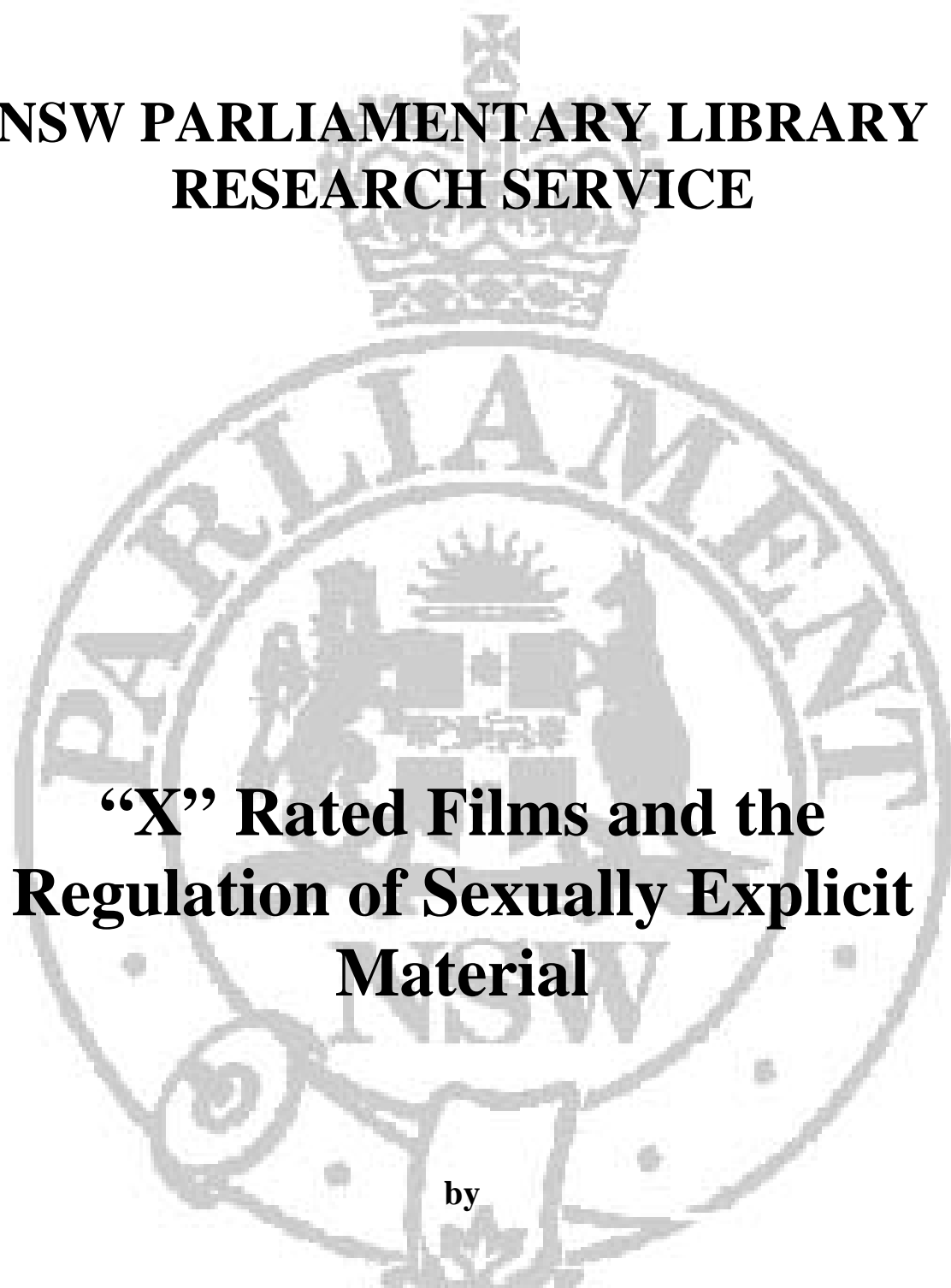


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**“X” Rated Films and the
Regulation of Sexually Explicit
Material**

by

Gareth Griffith

Briefing Paper No 15/03

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EXECUTIVE SUMMARY

In June 2002 the Legislative Council Standing Committee on Social Issues released a report titled, *Safety net? Inquiry into the Classification (Publications, Films and Computer Games) Enforcement Amendment Bill 2001 – Final Report: On-Line Matters*. That report included the following recommendation:

The Attorney-General consider either establishing a licensing scheme, similar to that which operates in the ACT to allow controlled premises to sell X-rated material in NSW or taking more enforcement action against breaches of the legislation.

Further to this, on 30 April 2003 a notice of motion was moved in the Legislative Council that leave be given for a Private Members’ Bill, sponsored by the Hon Peter Breen MLC, ‘to amend the NSW Classification (Publications, Films and Computer Games) Enforcement Act 1995 to remove the prohibition on the sale of films classified “X”, and for other purposes.

These developments serve as the basis for this paper on X rated films. Its major findings are:

- X rated films are legally available for sale or hire from the ACT or the Northern Territory (p 2).
- In the States, the law only permits X rated films to be possessed for personal use. X rated films are not, and never have been, legally available for sale or hire in NSW (p 3).
- Prior to the introduction of the X classification in 1984, sexually explicit films were available for sale in NSW. They were unclassified and subject to the State’s indecency laws (p 3).
- The X classification is a restrictive category of films that is defined to be unsuitable for minors (p 3).
- The X classification is also defined under the National Classification Code to exclude all violent content. Depictions involving coercion and non-consent have been banned in X since 1984, with later prohibitions being placed on sexually assaultive language, fetishes and purposefully demeaning depictions (p 3).
- While all classification decisions for NSW are made under the Commonwealth Classification Act – the *Classification (Publications, Films, Computer Games) Act 1995*, enforcement of the law is a matter for the State, under the *Classification (Publications, Films, Computer Games) Enforcement Act (NSW)* (p 3 and p 19).
- Specific offences relating to the sale, production and distribution (but not possession by adults) of X rated films are found under Part 2 of the NSW Classification Enforcement Act 1995. The private exhibition of an X film in the presence of minors is an offence under this legislation (s. 14) (p 22).
- An offence of publishing indecent articles (other than child pornography) is specifically created under section 578C (2) of the *Crimes Act 1900* (NSW). Whether an X film constitutes an ‘indecent article’ would be for the courts to decide. The proposed Draft Classification Enforcement Amendment Bill 2003 would amend the Crimes Act by omitting ‘or X’ from paragraph (e) of the

definition of article in section 578C (1) (pp 24- 25).

- Two conclusions can be drawn from the enforcement statistics. One is that relatively few cases are brought under the relevant provisions of the Classification Enforcement Act 1995. The second is that, for those cases where a finding of guilty is recorded for a principal offence, most occur under section 6 (a), where a fine is the most common outcome. Section 6(a) provides for the offence of selling or exhibiting a film classified RC or X (p 30).
- The current ACT X film licencing scheme has been in place since 1996. According to the Registrar for this scheme, Tony Brown, there is a high level of compliance with the relevant licensing conditions, something that is helped 'by the fact that the industry is now controlled by a smaller number of players and in the main these are publicly listed companies' (p 31).
- Every aspect of the debate about X rated films is contested, none more so than research findings on the effects, or lack of effects, of viewing sexually explicit material. The recent research of Flood and Hamilton on youth and pornography in Australia has proved controversial (pp 32-41).
- At this stage, social science research is unlikely to answer the legal and policy questions at issue in the X rated debate in any definitive way. However, certain benchmarks are established in Australian law and policy. For example, it recognises the potential harmful effects that may be caused by sexually violent pornography. For this reason, such material is banned (p 41).
- From one standpoint, over recent years the base line of Australian law and policy has moved beyond a primary concern with 'harm' towards a greater emphasis on 'offensiveness', as seen in the banning of all fetishes from the X classification. From another standpoint, recent policy has reflected a different and broader conception of 'harm', one that encompasses a concern for the physical (and psychic) well-being of participants in sexually explicit material, as well as a concern for the 'social harm' that may be caused by such material. This reminds us that very different results on the harmful effects (or lack thereof) of pornography can be reached depending on how 'harm' is defined (p 42).
- Various surveys and opinion polls have been conducted over the past decade or so (pp 42-46). The available results are set out in Appendix D.
- The largely ACT based legitimate X film industry has around 430,000 persons on its mail order list (p 47). Various claims are made about the size of the black market in NSW, which is estimated to have a turnover of \$45 million in video sales alone (p 50).
- In recent years some art-house films, depicting sexually explicit material, have been classified R. Explicit sex education films have been permitted in R since the early 1990s (p 53).
- Whatever the merits or demerits of an X film licencing scheme, ultimately the debate will revolve around competing and conflicting perceptions of the content of X rated films (p 58).

