videotape(s.35).

An important difference between the States was that Queensland, South Australia and Western Australia retained a secondary level of censorship capable of reviewing decisions made by the Film Censorship Board. The Queensland Films Review Board was abolished by the *Classification of Films Act 1991*.

Customs (Cinematograph Films) Regulations: These Regulations, which provide for the Registration or Refusal to Register of films for public exhibition, were the least affected by the overhaul of censorship legislation. The result is that the criteria for registration in Reg.13 (1) are substantially different from the criteria for classification in both the Ordinance and the State Acts. The anachronistic provision relating to films or advertising matter 'likely to be offensive to the people of a friendly nation or to the people of a part of the Queen's dominions' was omitted. Regulation 13(1) now provides that a film shall not be Registered and advertising shall not be passed if it is (a) blasphemous, indecent or obscene, (b) likely to be injurious to morality, or to encourage or incite crime, or (c) undesirable in the public interest. Blasphemy is unique to these Regulations.

Customs (Prohibited Imports) Regulations: As part of the package of reforms to provide for regulation of video material amendments were made in 1983-84 to Regulation 4A of the *Customs(Prohibited Imports) Regulations*. These Regulations provide for controls at the custom barrier for a range of imported goods, including films, videos and publications.

Before amendment in December 1984 these contained wide prohibitions concerning goods which were 'blasphemous, indecent or obscene', or 'unduly emphasised matters of sex, horror, violence or crime', or were 'likely to encourage depravity', as well as advertising matter relating to such goods. The Government's intention in the new legislation was to control what the Attorney General termed 'really extreme and utterly unconscionable material'.[34]

The Government's proposals were the subject of vigorous Parliamentary debate. On 4 April criticism of the proposals crystallised when Senator Mason moved to disallow Regulation 4A and Senator Harradine moved to disallow the ACT Ordinance. The upshot was that the criteria for prohibition under Regulation 4A underwent further amendment to broaden the scope of proscribed material. Initially the qualifying word 'extreme' was removed from the prohibition of material on grounds of cruelty, violence or sexual violence. This was revised to cover material containing 'detailed and gratuitous depictions in pictorial form of acts of considerable violence or cruelty, or explicit and gratuitous depictions in pictorial form of sexual violence against non-consenting persons'. Responding to concerns about the application of the scheme, the Attorney-General assured Parliament that the Regulations would be administered 'in accordance with the substantive letter of the law' and not 'in some twilight zone of discretions'.[35]

Guidelines: Running concurrently with this debate was the attempt on the part of the Board, with the agreement of the relevant Ministers, to formulate appropriate Guidelines for film classification. In all, five sets of Guidelines were agreed upon in 1984, with the particular intention of meeting community concern about the portrayal of violence and sexual violence in videos.[36] Up to November the guidelines for the 'X' classification provided for the inclusion of 'explicit violence' in addition to explicit sex. Only gradually and in response to public controversy did the idea of a category of non-violent erotica develop, as stated in a Ministerial press release of 28 September 1984. Also addressed was the issue of formulating stricter guidelines in relation to violence in the 'M' and 'R' categories. Interestingly, as the Guidelines moved towards becoming a public document it was decided to omit the reference to sexual violence ('rape, only if very discreet') from the guidelines for 'M', leaving a rather curious gap for future classifiers to puzzle over. Overall the effect was to produce a document expressed in more general language. Particular coarse words or types of depictions of sexual acts acceptable in each category

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34 Senate, Parliamentary Debates, 4 April 1984, p1180.

35 Senate, Parliamentary Debates, 29 May 1984, p2072.

36 All five sets of Guidelines are published in the Report of the Joint Select Committee On Video Material, 1988.

were set aside.[37] In this way considerable scope for the exercise of discretion was allowed for.

A feature of the debate was the nexus that developed between the Refused category under the Guidelines and Regulation 4A. By June 1984 both proscribed child pornography, bestiality, terrorist manuals and detailed instructions for the use of hard drugs, plus a prohibition in the terms cited above against violence and sexual violence. The drafting history indicates an intention to administer the two pieces of legislation in an identical manner. In this sense debate on Regulation 4A acted as a sounding board for the formulation of what was to be refused classification under the ACT Ordinance. Almost immediately however a legislative 'gap' developed as the 'X' guidelines were defined in such a way as not to require evidence of non-consent for refusal of classification.[38] Both the Senate Joint Select Committee Report of 1988 and the Law Reform's Report of 1991 recommended that the gap be closed.

A further anomaly is that the Guidelines for the Refused category under the ACT Ordinance now includes material depicting incest fantasies, which again is not provided for under Regulation 4A.

The Guidelines are an important development. In recent years Guidelines for both films and publications have been available to the public. These are drawn up in consultation with Commonwealth and State Ministers with censorship responsibilities and apply equally to the FCB and the Board of Review. Legislation covering film censorship in two States, New South Wales and Victoria, makes reference to the Guidelines. Thus section 5A of the *Film and Video Tape Classification Act 1984 (NSW)* provides: 'In exercising their functions under this Act, the censor and appeal censor are to have regard to any guidelines issued to them from time to time by the Minister relating to the classification of films'. The purpose of the Guidelines is to flesh-out the very general words of the law in this area and, as such, to form the real basis of accountable decision making. This is not to suggest that the Guidelines are or can be applied in any mechanical sense. Indeed it has been said:

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37 In recent years the Guidelines have been published in OFLC Information Bulletins. The latest of these (7 May 1993) contains the Guidelines for the new 'MA' classification, a statement of general principles, plus comments on the interpretation of the Guidelines. Coarse language is explicitly referred to in the latter section which is perhaps a little surprising in a document distributed to schools and used for public education generally.

38 The Law Reform Commission, *Report No 55, Censorship Procedure* (1991). The Commission notes that "This gap exists, not because of any policy decision that there is a category of material beyond what is able to be classified which should be allowed into Australia, but because of a reluctance on the part of the Australian Customs Service to become involved in censorship matters'(at p 59-60). In fact the position is more complex than that, deriving at least as much from the drafting history of Regulation 4A and the Guidelines.

The concepts employed in the guidelines require the making of sensitive judgments about community standards and attitudes and on matters of artistic judgment, such as whether or not the depiction of violence is discreet, gratuitous or exploitative in its context.[39]

The Law Reform Commission said the Guidelines should not be binding on the Boards, 'but their existence should enhance consistent decision making and improve community understanding of the classification system'.[40] It recommended that the Guidelines and amendments should be released for public comment for at least three months before being issued by the federal Attorney General.

The current Guidelines for films and publications are set out in Appendices 1 and 2 respectively.

Standing to appeal: This is one of the more controversial areas in the legal arrangements for censorship. Indeed the arrangements are perhaps unique in terms of Australian administrative law. The situation here is that one independent specialist Tribunal reviews the decisions of another independent specialist Tribunal on their merits and without reference to either the courts or the Administrative Appeals Tribunal. Only 'persons aggrieved', which in this case effectively means the distributor of the film or publication, have standing to appeal.[41] Further appeal is only possible on a point of law, for example, if the Review Board neglected to consider 'blasphemy' in relation to the films *Hail Mary* and *The Last Temptation of Christ*.[42]

The Administrative Review Council was basically supportive of this specialist Tribunal system of appeal.[43] The Law Reform Commission

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39 Administrative Review Council, Report No 24: Review of Customs and Excise Decisions: Stage Four - Censorship, 1986 at 11.

40 The Law reform Commission, Report No 55, at 19.

41 There are in fact two additional ways of initiating an appeal. One was established in *Ogle v Strickland* [1987] 13 FCR 306 where the Federal Court held that ministers of religion were 'persons aggrieved' in relation to the film *Hail Mary* and entitled therefore to seek judicial review under the *Administrative Decisions (Judicial Review) Act 1975 (Cth)*. Further, a member of the general public can ask the federal Attorney-General, or a State or Territory Attorney-General, to intervene on his or her behalf. Both these approaches involve significant obstacles. They are rarely used and the Law Reform Commission considered them inadequate avenues for appealing a decision of the Boards.

42 The issue of standing to appeal a decision of the FCB is considered at some length in the Annual Report of 1986 in relation to the film *Hail Mary* and in the Law Reform Commission's Report at 22-25.

43 Administrative Review Council, Report No 24, 1986. This was seen to be an instance 'where an existing specialist tribunal is seen to work efficiently and economically in a field that presents special features...'(at 13).

agreed, with the proviso that standing to seek reconsideration of a classification or associated decision should be widened to include any person acting in good faith. This widening of the standing to initiate a reconsideration would only apply where the decision involves a legal restriction, and not therefore to the advisory classifications of 'G', 'PG' and 'M'.[44]

The issue of standing has surfaced again in relation to the Review Board's decision to award the film *Salo* an 'R' classification.[46]

Recent developments: The law relating to censorship is never still. Some of the recent changes and recommendations for change have been noted. Other alterations include:

- the introduction in 1993 of the 'MA' film classification. This is designed to serve at least three purposes; (a) to reduce the absurd width of the former 'M' classification which encompassed everything from Crocodile Dundee to Cape Fear, (b) to restrict the access of those under 15 to the stronger material in the former 'M' category, and (c) as part of a wider reform, to form the basis for the uniform classification of films/videos and television.

  Paradoxically, the community is now faced with three distinct categories of 'M' material, namely, those films and videos classified 'M' before 1 May 1993, those classified 'M' after that date, and 'M' material modified for television. Also the logic of the revised system is perhaps counter intuitive. The new 'M', which is a wholly advisory category open to all ages, is set between two categories (PG and MA) both of which advise or require parental intervention. 'M' films are not 'recommended' for viewing by those under 15; 'MA' films are 'unsuitable' viewing for the same age group, but may be seen by those under 15 in the company of a parent or guardian. This would seem to be a legal tautology. Presumably the reason why a film cannot be recommended for viewing by the young is because it is unsuitable for them.

- in 1989 the specific prohibition against material promoting or inciting terrorism, found in the ACT Ordinance and in Regulation 4A of the Customs Prohibited Imports, was replaced by a wider test prohibiting a film or publication which 'promotes, incites or instructs in matters of crime or violence'. This amendment was apparently made without any Parliamentary debate and certainly no public discussion of its implications. Potentially the provision has a

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44 The Law Reform Commission, Report No 55, at 25.

45 Senate Select Committee on Cultural Standards Relevant to the Supply of Services Utilising Telecommunications Technologies, Hansard Report 20 August 1993, 466.

very long reach. *Final Exit* was of course originally banned on the grounds that it instructed in the crime of assisting suicide.[46] But beyond that a literal reading of the provision could result in the prohibition of a wide range of books and films. Admittedly, the banning of Agatha Christie on the grounds that her work instructs in matters of crime or violence is an unlikely prospect. It may not be so unlikely in the case of more marginal material. From a certain standpoint it could be argued that any number of films, entire genres indeed, incite violence. What it suggests is the need for careful scrutiny of censorship laws by Parliaments and the community.

In New South Wales the legislation for both films and publications remains unaltered.

- the introduction in 1988 of consumer advice for films and videos, this being a way of telling people what caused a film to be classified a particular way.

- the gradual implementation of the 1987 agreement that the FCB 'ought to be able, on its own motion, to issue a fresh classification for a film...after two years'. In New South Wales this was introduced in 1991.[47]

Prospects: Implementation of the Law Reform Commission's recommendations for a uniform censorship scheme is currently under consideration by relevant Federal and State Ministers, which may well result in a new round of legislative reform. A semi-compulsory literature classification scheme, replacing the present voluntary system, may form part of this legislative package.