1. INTRODUCTION

The regulation of sexually explicit material is a contested subject. For some, such material is exploitative, demeaning and degrading of participants and viewers alike; they argue its harmful effects, for individuals, families and the community at large, are apparent enough, even if these effects cannot be established with scientific certainty. From this perspective, sexually explicit material should be regulated out of existence. Others are less censorious, perhaps sharing certain residual concerns about high levels of exposure to sexually explicit material, especially where the young are involved, yet protective of the right of adults to read, see and hear what they want. For them, the purpose of regulation is not to prohibit sexually explicit material, but to ensure that certain conditions as to content, production and distribution are enforced, in particular that the product on offer is non-violent in content, that it is produced by fully consenting adults and that its mode of distribution facilitates informed choice and minimises any risk to children.

Of course many variations on these contrasting perspectives exist. Not everyone who finds sexually explicit material objectionable may seek its outright prohibition, if only because they consider this an impractical goal and one that is likely to leave the sex industry in the hands of an unregulated black market. In this pragmatic way, some who are inclined to prohibit may accept a more regulatory strategy. Others accept no such compromise. Likewise, the less censorious approach contains many shades of opinion, from the libertarian view that reluctantly accepts regulation of only the most extreme material, to various gradations of advocacy and acceptance of sexually explicit material.

About the availability of sexually explicit material in Australia there has been much debate in recent years, especially in regard to the Internet. The other main area of debate has been over X-rated films (on video or DVD). Should they be banned altogether, as the Federal Coalition Government had proposed in the lead up to the 1996 election? Should the X classification be replaced by a Non-Violent Erotica category (NVE), as proposed by both the ALP and Liberal Party at the 1998 federal election? Should the licensing arrangements in place in the ACT be adopted in NSW to permit the production and sale of X-rated films in this State, as recommended by the Legislative Council Standing Committee on Social Issues in 2002?

Further to this last recommendation, on 30 April 2003 a notice of motion was moved in the Legislative Council that leave be given for a Private Members' Bill, sponsored by the Hon Peter Breen MLC, 'to amend the NSW Classification (Publications, Films and Computer Games) Enforcement Act 1995 to remove the prohibition on the sale of films classified "X", and for other purposes. Note that this proposed Bill is referred to in this paper as the *Draft Classification Enforcement Amendment Bill 2003*.

It is these latter developments that serve as the basis for this briefing paper. The present paper covers some of the same ground as Briefing Paper No 4/2002, *Classification in Australia: Regulating the Internet and other recent developments*. Unlike that publication, however, which presented a comprehensive review of the legislative and administrative arrangements pertaining to censorship in this country, the focus here is directly on the issue of X rated films. By way of comparison, mention is made of the availability of sexually

explicit material in other forms of communications, notably on the Internet and in publications, but this is not the subject of the present paper.

Note, too, that this paper does not enter into any definitional debates. The phrase ‘sexually explicit material’ is used to describe the content of the X classification. However, the word ‘pornography’ is used on occasions, and reference is also made to ‘non-violent erotica’.¹

For the sake of clarity, certain key points are set out at the outset. The paper then takes as its starting point the relevant recommendation of the Legislative Council Standing Committee on Social Issues. Beyond this, it looks at: the historical background to law and policy in this area; the current classification system; statistical findings on the classification of X films and the enforcement of the law in NSW; the X film licencing scheme in place in the ACT; the social science literature on the ‘effects’ of pornography; relevant surveys and opinion polls; the X film industry in Australia; arguments for and against X rated films; and the trend towards the inclusion of sexually explicit material in the ‘R’ classification.

2. KEY POINTS

Several key points about the classification system and X rated films can be noted:

- The NSW censorship legislation, the *Classification (Publications, Films, Computer Games) Enforcement Act 1995* [**the NSW Classification Enforcement Act 1995**] deals with the enforcement of a classification scheme that is determined nationally under the Commonwealth Classification Act – the *Classification (Publications, Films, Computer Games) Act 1995* (Cth) [**the Commonwealth Classification Act 1995**].
- Under this national scheme, censorship decisions for NSW are all made by the Classification Board and the Classification Review Board, these being independent statutory bodies established under Commonwealth Act.²
- These Boards do not enforce classification decisions. That is a matter for the NSW Police under the NSW Classification Enforcement Act 1995 and certain sections of the *Crimes Act 1900*.
- X rated films are legally available for sale or hire from the ACT or the Northern Territory.

¹ For a recent overview of this debate over terminology see - The Parliament of the Commonwealth of Australia, Senate Legal and Constitutional Legislation Committee, *Inquiry into the provisions of the Classification (Publications, Films and Computer Games) Amendment Bill (No 2) 1999*, April 2000.

² It is sometimes said that the Office of Film and Literature Classification (**the OFLC**) makes classification decisions. It does not. These decisions are made, in the first instance, by the Classification Board and, on appeal, by the Classification Review Board.

- In the States, the law only permits X rated films to be possessed for personal use. X rated films are not, and never have been, legally available for sale or hire in NSW. The sale of X rated films was legal in Victoria for a brief period in 1984 and in South Australia in 1984-85.³
- Prior to the introduction of the X classification in 1984, sexually explicit films were available for sale in NSW. They were unclassified and subject to the State’s indecency laws.
- The X classification is a restrictive category of films that is defined to be unsuitable for minors.
- The X classification is also defined under the National Classification Code to exclude all violent content. Depictions involving coercion and non-consent have been banned in X since 1984, with later prohibitions being placed on sexually assaultive language, fetishes and purposefully demeaning depictions.
- Under the National Classification Code, X rated films are defined as a special purpose category, containing *‘real depictions of actual sexual activity between consenting adults in which there is no violence, sexual violence, sexualised violence, coercion, sexually assaultive language, or fetishes or depictions which purposefully demean anyone involved in that activity for the enjoyment of viewers, in a way that is likely to cause offence to a reasonable adult’*.
- Although most of the material that is classified X in Australia originates from the USA, it is important to note that a comparable official classification system does not operate in that country. The term ‘X rated’ in the US is now purely a colloquialism; it has no legal status. In effect, any film can call itself an X film (or XXX) in the US. In Australia, where ‘X rated’ is a legal term and the legitimate adult film industry is highly regulated, what is classified X may not be equivalent in content to what is colloquially referred to as the X rated industry in the US.
- Likewise, X rated films under Australia’s regulated classification scheme are not equivalent in content to what is available on the basically unregulated Internet.

³

For an overview of the legislative history in the States see – Parliament of the Commonwealth of Australia, *Report of the Joint Select Committee on Video Material, Volume One*, AGPS, 1988, Chapter 6.

3. THE RECOMMENDATION OF THE STANDING COMMITTEE ON SOCIAL ISSUES

In June 2002 the Legislative Council Standing Committee on Social Issues released a report titled, *Safety net? Inquiry into the Classification (Publications, Films and Computer Games) Enforcement Amendment Bill 2001 – Final Report: On-Line Matters*. That report included the following recommendation:

The Attorney-General consider either establishing a licensing scheme, similar to that which operates in the ACT to allow controlled premises to sell X-rated material in NSW or taking more enforcement action against breaches of the legislation.

This recommendation was prompted by testimony received by the Committee on the effectiveness of the current classification. It was reported that:

The Committee heard testimony from Sharon Austen Limited about the effect of the lack of enforcement on the sale of unclassified adult videos in NSW. It was suggested that a large proportion of adult videos currently on sale in NSW should be Refused Classification under the scheme because they contain explicit violence or demeaning content. According to Sharon Austen Limited, the illegal sale of adult videos in NSW has a significant impact on the legal X-rated video trade based in the Australian Capital Territory. The Committee has heard that the ACT has a good compliance record and operates within a tightly enforced licensing structure. Licence fees from the sale of X-rated material are used to fund the enforcement of classification guidelines. As a consequence, material that would be refused classification is considerably less available in the ACT than in NSW.

The Committee notes the anomaly that in NSW it is perfectly legal to possess these products, but not to publish or to sell them.

The Committee considers that this position should be revisited by the Attorney-General so that there is either a commitment to enforcing the current restrictions on adult films in NSW or a consideration of legalising their sale within an appropriately regulated licensing scheme.⁴

On 9 December 2002 the Government responded to the Committee's recommendation on X-rated material, as follows:

The Attorney General listed the Final Report for consideration by State, Commonwealth and Territory Censorship Ministers at the Standing Committee of Attorney-Generals meeting in July 2002. That forum provides a venue for ongoing consideration of issues regarding X-rated material.

⁴

Legislative Council Standing Committee on Social Issues, *Safety net? Inquiry into the Classification (Publications, Films and Computer Games) Enforcement Amendment Bill 2001 – Final Report: On-Line Matters*, Report 25, Parliament of NSW, June 2002, p 45.

4. HISTORICAL BACKGROUND TO THE X CLASSIFICATION – LAW AND POLICY

4.1 The video revolution of the early 1980s

The story of the X classification for films starts with the wave of imported videos into Australia in 1980. In that year the Film Censorship Board examined 828 films/videos for sale or hire; in 1981 the number was 5,146. Two years later the number of imported videos examined by the Board peaked at 8,883.⁵ Concern from some quarters about the content of many of these videos was soon expressed. The term ‘video nasties’, indicating material of a violent and often sexually violent nature, entered the language and it was assumed that a black market in this product was developing, free of government regulation. Unlike cinema films, videos were small, portable, easy to copy, hard to detect and for private use. Unlike radio and TV broadcasting, the video market was diffuse and low budget, and therefore harder to regulate either at point of production or consumption. Before the Internet became popularly available, the video revolution was the greatest challenge to systems of official censorship since the invention of the printing press.