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[46] For an interesting critique of the decision from the standpoint of legal interpretation see, H Kuhse, "Grounds for banning suicide guide unclear and open to challenge", *The Age* 10 April 1992, at 13.

[47] Section 11A of the *Film and Video Tape Classification Act 1984 (NSW)*.

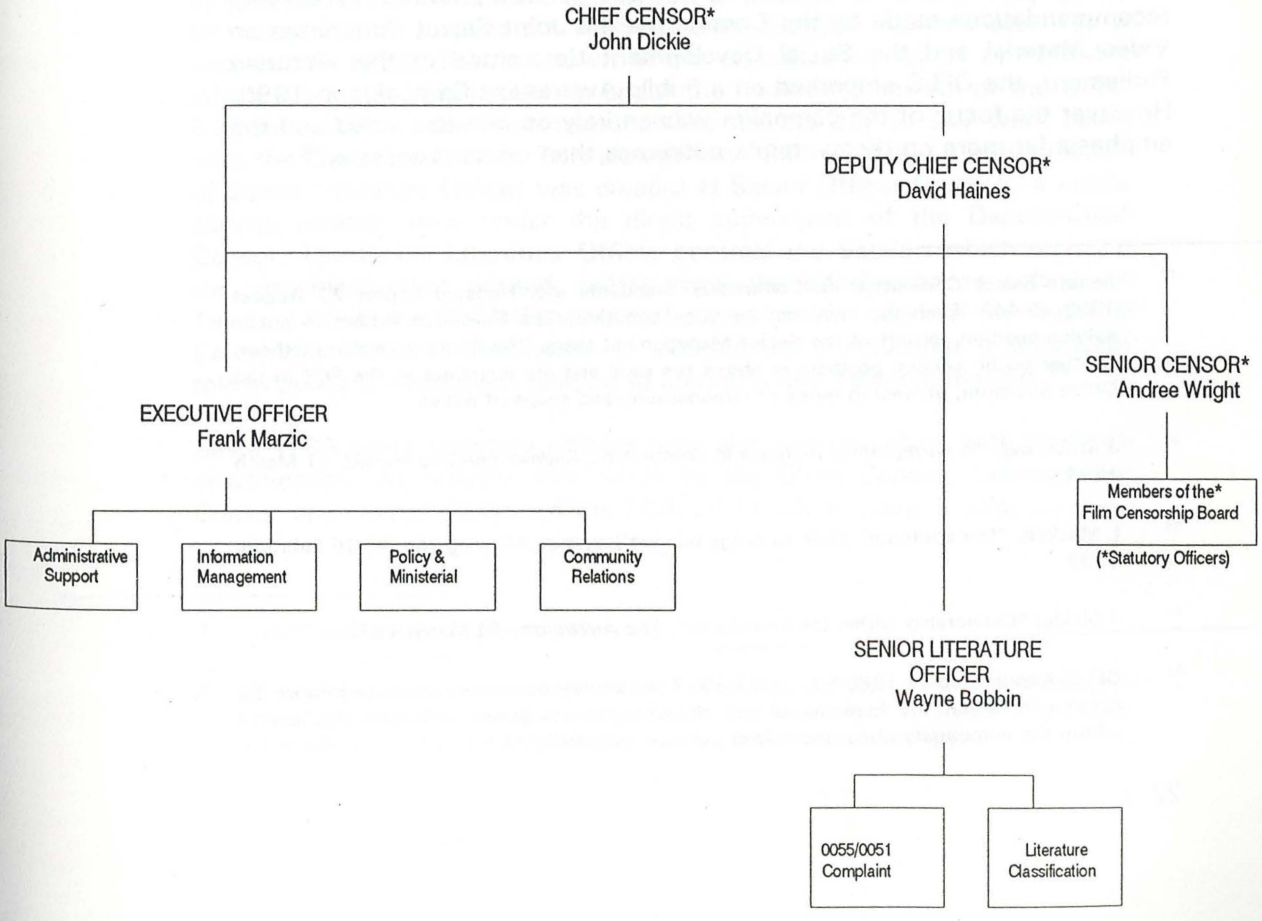
4 Administrative Framework

The Office of Film and Literature Classification: The legislative framework established in 1983-84 remains substantially in force today. The administration of the censorship system, however, has undergone significant revision in recent years, in particular with the setting up of the Office of Film and Literature Classification in 1988.

According to its inaugural Annual Report, the OFLC was 'created to rationalise as far as possible the activities relating to censorship and classification under the Attorney-General's control'. It incorporates the following:

- the Film Censorship Board
- the Literature Censorship function of the Attorney-General's Department, and
- the censorship policy function within the Attorney-General's Department.

The OFLC Organisation Chart from the 1991-92 Annual Report is set out below.



On its face the OFLC appears to be a more or less straightforward exercise in administrative rationalisation, substituting simplicity for complexity. On closer investigation this is not quite the case. Norman Reaburn, Deputy Secretary of the federal Attorney General's Department, comments that, 'The OFLC is a funny kind of hybrid in that in one technical sense it is part of the department, but all the board members and the more senior people within the OFLC are statutory officers'.[48] In terms of 'who does what, when and how' there is still considerable scope for public misunderstanding. The scope is perhaps wider for literature classification, but it exists for film classification as well. For example it is suggested in public debate that the FCB no longer exists, or that it has been replaced by a Film and Literature Board, or alternatively that the OFLC Board now classifies both film and literature. All these statements are incorrect. An indication of the extent of the confused state of current debate is found in a letter to the press from the now former Chief Censor, Janet Strickland, commenting on the decision to ban the book *Final Exit*. She refers to 'The latest and most outrageous decision of the Office of Film and Literature Classification (formerly the Film Censorship Board)...'.[49] A few weeks before, in reference to the decision to ban a university handbook, a press report said the decision was made by 'the Chief Censor of the Film and Literature Board of Review'.[50] An entire edition of the SBS 'Bookshow' program (30/10/92) was devoted to the contemporary censorship of literature, based throughout on the misapprehension that literature is classified by a Board of the OFLC.