The classification system in place in the early 1980s was basically this. The available classification categories for films were as follows: G, NRC,⁶ M and R. There was no X classification and therefore any film containing sexually explicit material would have been Refused Classification (RC). In any case the classification of videos was not a legal option. The Film Censorship Board, a Commonwealth body, registered films for importation under the federal Customs regulations – the Customs (Cinematograph Films) Regulations. Under Regulation 13 (1) the Board was empowered to refuse registration on a number of grounds, including ‘indecenty’. The Film Censorship Board also, by agreement,⁷ classified films under State legislation, but only those films for public exhibition. In fact, of all the State legislation in place in the early 1980s, only the NSW *Theatre and Public Halls Act 1908* (as amended in 1971) included videotapes in its definition of ‘film’ (s. 26B).

For the Film Censorship Board the video revolution created a legal and administrative problem. The Board’s initial response is explained in the Annual Reports for 1980 and 1981. They indicate that, in addition to registering or refusing to register videos for importation under the Customs Regulations, for a short period the Board adopted a policy of partial classification. In effect, videos it considered to fall into the R classification were classified as such, whereas other videos were registered subject to the special condition ‘That this film/tape will not be exhibited in any State in contravention of the State’s law relating to the exhibition of films’. This partial classification policy was abandoned as from January 1983, ‘as it was deemed inappropriate on legal and practical grounds: legally, because cinema classifications are valid only for the purpose of public exhibition; and practically, because the prohibition against exhibition to persons under 18 is unenforceable

⁵ Film Censorship Board, *Annual Report*, 1984, p 10.

⁶ NRC - Not Recommended for Children.

⁷ *Theatres and Public Halls Act 1908* (NSW), Part 111A.

in the case of videotapes for sale/hire'.⁸ The Board's policy was then to register videos without classification. Beyond that point, it was left to the States to deal with these videos according to their varying obscenity and indecency laws, including in NSW the *Indecent Articles and Classified Publications Act 1975*.

Videos constituted a regulatory anomaly, sexually explicit videos particularly so. The only options available to the Film Censorship Board were to refuse them registration as 'indecent', under Regulation 13 (1) of the Customs regime, or to register them subject to the condition that they were not for public exhibition. The upshot was that a whole range of material became available for sale, legally or by more circuitous means, of a kind that had previously been unknown, or available only in limited forms (8mm or 16 mm films).⁹ Adele Horin summed up the situation as follows:

Strictly speaking, the importation of videos showing explicit sex contravenes Federal customs regulations. The selling of them contravenes State obscenity laws. Despite the laws, hard core videos have been freely available, in the way that despite the laws, marihuana is freely available.¹⁰

4.2 Establishing an X category within a national classification scheme, 1983-84

Out of this state of affairs there developed a move to establish a national, uniform classification scheme for videos for sale or hire which, some argued, should include an X category. The case was made by the then Chief Censor, Janet Strickland, in an address to the Convention of the Motion Picture Exhibitor's Association of Queensland in July 1982. She argued for 'A comprehensive classification system for videotapes (embodying an X category that would include some currently prohibited material)'. Her argument was that such a scheme would:

- meet the public demand for consumer advice in this area;
- gain acceptance by the 'legitimate' videotape distribution industry;
- further implement the Federal Government's philosophy that adults have the right to make their own decisions regarding the material they read, hear or see, but that

⁸ Film Censorship Board, *Annual Report 1982*, p 11.

⁹ In these limited forms (and on videotape) sexually explicit material was in fact shown in selected adult cinemas at this time, as shown by the police prosecution of persons charged after raids by the Licensing Squad in May 1983 on the inner-city Eros and Oxford Cinemas. In October the *Sydney Morning Herald* reported that the senior magistrate of the Licensing Court, Cecil Brahe, had found that persons associated with those cinemas were not guilty of publishing an indecent article. Applying the community standards test, Mr Brahe classified 'indecent' as offensive to 'the modesty of the average man in normal circumstances' and observed that the standards of decency had 'changed, especially in the past few years': 'Porn movies not indecent, SM rules', *Sydney Morning Herald*, 11 October 1983. His view was that the showing of sexually explicit material in the context of restricted premises was not indecent, a judgment described by the *Herald* as one of 'eminent commonsense': Editorial, 'Pornography is not the real issue', *Sydney Morning Herald*, 15 October 1984.

¹⁰ A Horin, 'Women and pornography: the new censors', *The National Times*, 30 March-5 April 1984.

people generally should be protected from exposure to material that may be offensive – or, in the case of children, harmful – to them;

- provide more effective control over material that depicts such matters as, for example, child pornography, bestiality, drug abuse, and acts of extreme violence, cruelty or terrorism.¹¹

In May 1983 the Chief Censor expressed further concerns about the lack of adequate regulation in this area, arguing that the system then in place could not deal with the importation and copying of videos. She explained:

One of the Customs Department’s standing instructions is that they will only look at material that is in commercial quantities. But now you can import privately one master tape and make 30,000 copies. One cannot control that capacity to copy.¹²

Tentative moves towards establishing a national classification scheme had been made by the Fraser Government. The matter was discussed by Commonwealth and State Ministers responsible for censorship in October 1981, when it was agreed to require officials to ‘prepare proposals for the next meeting’.¹³ However, it was when the Hawke Government came to office in 1983, with Gareth Evans as Attorney-General, that concerted moves to establish a national system of classification for videos, incorporating an X category, got under way. As Neil Thornton comments, ‘Since the ALP was in power federally and in four out of the six States, there seemed a reasonable prospect of coming to a suitable Commonwealth-State agreement’.¹⁴

In July 1983 a meeting of censorship Ministers was convened in Brisbane for this purpose. Broad agreement was reached there on a uniform system for the classification of videos to be sold or hired for private use. Using a suitably amended ACT censorship Ordinance as its basis – the *Classification of Publications Ordinance 1983* (ACT) - the proposed video regime was to be non-compulsory in nature and was to incorporate an X category. Under this scheme video material could be classified by the Film Censorship Board at the request of an importer distributor or retailer and such classification was to be a complete defence against prosecution under the indecency and obscenity laws of the States. At the same time the States were to legislate to impose point-of-sale restrictions on material classified R or X, in particular prohibiting access to minors. The requirement that videos be registered on importation was to be abolished. Formulating the rationale behind the proposed X classification, Senator Evans stated that the classification standards were to be the same as for cinemas

¹¹ Film Censorship Board, *Annual Report 1982*, p 16.

¹² M Brown, ‘Censor wants ratings for X-rated videos’, *Sydney Morning Herald*, 12 May 1983.

¹³ Commonwealth Attorney-General, ‘Meeting of Ministers on Censorship Matters’, *Media Release*, 16 October 1981; N Thornton, ‘Enforcing the moral consensus: the case of video pornography’ (1985) 2 *Australasian Political Science Association Conference Papers* 598 at 609. The present discussion of the debate on the X classification draws generally on this paper.

¹⁴ N Thornton, n 13, p 609.

but with a further category X, to be added for stronger material which would be refused cinema showing. Only child pornography and similar very extreme material would be refused classification altogether.¹⁵

At the stage, therefore, the X classification was not perceived as a distinct category, set aside exclusively for non-violent sexually explicit material. It was seen, rather, as an added step in the classification hierarchy, accommodating material that would not be acceptable in R, including material of a more violent nature. X was defined as a 'new extra-restricted category'. Senator Evans's statements at this time were in fact a high water mark for the advocacy of a 'liberal' censorship philosophy in official circles.

According to Thornton, reaction to this seemingly controversial proposal was curiously muted:

Despite the issue of a Commonwealth press release the new and decidedly liberal video censorship scheme received little coverage in the media and escaped public notice, escaped even the attention of a range of single-issue, moral protest groups that could have been expected to have galvanised into political action. Even up until the time the Federal Government's enabling legislation came into effect on February 1, 1984, the video censorship proposals went virtually unnoticed.¹⁶

On 25 January 1984, on the eve of the new *Classification of Publications Ordinance 1983* (ACT) coming into effect, Senator Evans issued a further press release. He described the Ordinance as a model for the States, one that provided a voluntary classification scheme for publications and videos alike. On that point, he explained:

I emphasise that while importers, distributors and retailers are under no compulsion to apply for formal classification, clearly it is in their best interests to do so: purveyors of unclassified material are subject to the full range of sanctions in their State's or Territory's obscenity laws for the sale, display or hire of material not in accordance with the required provisions for publications and videotapes which could be classified Category 1, Category 2, R or X.¹⁷

He explained, too, that as with printed matter, videotapes classified R or X could only be displayed, sold or hired subject to special conditions, their object being 'to prevent children gaining access to material that might be harmful to them and adults being exposed to material that might be offensive to them'. The rationale behind the X classification remained the same:

¹⁵ Commonwealth Attorney-General, 'New Uniform Video Censorship System', *Media Release*, 13 July 1983.