On behalf of the OFLC the present Chief Censor, John Dickie, has said that 'the office has gone out of its way to inform the public about its functions not only in relation to film and video but also about literature'.[51] Following recommendations made by the Commonwealth Joint Select Committee on Video Material and the Social Development Committee of the Victorian Parliament, the OFLC embarked on a Public Awareness Campaign in 1990. However the focus of the campaign was entirely on film and video and the emphasis far more on the system's outcomes than on its processes.[52]

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48 Senate Select Committee on Community Standards etc, Hansard Report 20 August 1993 at 443. Even this may not be quite accurate. The Executive Officer, a public service position, is part of the Senior Management team. The Senior Literature Officer, another public service position, is above the rank and file members of the FCB in the Office structure, at least in terms of remuneration and scope of duties.

49 J Strickland, "A surreptitious increase in censorship', *Sydney Morning Herald*, 11 March 1992.

50 L Macken, "Uni students' guide to drugs banned', *Sydney Morning Herald*, 26 February 1992.

51 J Dickie, "Censorship within the boundaries', *The Australian*, 13 March 1992.

52 OFLC Annual Report 1989-90, at 37-39. The primary objectives were to inform the community about the meaning of the classification categories and symbols, and to inform the community about the role of parental responsibility.

For clarification, the FCB is incorporated into the OFLC for administrative purposes. The OFLC has not thereby replaced the FCB or subsumed its legal powers. The FCB remains a statutory body with members appointed for fixed terms by the Governor-General. Under the *Customs (Cinematograph Films) Regulations* its statutory powers of censorship and classification remain distinct to itself. The OFLC is a non-statutory government agency. Whilst it administers the censorship system it is not in itself empowered to make classification decisions. This holds for both film and literature.

There is no Literature Censorship Board, nor is there a Film and Literature Censorship Board.

Since 1990 there is however a Film and Literature Board of Review (the FLBR), replacing the former Films Board of Review. This remains a part-time statutory body, receiving secretarial support from the OFLC.

With the exception of the Melbourne Office, the Regional Censorship Offices were abolished in 1988.

The censorship of literature: A total of 3,386 publications were examined and classified in this period. Almost 80% of these were either Category 1 or 2 classifications, reflecting the overwhelmingly sexual nature of the material submitted under the voluntary scheme; a total of 164 publications were refused classification.[53]

Within the OFLC literature classification is undertaken primarily by public servants. In that respect the administrative situation remains much as it was before 1988. This is shown in the organisational chart of 1988-89 where literature classification is under the immediate control of the OFLC Executive Officer, the main responsibility for the day to day work being with the Literature Officer. This changed in 1991-92 when a new position of Senior Literature Officer was created at Senior Officer Grade C, a public service position now under the direct supervision of the Deputy-Chief Censor. The Senior Literature Officer controls the Section which includes the classification of printed matter, vets the information to callers on Telecom 0055 and 0051 Services and supervises the work of the Regional Censorship Office in Melbourne. In addition the position has a significant role in policy development relating to literature and Telecom matters.[54]

Since 1988 some statutory officers have also been involved with literature classification. At present this refers to the Chief Censor, Deputy-Chief Censor and Senior Censor of the FCB, all of whom have in addition been

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53 OFLC Annual Report 1991-92, 12.

54 This is based on the duty statement for the position and the original advertisement in the Commonwealth Government Gazette of 15 October 1992. The position was only available to Commonwealth public servants and advertised accordingly.

appointed publications officers by the Attorney-General and, where relevant, under the State Acts. These latter appointments are separate and distinct from the positions they hold as members of the FCB. All Publications Officers are appointed by the Federal Attorney General under the ACT Ordinance. The situation is complex but the fact that the Deputy Chief Censor of the FCB is also a publications classifications officer would seem to be an outcome determined more by policy than law. Film and literature classification are legally distinct undertakings; to a large extent they are also administratively distinct.

Oversight, accountability and accessibility: Do these fine and sometimes not so fine points of distinction matter? They do in terms of the decision-making processes, both from a standpoint of content and integrity.

To suggest that there is a Board of the OFLC is to imply that there is a body with some general oversight of the Office's work, responsible for policy and the integrity of the censorship process. The implication is that it acts in some way like a Board of Directors, only in this case there is the added requirement that the Board should be in some way representative of the community at large. The role of the FCB within the Office seems significantly less than this. It has no policy function or any executive power. Its role is determined by its statutory duties. As such it is merely a mechanism for registering/classifying films and the work of the rank and file Board members is defined accordingly.[55]

On the positive side, the fact that there is a properly constituted Board responsible for film censorship does give rise to a well-defined system involving agreed procedures for decision-making, reporting, and the discussion of substantive issues. Further, the members of the Board are made known through the Annual Report. On the basis of the curricula vitae included therein the community can make an informed judgment on the representative nature of the Board's constitution, in terms of gender, professional and ethnic mix. Length of service on the Board is also made clear.

For literature classification the situation is less certain, both in regard to procedural regularity and the level of public accountability. It is generally known that the Chief Censor has overall responsibility for literature censorship; the Deputy-Chief Censor's involvement is also understood up to a point. But even their positions have their difficulties and presumably

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[55] The OFLC Organisational Chart from the Annual Report of 1991-92 (at 4) shows that policy and ministerial responsibilities are located in a distinct section of the Office under the direct supervision of the Executive Officer and ultimately under the control of the Chief Censor. On this basis, OFLC policy, and classification policy generally, is a matter for Management assisted by the 'policy' section. This is consistent with the current duty statement for rank and file Board members, though it does seem to conflict with some other statements on the issue. The basic point is that participation in policy does not lie within the Board's statutory powers and remains therefore at the discretion of management, an impression strongly supported by the Organisational Chart.

their involvement would be restricted to unusual cases. Beyond that the system is still quite obscure. With some notable exceptions (*American Psycho* and *Final Exit*) decisions do not seem to be reported upon and even in exceptional cases there is no record of a minority view. Most decisions are seemingly logged only for internal record. Debate is apparently undertaken on an informal basis. The public servants working in the Literature Section have remained basically anonymous, their length of service unknown. Reference is made to decisions of the Chief Censor which in most instances can only apply in a formal sense; further reference is made to decisions by undefined 'officers' of the OFLC. In essence the decision-making process remains apparently ad hoc in nature.