¹⁶ N. Thornton, n 13, p 610.

¹⁷ Commonwealth Attorney-General, 'New Censorship Classification Scheme for Publications and Videotapes', *Media Release*, 25 January 1984.

For videotapes there will be in addition a new category, X, covering more explicit material that would be refused cinema showing. As with printed matter, videotapes containing child pornography and similarly very extreme material will be refused classification altogether.¹⁸

This was reflected in the classification guidelines of January 1984. Under the heading ‘violence’, films were to be Refused Classification if they contained:

Violence: Explicit detailed and gratuitous depictions of acts of extreme cruelty including extreme sexual violence.¹⁹

Striking an optimistic political note, Senator Evans observed:

Legislation similar to the ACT model is already in force in South Australia, is imminent in Victoria, Western Australia and the Northern Territory, and is under active Government consideration in New South Wales and Queensland.²⁰

It was at this apparently late stage that opposition to the new classification scheme, and the X classification in particular, gathered momentum, both in the media and in the Commonwealth and State Parliaments. A particular point of debate was that only ‘extreme’ sexual violence was to be banned under the January 1984 guidelines (and under the Customs regulations then under discussion federally). Presumably, depictions of sexual violence that fell short of ‘extreme’ were to be permitted. Thornton noted the hostility in the Senate where on 28 March 1984 Senator Harradine and Senator Mason gave notice of motions to disallow the ACT enabling legislation. Thornton continued:

During the debate on the legislation in the Senate, Senator Evans agreed in principle to two notable changes, namely that classification of videos be compulsory and that guidelines for classification to be tightened in respect to the degree of sexual violence permissible in X-rated videos.²¹

It was this commitment that Senator Evans brought to the meeting of censorship Ministers in April 1984. At that meeting ‘general support’ was expressed for making the national video classification scheme compulsory. As for violence and sexual violence in videos, the guidelines were altered, so that now under the heading ‘violence’ films were to be Refused Classification if they contained:

Violence: Detailed and gratuitous depictions of acts of significant cruelty; explicit and gratuitous depictions of sexual violence against non-consenting persons.

¹⁸ Commonwealth Attorney-General, n 17.

¹⁹ Parliament of the Commonwealth of Australia, *Report of the Joint Select Committee on Video Material, Volume One*, AGPS, 1988, Appendix 5. All 5 versions of the guidelines agreed to in 1984 are set out in the Appendix.

²⁰ Commonwealth Attorney-General, n 17.

²¹ N Thornton, n 13, p 611.

The press release indicated that all 'explicit violence against non-consenting persons' was to be refused classification.²² Clearly, the identity of X as a distinct, violence-free category was taking shape. However, scope for interpretation remained. Only 'Explicit and gratuitous' sexual violence was to be banned, and then only if it was against 'non-consenting persons'. Moreover, 'explicit' violence that was non-sexual in nature was still permitted in X at this stage, with the relevant guideline stating:

Violence: Explicit depictions (except those referred to under 'Refused Classification').

Outside the Ministers' meeting a group from Women Against Violence and Exploitation (WAVE) staged a demonstration in Chifley Square against the proliferation of hard-core pornography and the legalisation of the sale and hire of X rated videos.²³ On this issue at least these feminists were in agreement with the Reverend Fred Nile MLC, national coordinator of the Festival of Light (FOL), who spearheaded the public campaign against the X category. A report in *The Newcastle Herald* by staff writer, Joyce Morgan, claimed that:

The main thrust of the FOL's opposition to an X-rating is the effect such material has on children. The FOL's national co-ordinator, the Rev. Fred Nile told me this week X-rated material would shock children and the damaging effects on them 'just could not be calculated'. He was concerned that 'permissive parents' might allow their children to view such material or could be careless enough to leave it lying around where children could have access to it. 'It's damaging to children', Mr Nile said. 'We've had reports already of them hanging themselves. Murders and violence are increasing.'²⁴

4.3 NSW and other States abandon the X category, 1984

The various State Ministers brought a range of attitudes to the April meeting. Complementary legislation was in place in South Australia, but not elsewhere. In Western Australia interim arrangements were in place, permitting the State's advisory committee on publications to classify videos R or X. In May 1984, legislation was proclaimed in Victoria, permitting sexually explicit films to be sold in video shops (the public exhibition of X rated films remained illegal).²⁵

In NSW concern about the classification agreed to in July 1983 was taking shape, among Christian and community groups, feminists and beyond. On 19 February 1984 a spokesman for the Premier, Neville Wran, is reported to have said that, although the matter was yet to

²² Commonwealth Attorney-General, 'Ministers Reach General Agreement on Video Censorship', *Media Release*, 6 April 1984.

²³ 'Protest against porn', *The Daily Telegraph*, 7 April 1984.

²⁴ J Morgan, 'The politics of porn', *The Newcastle Herald*, 28 July 1984.

²⁵ I Graham, *The X-rated hoax: a tale of harridans, charlatans and poppycock* - <http://libertus.net/censor/xrhoax1.html>

go before Cabinet, ‘NSW was likely to fall into line with the other States, which would involve legislating on the point-of-sale display, hiring and selling of the hard-core videos’. However, the same report noted that the Government ‘will meet opposition from its own ranks’, in particular the Women’s Advisory Council whose Chairperson, Faye Lo Po, said that by hard-core she meant the ‘sexually explicit subordination of women graphically depicted in pictures or words’.²⁶ Opposition to the X category was to be found in feminist circles, therefore, as well as on the right of the ALP, as expressed by the moving of the following urgency motion in the NSW Parliament on 22 February by BJ Bannon, ALP Member for Rockdale:

Whilst acknowledging the powers of the Commonwealth Government in respect of bringing into the country video movies, this ‘House’ calls on the NSW Government to examine closely the type and nature of certain classes of such movies becoming available under an X-rating with a view to action being taken to protect women and children from exploitation.²⁷

There followed a screening in the NSW Parliamentary theatre of a video compiled by the Film Censorship Board, depicting representative scenes from a range of video classifications. Around 40 NSW parliamentarians attended the screening, some of them walking out early. The *Sydney Morning Herald* reported that ‘Nick Greiner and Paul Landa left early, looking decidedly queasy’.²⁸ *The Daily Telegraph* quoted one Member as saying, ‘I will be doing all I can to make sure that X-rated movies are not legalised in NSW’.²⁹

Premier Wran had not attended the parliamentary screening. Following a meeting with members of the Women’s Advisory Council in February he had indicated his support for a compulsory classification scheme³⁰ and, despite reiterating his Government’s commitment to non-censorship, had emphasised that ‘there are certain things that are beyond the pale’. He singled out ‘extreme violence in association with sex acts’ and reportedly went on to say that the ‘NSW Government would act independently if it thought the restrictions imposed in other States were not sufficiently strong’.³¹ In the mean time, Wran called an election for 24 March 1984, with the immediate result that any legislation to bring NSW into line with a national scheme was delayed. Delay also placed the ‘general agreement’ arrived at in early April in doubt, especially when Queensland decided soon after to ban all X rated videos.³²

Clearly, by the middle of 1984 political pressure upon the NSW Government, some of it

²⁶ L Lamont, ‘Hard-core finds a home’, *The Sun Herald*, 19 February 1984.

²⁷ *NSWPD*, 22 February 1984, p 4570.

²⁸ ‘What they did in Macquarie Street’, *The Sydney Morning Herald*, 1 March 1984.

²⁹ ‘MPs walk out of blue movies’, *The Daily Telegraph*, 1 March 1984.

³⁰ ‘New hard porn video controls in NSW tipped’, *Illawarra Mercury*, 20 February 1984.

³¹ ‘Hard-core videos may be censored’, *Sydney Morning Herald*, 20 February 1984.

³² ‘Joh to ban all X-rated videos’, *The Australian*, 10 April 1984.

from within the ALP itself, from left and right wing factions, placed any legislation designed to legalise X rated in films in jeopardy. This was especially so after an ABC *4 Corners* program on X rated videos went to air on 9 June 1984. It suggested that Film Censorship Board members were less than categorical in their rejection of sexually violent material in the X category. Board members were shown debating whether to admit a rape scene into X. Of the same scene a feminist participant in the program commented, ‘if a 20 minute pack rape scene isn’t sexually violent, what is?’ In effect, like the earlier parliamentary screening, the *4 Corners* program seemed to prove the arguments of those opposed to the X category: (a) that the sexually explicit material of that era was riddled with sexual violence; and (b) that the Film Censorship Board did not, as a matter of policy, categorically reject sexual violence in X.³³ Adding weight to this debate, in July the British morals crusader, Mary Whitehouse, arrived in Australia to campaign against pornography. Still, legislation to ban or legalise X rated videos in NSW had not been introduced. A report in *The Daily Telegraph* on 8 August suggested that, at that stage, the Women’s Advisory Council, the Premier’s chief adviser on women’s affairs, did not favour an outright ban. A spokesperson for the Council said:

We are not wowers. We are not opposed to specific sexual content as long as it is between consenting adults and shows equality of power within the relationship. The Council is most concerned that pornography is reinforcing the view of women as sex objects and second class citizens.³⁴

The same report quoted John Marsden, President of the Council of Civil Liberties, saying that purchasing sexually explicit material ‘should be a decision left up to the individual’. Also quoted was Joe Langely, managing director of Video Brokers, then Australia’s largest video retailer, stating that such films will always be available:

While they are not legal they are going to be controlled by the underworld, which has been around since videos took off. Legislation would at least introduce some quality control and make it less of a big deal for kids to go and sneak a look at.³⁵

On 12 August the NSW Cabinet was poised to consider the X rated issue, informed by a background of complaints to MPs from constituents and submission from women’s and community groups. The Premier had declared himself opposed to sexually violent material, but on the other side did not favour a ‘return to the dark ages’. For the Opposition, Mr Greiner advocated an outright ban on X-rated material and promised, in the absence of Government legislation, to introduce a private member’s bill for this purpose.³⁶

³³ While the Chief Censor would have banned the scene in question, she later argued that the Film Censorship Board was applying the guidelines agreed to by the censorship Ministers: ‘Chief Censor warns of a black market’, *The Age*, 31 August 1984.

³⁴ R Neill, ‘A crime against women – video porn’, *The Daily Telegraph*, 8 August 1984.

³⁵ R Neill, ‘A crime against women – video porn’, *The Daily Telegraph*, 8 August 1984.

³⁶ R Dunn, ‘Government considers video porn crackdown’, *Sydney Morning Herald*, 13 August 1984.

Two days later the full range of arguments found in the debate was canvassed in an editorial in the *Sydney Morning Herald*. While the editorial acknowledged the force of the case against violent and sexually violent videos, it was not prepared to advocate an outright ban on sexually explicit material. It commented:

This seems to be the position adopted by Premier, Mr Wran, and it is a sensible stance to take. He accepts that the worst of the ‘video nasties’ should be banned...But he rejects the proposition that all video tapes deemed by the censor X-rated should be banned. To do this, he claims, would ‘promote a return to the plastic raincoat days’. There is the practical argument, as well, that such a ban would drive the trade in pornographic videos underground.

The editorial continued:

Right now, however, NSW has the worst possible system governing video films. X-rated videos can be legally imported into the State but the police have the option to prosecute a seller of these videos on an obscenity charge...To end the confusion, Mr Wran should bring in the X-rating classification, as he has promised. This would put NSW out of step with Western Australia, Queensland and Tasmania but in line with the ACT and Victoria. Admittedly, it will not appease those determined to have X-rated videos banned. However, the worst of the pornographic videos would continue to be illegal while only adults would be able to purchase or hire videos given an X-rating. There would still be the problem of pornographic movies, acquired by adults, being seen by children. But that is a matter of parental responsibility. Provided the classification is rigorously policed, it should result in a reasonable answer to an extremely difficult social problem.³⁷

In the event, in a press release dated 28 August 1984, the Premier announced that Cabinet had decided, not only that the classification scheme for videos would be compulsory, but that ‘X-rated videotapes would be banned in NSW’. According to the press release, Mr Wran said Cabinet had taken the view this was ‘the only appropriate response to the increasing availability and distribution of sexually violent and objectionable hardcore videotape material’. It said, too, that it was vital the Film Censorship Board ‘faced the realities concerning genuinely objectionable material’. Mr Wran was quoted as saying:

The fact is that these unacceptable tapes are being classified under the X-rating whereas any rational approach dictates their supply to the public at large should be deemed unlawful.³⁸

Effectively, Mr Wran placed the responsibility for banning X rated videos at the door of the Film Censorship Board. In the Board’s defence, the Chief Censor, Janet Strickland, warned that differing State laws on such material would ‘open the floodgates to a huge black market’. She added:

³⁷ Editorial, ‘X-ratings: no easy answer’, *Sydney Morning Herald*, 14 August 1984.

³⁸ Premier of NSW, *Media Release*, 28 August 1984.

People have thrown the X-rated classification out on the basis of their concern over sexually violent and violent material, whereas 99 per cent of the material is just hard core porn without any violence, just the explicit depiction of sexual acts performed by consenting adults.³⁹

4.4 The X classification – a non-violent, sexually explicit category

With this NSW decision, added to those from other States,⁴⁰ the national uniform classification scheme was in tatters. In an attempt to revive the scheme, the Victorian Premier, John Cain, requested an urgent meeting of censorship Ministers. This took place in Melbourne on 28 September 1984.

Discussed there was an 'ER' (Extra-Restricted category) which would expressly exclude all depictions of violence and sexual violence. In a discussion paper prepared for that meeting, it was acknowledged that research by Donnerstein and others had 'fairly conclusively pointed to the socially deleterious effects (even amongst clinically "normal" persons) of being exposed to "substantial amount" of "aggressive pornography". On the other side, it was argued that:

there appears to be no unequivocal and uncontested research currently available which draws the same conclusions in relation to exposure to "traditional" hard core pornography of a non-sexually violent kind.⁴¹

Among other things, the September meeting of censorship Ministers resolved:

Noted the views of the Chief Censor that the largest proportion of the X material was straightforward sexual erotica not involving violence in any form and that, on the basis of overseas experience, a very large black market could be expected to develop in relation to such material were it to be banned outright.

Agreed that further consideration should be given to whether the concept of an acceptable category of non-violent erotica could be developed, going beyond the existing R category but excluding such limited depictions of violence as are permitted under the present X category.⁴²

³⁹ 'Chief Censor warns of a black market', *The Age*, 31 August 1984.

⁴⁰ By September 1984 only South Australia seemed to be still committed to the uniform scheme agreed to in April. By March 1985 it, too, had legislated to ban X films. Victoria's initial legislative support for X, under the *Films (Amendment) Act 1983*, was overturned by the *Films (Classification) Act 1984*, section 19 of which made it an offence to sell, deliver or advertise an X rated film. In fact, the Victorian legislation was designed to accept the Extra-Restricted classification should the letter X be changed to ER. The interim arrangements in place in Western Australia appear to have fallen into disuse, to be superseded by legislation banning X rated films. Queensland and Tasmania had always indicated that the X classification was unlikely to be accepted in those jurisdictions.

⁴¹ Film Censorship Board, *Classification and Content of Films for Sale and Hire*, September 1984.

⁴² Commonwealth Attorney-General, 'Meeting on Video Censorship', *Media Release*, 28 September 1984.

In NSW this approach attracted support from various quarters, including the NSW Labor Women’s Committee which called at its conference for a special ‘E’ category for videos considered ‘sexually explicit erotica’ but without ‘explicit or gratuitous sexual violence’.⁴³

At a subsequent meeting of censorship Ministers, held in Sydney on 26 October, a majority agreed to recommend to their Governments a ban on the sale of X rated videos, and to consider in its place the adoption of a new ‘ER’ category, in the following terms:

Material which includes explicit depictions of sexual acts involving adults, but does not include any depiction suggesting coercion or non-consent of any kind.⁴⁴

Ministers supporting the change were those from the Commonwealth, NSW, Victoria, South Australia and the Northern Territory. Queensland and Tasmania opposed it, whereas the non-ministerial representative from Western Australia undertook to refer the matter to his Minister for consideration.

The upshot was that the X classification was now designated ‘X’ - Extra Restricted (18 years and over) and it was defined to exclude all violence. This, in effect, was the start of the X classification, as currently understood. However, none of the States adopted the X or ER classification in its revised form, leaving only the ACT Ordinance as the basis for classifying sexually explicit video material in Australia.⁴⁵

In NSW the *Film and Video Tape Classification Act* was introduced on 30 October, with the legislation coming into force on 1 March 1985. It established the present position, whereby it is legal to possess X rated material, but illegal to sell or hire it in this State. In essence, it was a classic example of political compromise, achieved within the flexible arrangements provided under a federal system of government. There was something for everyone: moral conservatives; radical feminists; the adult video industry; even civil libertarians. That the NSW Attorney General had agreed only a few days earlier to recommend adoption of a non-violent ER category was not dwelt upon in the relevant Second Reading speech.⁴⁶

As for the X classification, it seemed to be identified in the public mind with video nasties, perhaps irretrievably so, even though by December 1984 the relevant guidelines categorically rejected any depictions of coercion or non-consent. The guidelines for the X classification, as published in the Film Censorship Board’s annual report for 1987, remained unchanged until 1996, when the ACT Ordinance was repealed and the

⁴³ S Browne, ‘Labor women urge video “erotic” rating’, *The Australian*, 1 October 1984.

⁴⁴ Commonwealth Attorney-General, ‘New video guidelines agreed and recommended’, *Media Release*, 26 October 1984.

⁴⁵ The X classification was also allowed under the Northern Territory’s *Classification of Publications Act 1985*, which commenced operation on 1 July 1986.

⁴⁶ *NSWPD*, 30 October 1984, p 2757.

Commonwealth's Classification Act 1995 came into force. The guidelines read:

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-violent fetishes.

Senator Harradine has said of the X classification that 'All of the sexual violence has been out since 1984'.⁴⁷ From his standpoint, however, as from others, the X category has remained highly objectionable. Indeed, by giving something to everyone, the federal compromise arrived at in November 1984 was not completely satisfactory to any of the stakeholders involved. Further controversy was assured.