The unsatisfactory nature of this situation was recognised by the Law Reform Commission in its 1991 Report on Censorship Procedure. It recommended establishing a Classification Board having carriage of both film and literature classification. The Commission stated:

> This will mean that work now performed by classification officers and deputy censors will be performed by the Board. The Commission recognises that there may be a need for the Board to be relieved of some of the more routine work in order to concentrate on complex issues.[56]

This internal arrangement of work was not to be legislated for but addressed by the power of delegation. That proposed power of delegation itself raises interesting questions about the role of the present Board within the OFLC.

Interesting, too, is a comment made by the FLBR in the 1991-92 Annual Report, underlining the revival of interest in and the importance of literature censorship. The FLBR states:

> The Board noted the increasing prominence of publications among the matters submitted to it on appeal. The four literature-related appeals in 1991-92 all involved matters of high public interest, in which important questions of principle were considered.[57]

The Film Censorship Board: At present this is the only statutory Board incorporated under the administrative umbrella of the OFLC. There is now provision for 12 full-time members, including the Chief Censor, Deputy-Chief Censor and Senior Censor (a position created in 1990). All are appointed by the Governor-General on the advice of the Federal Executive Council for fixed terms. For the most part appointments have been limited to two terms of office, though exceptions have been made to this rule of

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[56] The Law Reform Commission, Report No 55, at 32.

[57] OFLC Annual Report 1991-92, at 53.

policy.[58] The Law Reform Commission recommended a maximum period of total service of six years.

In 1991-92 the Board examined a total of 4,866 films and videos. Ten cinema features were refused Registration/Classification compared with 109 videos. Nearly 50% of cinema films were classified 'M'; 8.91% were classified 'R'. Of videos, 40.09% were classified 'G', 13.35% 'PG', 17.21 'M', 7.68% 'R', and 18.46% 'X'.[59]

The Senior Censor plays a pivotal role in the day-to-day operation of the Board, deciding what is to be viewed and by how many censors. In making the latter decision the Senior Censor takes note of the synopsis which the film distributor is required to supply to the Board. Most mainstream feature films for theatrical release are viewed by three Board members. Chinese language feature films from Hong Kong, which after the USA is the main source of films publicly exhibited in Australia, are usually viewed by two Board members. More censors will see it if the synopsis suggests that the film is particularly violent or contains sexual violence. Again it is the synopsis which primarily determines how many censors see a video and again violence and sexual violence are the focus of attention. If these elements are suggested in the synopsis then three censors may view the video, otherwise videos may be seen by one or two Board members. All edited adult sex videos aiming for an 'R' classification are screened by two censors; 'X' rated material is usually screened by one censor. The vast majority of films and videos are seen in full, but there are some exceptions. Where there is a previous record for a video, plus full running notes, then it may be viewed in fast forward. Some obviously uncontentious material may be 'written off' as 'G' by the Senior Censor and therefore not viewed at all.

The vast bulk of films and videos is screened by those rank-and-file Board members under the direct supervision of the Senior Censor. In recent years there has been a maximum of eight censors working at this level and screening, almost without exception, three films or videos in full per day. Running notes for continuity purposes and detailing any classifiable elements are taken by each censor. After screening each censor writes an individual report giving reasons for his or her decision. These are called 'whites'. If there is more than one censor involved then a combined 'pink' report is then written. Where relevant, the 'pink' will include a statement of majority and minority opinion. This report is signed by all those involved in the decision. A good insight into this system is gained from the Board's paperwork on the controversial film, *Salo*, cited in the Hansard Report for the Senate Select Committee on Community Standards Relevant to the

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[58] For example, the present Deputy Chief Censor, David Haines, has been a Board member since 1981.

[59] ibid, at 28.

Supply of Services Utilising Electronic Technologies.[60]

Where Board members disagree over an issue of classification or registration, or where there is uncertainty, or a view that a wider screening would be appropriate, then the film or video is re-screened by a further panel. The number of censors involved in that second screening is determined by the Deputy-Chief Censor in consultation with the Senior Censor. The matter is afterwards discussed at a Board meeting where a majority decision is reached. In the event of a tied vote the Chief Censor may exercise a casting vote.

The 'Year in review' section of the 1991-92 Annual Report makes it clear that the FCB no longer edits or cuts films. The onus now is entirely on the distributor, either to take a film to appeal or to edit it. In the latter case the FCB gives advice, on request, as to the reasons for decisions and comments on the proposed plan of reconstruction. Obviously Refused films are often appealed or edited by the distributor; others are edited for purely commercial considerations, where a distributor believes it will perform better at the box office with an alternative classification. This occurs with such films as *Total Recall*, originally classified 'R' but then edited to attain an 'M' in order to reach its target teenage audience. Often the upshot is that both the 'R' and 'M' versions become available on video, the 'R' version usually being advertised as 'complete and uncut', thus fuelling public misunderstanding.

Since 1990 the decisions of the FCB have been available on the Telecom Discovery network.

The Regional Censorship Office: The work of the Melbourne office is clearly outlined in the Annual Report of 1989-90, which states it is staffed by two officers who hold appointments as publications classification officers under the ACT Ordinance and Deputy Censors under the *Customs (Cinematograph Films) Regulations*. Their responsibilities are to 'classify publications, videotapes and some films for theatrical release which are submitted by local distributors, and to deal with public enquiries.' For films and videos the work of the Deputy Censors is supervised by the Senior Censor who decides whether material will be screened by one or two Deputy Censors. Where the synopsis looks problematic a film will be forwarded to the Board for screening. Presumably the new position of Senior Literature Officer acts in a similar gatekeeper role for literature.

The Annual Reports do not include statistical information on the work of the Melbourne office. Deputy Censors working from Melbourne and within the OFLC are Commonwealth public servants.

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[60] Another account of the internal workings of the FCB is found in Report of the Joint Select Committee On Video Material, Vol 2, at 424.

The Film and Literature Board of Review: Obviously the volume and nature of the FLBR's workload will vary from year to year, depending entirely on the attitude taken by the film and publications industries to the decisions of the FCB and Literature Section of the OFLC. In its first full year of activity the FLBR heard seven appeals. One of these was for the film, *Silence of the Lambs,* where the FLBR overturned the 'R' decision of the FCB by awarding the film an 'M' classification. Another was an appeal by the ACT Government Law Office against a decision of the Chief Censor to accord an Unrestricted classification to a record cover insert for the Guns 'N' Roses album 'Appetite for Destruction'. That appeal was upheld and the material classified Category 1. In its second year the FLBR heard ten appeals, six relating to film and video and four to publications. Overturned was the ban on *Final Exit*; upheld was the decision to make an issue of *People* magazine a Category 2 publication.

There are six members of this part-time statutory body. It is headed by the 'Chairman' and 'Deputy Chairman'. At least one member must be a woman. Since 1986 all its reports have been cited in full in the Annual Reports. These reports are written by the Chairman but they include reference to minority opinion. They deal with the substantive issues of censorship and, as such, provide for the community the most 'open' and accessible insight into the way the legislation and Guidelines have been applied. As the recent decision to lift the ban on *Salo* shows the decisions of the FLBR are sometimes controversial. The positive aspect is that the community is in a position to make an informed judgment regarding the nature and quality of the FLBR's reasoning, without having to use the cumbersome machinery of the *Freedom of Information Act*.

Until recently this kind of substantive analysis has been conspicuously absent from the reporting of the work of the FCB and the Literature Section of the OFLC. The 'Year in Review' section from the latest Annual Report begins at least to address this gap for films and video. Some comments on the controversial decisions in literature have also been included, but these have tended to be more procedural in nature.

5 Issues in Conclusion

Law reform: Implementation of the recommendations of the Law Reform Commission is very much on the agenda at present. Central to this is the formulation of a national uniform system of censorship. The proposed legislative scheme consists of:

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

An expanded Classification Board is proposed, of 15 members, having carriage of all the classification functions incorporated under the administrative umbrella of the OFLC.

By implication the Classification Board is to have at least some executive authority. This is found in the proposed delegation power. At present the Chief Censor may delegate his powers to any officer of the OFLC. For example, the Executive Officer may be appointed Acting Deputy Chief Censor. In the Commission's Discussion Paper this power was actually enlarged so the Chief Censor now had more power than the Governor General and the Attorney General combined, to appoint officers of the OFLC to any statutory position for any length of time.[61] In the Report itself this power was seriously curtailed. The proposal now is that the Director (as the Chief Censor is to be known) should be able to delegate his/her powers to designated Board members; and delegate powers of the Board to people employed in positions approved by the Board, to allow them to deal with straightforward matters.[62] The effect would be to alter the status of the Board within the OFLC. For the Commission this administrative matter was integral to the integrity of the proposed procedural reforms.

Legally, there would still be no Board of the OFLC. Further, the proposed

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61 The Law Reform Commission, Discussion Paper 47: Censorship Procedure, 1991,at 69. The delegation power if found in s.37 of the draft Bill.

62 The Law Reform Commission, Report No 55, at xiv.

Classification Board's capacity to involve itself in policy work would remain at the discretion of the Senior Management of the OFLC. But if the Commission's proposal were adopted the Board could at least exercise some executive control over the classification process itself, thus ensuring, in the Commission's words, 'that the power to delegate will not be at large but will be subject to appropriate controls'.[63]

Administrative reform: The issue of the integrity of the process becomes more pressing the wider the OFLC casts its regulatory net, beyond films, into literature and on into computer games, Pay TV, clothing carrying advertisements and advertising of telephone information services. The OFLC promises to become the nearest thing Australia has had to a de facto Ministry of Cultural Standards. Its sphere of activity cuts deep into areas of personal rights and freedoms. Its modus operandi should be as clearly and fully articulated as is necessary for meaningful community understanding.

Vital to the integrity of the whole censorship scheme for the Commission was the perceived need for stronger relations between the Boards and the community. The system is founded on the idea that the decisions of these Boards are representative of contemporary community standards. To achieve this there must be strong emphasis on public participation and consultation in the Board's work, plus a continuing research program. Moves have already been made in this direction.

The community standards test: The *Australian Law Journal's* editorial comment on the 1965 *Oz Trial* observed that the community standards test may be so vague and operates with such a 'wide ambit of discretion as to be meaningless for practical purposes of application'.[64]

It is certainly the case that in a pluralistic society this must be a very difficult test to apply. Censorship is inescapably controversial, be it in relation to films like *Silence of the Lambs* and *Salo*, such books as *American Psycho* and *Final Exit*, and now computer games like *Night Trap*. In some cases, notably violence and pornography, the whole genre is a matter of public controversy. What is offensive to one person or group

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63 ibid, at 35-36. The Commission's recommendations invite comparison with the recent reforms in New Zealand under the *Films, Videos, and Publications Classification Act 1993*. This Act establishes an OFLC. In this and other respects it obviously owes something to the Australian model. However, the New Zealand OFLC operates within a very different censorship system where, it seems, much of the work undertaken here by the FCB (or the Classification Board under the Commission's proposals) is done in New Zealand by a labelling body, which is basically an industry organisation with some additional community representation (s.72 and s.74). No Classification Board is provided for under the Act, but there is to be a Film and Literature Review Board. At the risk of over simplification, the OFLC's role is restricted to classifying the material which the labelling body finds problematic (s.12), plus referrals from other sources such as the Comptroller of Customs (s.13).