4.5 The ongoing debate

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, recommending by majority a new classification to be called non-violent erotica (NVE) to replace the 'X' classification (but note that a majority of the Joint Committee did not support Recommendation 2, namely, that the proposed NVE category contain the same material as then defined in the X classification).⁴⁸ The NVE recommendation was rejected in June 1988 at a meeting of Commonwealth and State ministers, where the States instead supported the outright banning of X-rated material.⁴⁹ In November 1988 the ALP Caucus voted not to accept this move to ban X.⁵⁰

The Commonwealth Classification Act 1995 commenced on 1 January 1996. On 11 July that year the censorship Ministers agreed to revise the guidelines, including those relating to the X classification. In particular, 'offensive fetishes' (violent or non-violent) were excluded from the category, as were 'depictions which purposefully debase or abuse for the enjoyment of viewers'.

The background to the subsequent debate has been explained in a Commonwealth Parliamentary Library publication as follows:

⁴⁷ Commonwealth of Australia, Official Committee Hansard, Senate Legal and Constitutional Legislation Committee, *Reference: Classification (Publications, Films and Computer Games) Amendment Bill (No 2) 1999*, 30 March 2000.

⁴⁸ Parliament of the Commonwealth of Australia, *Report of the Joint Select Committee on Video Material, Volume One*, AGPS, 1988, p 296 and pp 302-4.

⁴⁹ Commonwealth Attorney-General, 'Standing Committee of Censorship Ministers', *Media Release*, 1 July 1988.

⁵⁰ K Jackson, *Censorship and Classification in Australia*, Commonwealth Parliamentary Library Current Issues Brief, p 2.

In 1997 there was a flurry of publicity around the issue of censorship in the wake of the election, during which the in-coming Government had had a policy that ‘X’-rated videos should be banned. On 7 April 1997 the Government agreed that the Attorney-General negotiate with State and Territory Censorship Ministers to achieve a ban on ‘X’-rated videos and to create a new ‘NVE’ category for non-violent sexually explicit videos that would exclude certain material which is currently allowed in the ‘X’-rated category or which contains demeaning material. Both the Australian Labor Party and the Liberal Party went to the 1998 election with policies that committed them to the introduction of a new classification category of non-violent erotica.⁵¹

A Bill was introduced into Federal Parliament for this purpose on 8 December 1999 and was subsequently referred to the Senate Legal and Constitutional Legislation Committee. The Committee recommended that the Bill be passed without amendment.⁵²

However, in May 2000 the Government abandoned the NVE proposal, amending the Bill so that the ‘X’ classification would be retained. In a Media Release it was explained that the ‘X’ classification would in fact be retained in a restricted form and that the National Classification Code and the ‘X’ classification guidelines would be altered accordingly, with effect from 18 September 2000. Another Media Release issued by the censorship Ministers in July 2000 announced that warning labels were to be placed on ‘X’ films.⁵³ The net effect was that the amendments expanded the range of prohibition on sexually explicit videos to prohibit, amongst other things, violence, sexual violence, certain fetishes, the portrayal of persons over the age of 18 as minors and sexually assaultive language. A child health warning label has also been placed on such videos, stating ‘Children may be disturbed by exposure to this film. It is a crime to allow this film to be seen by a person under 18 years’.⁵⁴

The policy issues behind these amendments, plus the inherent difficulties involved in the regulation of social issues about which there is a divergence of views in the community, were outlined in the Senate in October 2000 by the Parliamentary Secretary to the Minister for Communications, Information Technology and the Arts, Senator Ian Campbell. Having warned of the dangers of driving the pornography underground and having set out the category of material that should be banned, including child pornography, Senator Campbell commented: ‘The Government does not believe that the portrayal of explicit, but lawful, adult sex on film where there is no coercion or sexualised violence of any kind, falls into this category’.⁵⁵

⁵¹ K Magarey, *Classification (Publications, Films and Computer Games) Amendment Bill (No 2) 1999*, Commonwealth Parliamentary Library Bills Digest No 120 of 1999-2000, p 2.

⁵² K Jackson, n 50, p 3.

⁵³ ‘Censorship Ministers Meet’, *Ministerial Media Statements*, 27 July 2000.

⁵⁴ Commonwealth Attorney-General, ‘Warning labels for X-rated videos’, *Media Release*, 17 November 2000.

⁵⁵ *Commonwealth Parliamentary Debates* (Senate), 30 October 2000, p 18598.

This echoed views previously expressed by the Attorney-General, Daryl Williams, in the Second Reading Speech for the Classification (Publications, Films and Computer Games) Amendment Bill (No 2) 1999. Mr Williams's policy statement on that occasion is worth noting, reflecting as it does the present position of the Federal Government on this difficult issue:

The government is aware that some members of the community who find the portrayal of sexually explicit material on video tape offensive are unhappy with the government's decision not to ban this material. While the government understands and respects these views, there is a need to approach this issue from a general community perspective.

For over two decades now, all Australian governments, of both political persuasions, have subscribed to the principles that adults should be able to read, hear and see what they wish, that persons should be protected from unsolicited material that they find offensive and that children should be protected from material that is likely to harm or disturb them. To these the act has added the need to take account of community concerns about depictions that condone or incite violence, particularly sexual violence, and the portrayal of persons in a demeaning manner.

In Australia, the X-rated category is primarily concerned with explicit depictions of sexual acts which are lawful between consenting adults without any sexualised violence or coercion of any kind. For this material, the question to be asked is not whether some individuals find the material offensive but whether the general community finds it so unacceptable that it justifies its banning. The government does not consider the latter to be the case.

In reaching its decision, the government took into account the fact that X-rated videos have been available in Australia for over 15 years and that a large number are circulating within the community. Given the demand for these videos, banning them would inevitably drive the industry underground. The government considers it is far better to maintain a strict regulatory regime to control the content and availability of videos containing sexually explicit material. By doing so adequate protection can be provided to minors and those who may be offended by such material and the involvement of criminal elements in its production and distribution limited.

After carefully weighing the issues, it was decided that while the material was considered offensive by some members of the Australian community there were not sufficient grounds, as a matter of public policy, to deny adults generally the freedom to access non-violent, sexually explicit videos if they so wished.⁵⁶

⁵⁶

Commonwealth Parliamentary Debates (HR), 8 December 1999, p 13023.

5. OVERVIEW OF THE CURRENT LEGAL POSITION⁵⁷

5.1 The Commonwealth Classification Act 1995

In place under the Commonwealth Classification Act 1995 is a scheme in which: first, classifiers are directed to take certain matters into consideration; secondly, under the National Classification Code, classification decisions are to give effect to certain principles; and, thirdly, arrangement is made for the making of classification Guidelines, setting out in more detail what may be permitted under each of the classification categories. Classification decisions are to be made in accordance with a Code and Guidelines agreed to between Commonwealth and State and Territory censorship Ministers (section 9). The full text of the National Classification Code is set out at Appendix A.

The matters to be taken into account in making a classification decision include:

- the standards of morality, decency and propriety generally accepted by reasonable adults;
- the literary, artistic or educational merits (if any) of the film, publication or computer game;
- the general character of the film, publication or computer game including whether it is of medical, legal or scientific character; and
- the persons or class of persons to or amongst whom it is published or is intended or likely to be published.

The National Classification Code is a schedule to the Classification Act 1995. Under it, classification categories and criteria are not legislated by any State or Territory, or by the Commonwealth; but are instead the product of agreement between all the participating jurisdictions. The Code’s purpose is to set out the classification categories and criteria, as well as to formulate the principles that should inform classification decisions. Thus, classification decisions are to give effect, as far as possible, to the following principles:

- adults should be able to read, hear and see what they want,
- children should be protected from material likely to harm or disturb them,
- everyone should be protected from exposure to unsolicited material they find offensive.
- the need to take account of community concerns about: (a) depictions that condone or incite violence, particularly sexual violence; and (b) the portrayal of persons in a demeaning manner.

The Commonwealth Classification Act 1995 did not in fact change the existing classifications which are set out in the Table 1:

⁵⁷ This section is based on *Censorship in Australia: Regulating the Internet and other recent developments*, NSW Parliamentary Library Research Paper, No 4/2002, pp 14-6.