64 39 *ALJ* 294.

may not be to another.

The censors are required therefore to make difficult judgments. As the debate on *Salo* shows the community standards test contains hidden snags. Stated in rather crude terms, is it to be interpreted from a 'majority' or 'elitist' standpoint. The law of course refers neither to the community or its standards, but rather to offence against the standards of a reasonable adult person. That person has been defined as 'generally representative of ordinary people', but it may be interpreted more in terms of the ultra-enlightened individual of legal fiction. This contrasts with the test found in the Guidelines for 'R' rated films which are defined to accommodate material 'offensive to some sections of the adult community'. The dilemma is encapsulated in the following comment of the Deputy Chief Censor, David Haines, from his decision on *Salo*: '...I would concede that most people would find this horrifying or offensive, I do not believe a reasonable adult person would hold that it should be banned'.[65] What does this mean? That most people are not reasonable adults?. Or that reasonable adults are to be found in some sections of the community and unreasonable ones in another? Or that reasonable adults could well find the film offensive but not to the extent that it should be banned?. But then the last line of argument is only available in certain jurisdictions. New South Wales is not one of these, for here the likelihood of 'offence' per se against the standards of the reasonable adult person is the test for refusal of classification.

The dilemma inherent in the community standards test has been considered by the Canadian Supreme Court. In the landmark case of *R v Butler* [1992] [66]Sopinka J reviewed the authorities in this area, notably *Towne Cinema Theatres v The Queen* [1985],[67] where a divided court arrived at the following conclusions. For the majority, it was the standards of the community *as a whole* which had to be considered and not the standards of a segment of that community. At issue then was a 'national community standard of tolerance' to be understood in terms of what Canadians would not tolerate other Canadians being exposed to, as against a test of what Canadians would not tolerate being exposed to themselves. This can be characterised as the 'majoritarian' test which adopts the standards of the general community.

Against this is the minority view in the *Towne Cinema Theatres* case which, as Sopinka J explains, held that 'the tolerance level will vary depending on the manner, time and place in which the material is

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[65] Senate Select Committee on Community Standards etc, Hansard Report 5 August 1993, at 377.

[66] 1 SCR 452.

[67] 1 SCR 494.

presented as well as the audience to whom it is directed'.[68] This minority opinion is an elaboration on the view of the former Chief Justice of South Australia, Dr J J Bray, to the effect that the relevant standard of decency is contingent upon context. This in turn finds legislative support in those provisions of the ACT Ordinance (as well as some State Acts) concerned with the artistic merit of and likely audience for a film or publication. The implication is that such provisions allow for a more 'elitist' interpretation, with censorship decisions having regard to the standards of segments of the community. Another perspective on this approach is that it allows for the diversity of standards found in any complex modern society. Once again such provisions are only available in certain jurisdictions and New South Wales is not one of these. Further, the ACT Ordinance itself refers 'to the standards of morality, decency and propriety *generally* accepted by reasonable adult persons' (emphasis added).

This paper ends on this note, emphasising the complexity of the law in relation to censorship and the complexities involved in its application.

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[68] 1 SCR 478.

Appendix 1: Guidelines for Films and Videotapes[69]

Why a movie is rated G

General (suitable for all ages)

Parents should feel confident that children may view material in this classification without supervision, knowing that no distress or harm is likely to be caused.

Language: The mildest expletives, but only if infrequent and used in exceptional and justifiable circumstances.

Sex: Very discreet verbal references or implications, provided they are justified by the narrative or other context.

Violence: Minimal, mild and incidental depictions, provided they are justified by the context.

Why a movie is rated PG

Parental Guidance (parental guidance recommended for persons under 15 years)

Films in this classification may contain adult themes or concepts which, when viewed by those under 15 years, require the guidance of a parent or guardian.

Language: Low level coarse language is acceptable, provided its use is not excessive.

Sex: Discreet verbal and/or visual depictions, references to sexual matters.

Violence: Depictions of violence must be mild in their impact, and/or presented in a stylised or theatrical fashion, or in an historical context.

Other: Discreet informational and/or anti-drug references. Mild supernatural or "horror" themes may warrant 'PG'. Minimal nudity if in a justifiable context.

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69 From: *Guidelines for the Classification of Films and Videotapes*, **Information Bulletin No 7 - May 1993**, Office of Film and Literature Classification.

Why a movie is rated M 15+

Mature (recommended for mature audiences 15 years and over)

Material which is considered likely to disturb, harm or offend those under 15 years to the extent that it is recommended for viewing by those 15 years and over will be classified 'M'. Most adult themes may be dealt with, though the degree of explicitness and intensity of treatment will be an important factor.

Language: Crude language may be used, but not if overly frequent or impactful.

Sex: Sexual intercourse or other sexual activity may be discreetly implied.

Violence: Realistic violence of low intensity may be depicted if contextually justified.

Other: Drug use may be discreetly depicted, but not in an advocatory manner. Supernatural or "horror" special effects may be depicted, but not if graphic or impactful.

Why a movie is rated MA 15+

Mature Accompanied (restrictions apply to persons under the age of 15 years)*

Material which contains coarse language or depictions of sex or violence or any combination of elements likely to disturb, harm or offend those under 15 years to the extent that it should be restricted to those 15 years and over, will be classified 'MA'.

Language: Crude language may be used, but not when it is excessive, unduly assaultative, or sexually explicit.

Sex: Sexual intercourse or other sexual activity may be discreetly implied or simulated.

Violence: Realistic violence of medium intensity may be depicted but violent depictions with a high degree of realism or impact are acceptable only if contextually justified.