Table 1: Classification categories for publications, films and computer games

Printed Matter	Films and Videos	Computer Games
Unrestricted	G – General	G – General
	PG – Parental Guidance	G 8 +
	M – Mature: 15+	M – Mature: suit 15+
Restricted – Category 1 (Sold in a sealed wrapper to those 18 years and over)	MA – Mature Accompanied: 15+	MA – Restricted: 15+
Restricted – Category 2 (Sold on restricted premises to those 18 years and over)	R – Restricted: 18+	
	X - 18+ only	
RC – Refused Classification	RC - Refused Classification	RC - Refused Classification

A ‘Refused Classification’ (RC) category can be granted for a *film* on three separate grounds:

- that it depicts violence, sex or other phenomena in ‘such a way they offend against the standards of morality, decency and propriety generally accepted by reasonable adults *to the extent that they should not be classified*’. This is the community standards test. It is based on the notion of offence against the reasonable adult’s standards of ‘morality, decency and propriety’. However, mere offence against these standards is not sufficient to warrant refusal of classification. There is the further requirement that the likely offence must be ‘*to the extent*’ that classification should be refused. In other words, the offence at issue is a question of degree. The relevant contrast to make is with one of two tests for awarding a film an X classification – ‘*likely to cause offence to a reasonable adult*’.
- that it depicts ‘in a way that is *likely to cause offence to a reasonable adult* a minor who is, or who appears to be, under 16 (whether or not engaged in sexual activity)’. There is no question of the degree of likely offence here. For a film to be refused classification for the way it depicts persons under 16, the threshold is lower than that established for the general community standards test.
- that it promotes, incites or instructs in matters of crime or violence.

Under the National Classification Code, X rated films are defined as a special purpose category, containing ‘real depictions of actual sexual activity between consenting adults in which there is no violence, sexual violence, sexualised violence, coercion, sexually

assaultive language, or fetishes or depictions which purposefully demean anyone involved in that activity for the enjoyment of viewers, *in a way that is likely to cause offence to a reasonable adult*. They are also defined as *‘unsuitable for a minor to see’*.

Expanding on this, the Guidelines for the Classification of Films and Computer Games, as last revised in 2003, add that the X classification, which is available only for sale or hire in the ACT and Northern Territory, is restricted to adults and ‘Contains consensual sexually explicit activity’. According to the Guidelines:

Note: This classification category applies only to films. This classification is a special and legally restricted category which contains only sexually explicit material. That is material which contains real depictions of actual sexual intercourse and other sexual activity between consenting adults.

No depiction of violence, sexual violence, sexualised violence or coercion is allowed in the category. It does not allow sexually assaultive language. Nor does it allow consensual depictions which purposefully demean anyone involved in that activity for the enjoyment of viewers.⁵⁸

Fetishes such as body piercing, application of substances such as candle wax, ‘golden showers’. Bondage, spanking or fisting are not permitted.

As the category is restricted to activity between consenting adults, it does not permit any depictions of non-adult persons, including those aged 16 or 17, nor of adult persons who look like they are under 18 years. Nor does it permit persons 18 years of age to be portrayed as minors.

Definitions of some of the words used in the X category are found in the ‘List of Terms’ at the end of the Guidelines. For example, **‘Demean’** is defined to mean ‘A depiction or description, directly or indirectly sexual in nature, which debases or appears to debase the person or the character depicted’. **‘Fetish’** is defined to mean ‘An object, an action or a non-sexual part of the body which gives sexual gratification’. **‘Sexual violence’** is defined to mean ‘Sexual assault or aggression, in which the victim does not consent’. **‘Sexualised violence’** is defined to mean ‘Where sex and violence are connected in the story, although sexual violence may not necessarily occur’. The full text of the 2003 Guidelines is set out in Appendix B.

5.2 The NSW Classification Enforcement Act 1995

The object of the Act is defined to give effect to the national classification scheme for publications, films and computer games (not broadcasting) by:

- providing for the enforcement of classification decisions made under the Commonwealth Classification Act, and

⁵⁸

A grammatical and therefore accurate version of this last guideline would read – ‘Nor does it allow consensual depictions which, *for the enjoyment of viewers*, purposefully demean anyone involved in that activity’.

- prohibiting the publishing (including the sale, exhibition, distribution and demonstration) of certain publications, films and computer games.

NSW participates fully in the cooperative national classification system. For the purposes of the NSW Act, all relevant classification decisions are made by the Commonwealth censorship bodies – the Classification Board and the Classification Review Board. For this reason, the NSW legislation deals solely with enforcement matters – the conditions for public exhibition, sale, hire and advertising of publications, films and computer games. Provision is made for relevant offences and penalties where these enforcement requirements are contravened.

As noted, the Commonwealth Classification Act makes provision for an X classification for films. On the other hand, the highest classification available for films under the NSW Classification Enforcement Act is R18+. Thus, the sale,⁵⁹ production and distribution (but not possession by adults) of films classified X is prohibited in this State, as in all others under comparable enforcement legislation.

Specific offences relating to X rated films are found under Part 2 of the NSW Classification Enforcement Act (ss 6-18). In summary, provision is made for the following offences:

- ***Sell or publicly exhibit*** unclassified, RC or X films (s. 6). In the case of a film classified RC or X or an unclassified film that is subsequently classified RC or X, the penalty is 100 penalty units or imprisonment for 12 months for an individual, or 250 penalty units for a corporation.
- ***The sale or delivery to a minor*** of a film classified RC or X or an unclassified film that would, if classified, be classified RC or X (s. 9(1)). The maximum penalty is 150 penalty units or imprisonment for 2 years for an individual, or 300 penalty units for a corporation.
- ***A parent or guardian who permits a minor to attend the public exhibition*** of a film classified 'RC', 'X' or 'R' is liable to a maximum fine of 20 penalty units (s. 10).
- ***Minors over 15 who buy or attend*** RC, X or R films are subject to a maximum penalty of 5 penalty units (s. 11).
- ***The private exhibition in the presence of minors*** of a film classified RC or X or an unclassified film that would, if classified, be classified RC or X (s. 14). It is a defence to a prosecution under the section for the defendant to prove they believed on reasonable grounds that the minor was an adult. The maximum penalty is 100 penalty units.
- ***The keeping of any unclassified, RC or X films on premises where classified films are sold*** (s. 16). It is a defence for the defendant to prove that they did not, and could not reasonably have known, that the film was on the premises. The maximum penalty is 100 penalty units for individuals, or 250 penalty units for a

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'Sell' is defined to mean 'sell or exchange or let on hire, and includes offer or display for sale or exchange or hire, agree to sell, exchange or hire and cause or permit to be sold or exchanged or hired, whether by retail or wholesale'.

corporation.

- ***Leaving in a public place or on private premises (but only without the occupier’s permission)*** a film classified RC or X or an unclassified film that would, if classified, be classified RC or X (**s. 17**). It is a defence for the defendant to prove that they did not know, or could not reasonably be expected to have known, that the film is or would be classified RC or X. The maximum penalty is 100 penalty units or 12 months imprisonment for an individual, or 250 penalty units for an individual.
- ***The possession or copying, with the intention of selling or exhibiting,*** of a film classified RC or X or an unclassified film that would, if classified, be classified RC or X (**s. 18**). In proceedings under the section, evidence that a person made or possessed 10 or more copies of a film is prima facie evidence that the person intended to sell or exhibit the film. The maximum penalty is 100 penalty units or 12 months imprisonment for an individual, or 250 penalty units for an individual.

The enforcement record in relation to these offence provisions is discussed in the section of this paper headed – ‘Statistical findings about X rated films – classification and enforcement’.

5.3 The Draft Classification Enforcement Amendment Bill 2003

Broadly, the principal effect of this proposed Bill would be to permit the display and sale of X rated films in a ‘restricted publication area’, a term already defined under section 49 of the Classification Enforcement Act 1995 to include a ‘part of any premises’ but to exclude entry by persons under 18.⁶⁰ As well, the proposed Bill would permit the publication of such films and their delivery to persons, but only upon request and ‘in a package made of opaque material’. A **new section 6A** would be inserted into the Classification Enforcement Act 1995 for these purposes.

Certain other amendments are also proposed. The current identical treatment of RC and X films for offence and penalty purposes would be amended to reflect the revised legal status of X films. For example, the penalty under **section 6** for the sale of an unclassified film that is subsequently classified X would be lowered to 75 penalty units for an individual, and 150 penalty units for a corporation; whereas for an RC film it would be raised to 200 penalty units for an individual or imprisonment for 2 years, and 400 penalty units for a corporation. A similar sliding scale of penalties would operate in respect to sections 9, 14 and 17. Under **new section 14 (1A)** the penalty for the private exhibition of an X film in the presence of a minor would decrease from the current 100 penalty units to the proposed 75 penalty units.

⁶⁰

Under section 21 of the Classification Enforcement Act 1995 it is already the case that Category 2 publications can only be displayed in a ‘restricted publications area’. This means that the premises (or part of any premises) must be so constructed that the interior is not visible from outside, that the premises are fitted with a door or gate that must be kept closed, and that the area is properly supervised and signposted. A Restricted Publication Area must display the warning – ‘Persons under 18 may not enter, members of the public are warned that some material displayed in this area may cause offence’.

Section 17 would be amended to make it an offence to leave in a public place or on private premises (without reasonable excuse or the occupier's permission respectively) any RC, X, R or MA film. The current prohibition relates only to RC and X films, but the proposed offence would extend this to cover all classification categories to which any level of restriction applies.

5.4 NSW Crimes Act 1900, s 578C

Discussed in Briefing Paper No 4/2002 were those provisions of the *Crimes Act 1900* (NSW) which are relevant to the censorship regime, notably section 578B (Possession of child Pornography) and section 578C (Publishing child pornography and indecent articles). Child pornography is of course prohibited in any form. The word 'indecent' is not defined under the Act. An offence of publishing indecent articles (other than child pornography) is specifically created under section 578C (2).