Other: Drug use may be depicted, but not in an advocatory manner. Supernatural and "horror" special effects usually warrant an 'MA' classification, but not if overly graphic or impactful.

* Children under 15 years will not be admitted to cinemas unless accompanied by a parent or guardian; video material restricted to persons 15 years and over.

Why a movie is rated R 18+

Restricted (restricted to adults 18 years and over)

Material considered likely to be harmful to those under 18 years and/or possibly offensive to some sections of the adult community warrants an 'R' classification.

Language: There are virtually no restrictions on language in 'R' films.

Sex: Sexual intercourse or other sexual activity may be realistically implied or simulated.

Violence: Highly realistic and explicit depictions of violence may be shown, but not if unduly detailed, relished or cruel. Depictions of sexual violence are acceptable only to the extent that they are necessary to the narrative and not exploitative.

Other: Drug abuse may be depicted, but not in an advocatory manner. Extreme "horror" special effects usually warrant an 'R'.

Why a movie is rated X 18+

Contains sexually explicit material (restricted to adults 18 years and over)

The classification and guidelines for video are the same as those for cinema except that for video there is an extra classification, 'X', which is defined as follows:

No depiction of sexual violence, coercion or non-consent of any kind is permitted in this classification. Material which can be accommodated in this classification includes explicit depictions of sexual acts between consenting adults and mild non-violence fetishes.

What kind of movie is refused a classification

Refused classification

Any film or video which includes any of the following will be refused classification:

(a) depictions of child sexual abuse, bestiality, sexual acts accompanied by offensive fetishes, or exploitative incest fantasies;
(b) unduly detailed and/or relished acts of extreme violence or cruelty; explicit or unjustifiable depictions of sexual violence against non-consenting persons;
(c) detailed instruction or encouragement in:
    (i) matters of crime or violence
    (ii) the abuse of prescribed drugs.

Appendix 2: Printed Matter Guidelines[70]

UNRESTRICTED

No restriction as to sale or display.

Covers and Advertising Posters

- Photographs must be suitable for display in public. They may depict discreet nudity if it is not overtly sexually suggestive or if it does not imply sexual activity. Depictions of genitals, public hair, fetishes or implications of fetishes are not permitted.

- Language on covers should not be assaultative or sexually suggestive. Some lower level coarse language is acceptable, but sexually suggestive combinations of words or colloquialisms for sexual acts or genitals are not permitted.

(Covers or posters which do not comply with these guidelines are considered unsuitable for public display and would result in a Restricted Category 2 classification.)

Contents

- Photographs of discreet male and female nudity are acceptable but not if sexual excitement is apparent.

- Depictions of sexual activity between consenting adults are acceptable only where they are discreetly implied or simulated.

- Illustrations, paintings, statutes etc which are considered bona fide erotic artworks and depict explicit sexual activity or nudity may be acceptable in Unrestricted when set in an historical or cultural context.

- Written descriptions of sexual activity between adults are acceptable in mainstream works of literature and in publications not overwhelmingly dedicated to sexual matters.

RESTRICTED - CATEGORY 1

Sale restricted to persons 18 years and over, to be displayed in a sealed wrapper (not to be sold in Queensland).

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[70] From: *Printed Matter Classification Guidelines*, Office of Film and Literature Classification.

Covers

- As for Unrestricted.

Contents

- Photographs may include explicit genital detail or obvious sexual excitement. They may also include implied, simulated or obscured sexual activity between adults and touching of genitals.

- Depictions of mild fetishes such as rubberwear and stylised domination are acceptable.

- Illustrations and paintings which are considered not to be bona fide erotic artworks, and depict explicit sexual activity or nudity will warrant a Restricted Category 1 classification.

- Photographs of realistic and explicit violence, or its aftermath, may be accommodated in a publication that exploits violence, except in a sexual context, or if extremely cruel or violent.

- Exploitative novellas may contain explicit descriptions of sexual activity between consenting adults but excluding bestiality, or incest, or sexual activity involving children, or relished or detailed descriptions of gratuitous acts of cruelty, or detailed or unjustifiable descriptions of sexual violence against non-consenting persons.

- Publications which contain exploitative, realistic and gratuitous descriptions of violence will warrant a Restricted Category 1 classification. They will not include relished or detailed descriptions of gratuitous acts of cruelty, or detailed or unjustifiable descriptions of sexual violence against non-consenting persons.

RESTRICTED - CATEGORY 2

Sale restricted to persons 18 years and over, only to be displayed in premises restricted to persons over 18 years (not to be sold in Queensland).

Covers

- Photographs of sexual activity between consenting adults which include explicit genital detail.

- Depictions of stronger fetishes are permitted but not if non-consent or apparent physical harm are evident.

- Exploitative novellas may contain explicit descriptions of sexual activity of most kinds but excluding sexual activity involving children, or relished or detailed descriptions of gratuitous acts of cruelty, or detailed or unjustifiable descriptions of sexual violence against non-consenting persons.

REFUSED CLASSIFICATION

Publications refused classification may not be sold or displayed.

- Photographs of sexual activity involving children or of exploitative child nudity.
- Publications which promote, incite or instruct in matters of crime or violence.
- Photographs of sexual activity between humans and animals.
- Photographs which depict extremely cruel or dangerous practices, especially those which show apparent harm to the participants.
- Photographs which show sexual violence against the consent of a participant. This will also apply when the non-consent is established from text which relates to a photo sequence.
- Books which promote, incite or encourage the use of prohibited drugs. Included will be books that instruct in the manufacture or cultivation of prohibited drugs.
- Exploitative novellas which include gratuitous descriptions of sexual activity involving children. This guideline will not apply to works of genuine literary merit.
- Exploitative novellas which contains relished or detailed descriptions of gratuitous acts of cruelty, or detailed or unjustifiable descriptions of sexual violence against non-consenting persons. This guideline will not apply to works of genuine literary merit.