According to section 578C (1)(e), an 'article' does not include 'any film that is classified (other than as RC or X) under the Commonwealth Act'. The reference is to the Commonwealth Classification Act 1995. From this, it would seem that films that are classified RC or X are deemed to constitute an 'article' for the purposes of the section.⁶¹ This is confirmed by section 63 of the Classification Enforcement Act 1995. However, whether a particular RC or X film constitutes an 'indecent article' would be for the court to determine. In *Burrows v Commissioner of Police; Giardini v Commissioner of Police*, a case concerning the dismissal of officers from the NSW Police Service for sending pornographic images through the Service's e-mail system, Boland J explained that counsel for the NSW Police Commissioner had

submitted that eel2.mpe, having been classified as RC, supported the assertion that it was indecent. Whilst the image is disgusting, I am reluctant to accept that it is indecent within the meaning of s 578C(2) of the Crimes Act. To do so would be to establish a criminal offence. Indecency must be judged in the light of time, place and circumstance... The image eel2.mpe was sent to persons who did not find it offensive or unwelcome. No one complained about receiving the image. There was no evidence that the applicant ever intended for the image to be seen by any person other than those he sent it to. In this regard, I have also taken into account that classification decisions under the Classification (Publications, Films and Computer Games) act are to give effect, as far as possible, to the principle that adults should be able to read, hear and see what they want and that s 11 (d) of that Act requires the Office of Film and Literature Classification to take into account the persons or class of persons to or amongst whom the publication is published or is intended or likely to be published when making a decision on the classification of a publication.

⁶¹

This differs to the interpretation of Boland J in *Burrows v Commissioner of Police; Giardini v Commissioner of Police* [2001] NSWIRComm 333 (14 December 2001), a case concerning the dismissal of officers from the NSW Police Service for sending pornographic images through the Service's e-mail system. Boland J argued that films and publications classified under the Commonwealth Classification Act 1995, 'other than films and publications classified RC are not "articles" for the purpose of the Crimes Act'. However, section 578C (1)(e) places X films in the same category as RC films.

There is also the additional consideration...that an act done in private is not ordinarily regarded as indecent...Therefore it was submitted, a private email sent to consenting persons was not indecent. It seems to me there is some substance in this submission...In the circumstances I am not prepared to find the applicant published an indecent article within the meaning of s 578 (2) of the Crimes Act.⁶²

Not all these considerations would apply to X rated films. Nonetheless, the decision indicates that such films may not be found by the courts to be ‘indecent articles’ for the purposes of section 578C (2) of the Crimes Act. Note in this respect that the proposed Draft Classification Enforcement Amendment Bill 2003 would amend the Crimes Act by omitting ‘or X’ from paragraph (e) of the definition of article in section 578C (1). A similar amendment is proposed in respect to section 63 (b) of the NSW Classification Enforcement Act 1995.

⁶² [2001] NSWIRComm 333 (14 December 2001), paras 208-213 (references omitted).

6. STATISTICAL FINDINGS ABOUT X RATED FILMS – CLASSIFICATION AND ENFORCEMENT

6.1 Classification statistics

Based on the Annual Reports of the Classification Board and the Classification Review Board since 1995-1996 the volume of films classified X (and Refuse Classification) is set out in Table 2.

*Table 2: Commercial films (videos and DVDs) classified X, 1995-96 to 2001-02**

	Classified X	Refused classification	Total videos/DVDs classified	X films as % of videos/DVDs classified
1995-96	783	57	3,233	24.22%
1996-97	1597	60	3811	41.9%
1997-98	1215	46	3087	39.36%
1998-99	813	26	2536	32.06%
1999-00	873	59	2747	31.78%
2000-01	933	85	2912	32.03%
2001-02	523	17	2876	18.18%

* Cinema films for release for public exhibition are excluded. Commercial films exclude referrals from Australian Customs and the Police.

Why the number of films rated X should have fallen in both absolute and percentage terms in 2001-02 is not clear. It may be an aberration, as in 1994-95 when the number of commercial films classified X dropped to 539 (Table 3). On the other hand, it could be that similarly sexually explicit material is being accessed more readily via the Internet. Another factor may be that, in percentage if not absolute terms, the volume of X classifications is coming off the historically record levels experienced in the late 1990s and at the turn of the millennium.

Table 3 shows the number of commercial videos classified X in the period from the introduction of the video classification scheme in 1984-85 to 1995-96. Predictably, the highest absolute figure was reached in 1984-85, when an enormous backlog of videos remained to be classified. That year apart, only in 1992-93 was the absolute number greater than in any year from 1996-97 to 2000-01.

Table 3: Commercial films (videos) classified X, 1984-85 to 1994-95

	Videos classified X	X as % of videos classified
1984-85	1385*	26.77%
1985-86	329	6.59%
1986-87	347	14.87%
1987-88	129	6.68%
1988-89	429	16.95%
1989-90	657	20.4%
1990-91	616	17.09%
1991-92	678	18.46%
1992-93	934	24.25%
1993-94	735	22.60%
1994-95	539	18.15%

* The high figure is attributable to the backlog of videos waiting to be classified at this time.

Table 2 shows that in 2001-02 a total of 17 commercial videos and DVDs were Refused Classification. The reasons for Refusal are set out in Table 4.

Table 4: Reasons for Refusal in 2001-02 (commercial videos and DVDs only)*

REASON	NUMBER
Demeaning Portrayal	1
Fetish	1
Non-consent	1
Offensive fantasy	3
Offensive fantasy and sexualized violence	1
Offensive fetish	1
Sexual violence	1
Violence	8
TOTAL	17

* These would include videos and DVDs not intended for the X category, such as films depicting violence but not containing sexually explicit material.

Presumably an ‘offensive fantasy’ would include something like an incest fantasy within a sexually explicit film. An ‘offensive fetish’ would involve such things as ‘golden showers’.

6.2 Enforcement

The premise behind the relevant recommendation of the Legislative Council Standing Committee on Social Issues is that the present ban on the sale of X rated material (and indeed on the sale of any unclassified material) is not properly enforced in NSW. Influential in forming the Committee’s view on the X classification was the submission from the adult industry company, Sharon Austen.com, and the subsequent evidence received from persons associated with Sharon Austen Limited. The main argument from this source was that:

NSW is home to the largest black market of X rated, unclassified, Refused Classification (RC) video and DVD material in Australia. Enforcement agencies

operating under the current legislation have not been able to control this rapidly expanding black market and the technology that it uses. Until the industry is regulated in the 'off-line' arena (on the streets of NSW and in particular Sydney), it is unreasonable and illogical to expect that material uploaded onto the Internet from NSW can be controlled either.⁶³

More is said about this submission in a later section of this paper. For the moment it is enough to set out the statistical facts relating to enforcement, first as presented from the standpoint of the Classification Board (the number of enforcement applications dealt with from the NSW Police Service – Table 5), and secondly in relation to the level of prosecutions under the NSW Classification Enforcement Act 1995 (Tables 6 and 7).

The procedure relating to the enforcement of the classification in NSW is set out in Part 7 of the Classification Enforcement Act 1995. Section 58 is headed 'Evidence' and provides for a scheme by which films can be referred to the Classification Board for evidentiary purposes. Specifically, the section provides that a certificate issued by the Board under section 87 of the Commonwealth Classification Act, as to the classification status of a film, is 'admissible and is prima facie evidence of the matters stated in the certificate'. Statistical information on this evidentiary aspect of the Board's work is found in its annual reports, although the 2000-01 Annual Report is the first to expressly indicate which Police applications resulted in s. 87 certificates.

Table 5: Enforcement applications finalised by the Classification Board - NSW Police Service, 2000-01 to 2001-02*

	Publications (NSW Police)	Films Sale/Hire (NSW Police)	S.87 certificate (NSW Police)	Total all jurisdictions**	NSW applications as % of total
2000-01	26	26	53	322	32.6%
2001-02	8	77	102	409	45.7%

* Advice from the OFLC indicates that there is overlap between the s. 87 and other categories for NSW, thereby inflating its percentage of the overall total of applications.

**Note that of total applications from all jurisdictions, 63 were withdrawn in 2000-01 and 30 in 2001-02.

A number of points need to be kept in mind when interpreting Table 5. One is that the Police may seize a large number of films or publications in a single operation and a separate certificate will be issued for all these. However, these separate section 87 certificates may only result in one prosecution. In other words, while 102 section 87 certificates were issued in 2001-02, one for each decision made by the Classification Board, this does not mean that the NSW Police were involved in 102 separate prosecutions. A second point is that s. 87 certificate applications are not necessarily confined to films, but may include publications (or even computer games). A third point is that, unlike other jurisdictions, the NSW courts require s. 87 certificates for a prosecution to proceed.⁶⁴ For this reason the OFLC has

⁶³ *Submission No 32*, Legislative Council Standing Committee on Social Issues Inquiry into the Classification (Publications, Films and Computer Games) Enforcement Amendment Act 2001.

⁶⁴ Based on telephone advice from the OFLC.

adopted a work practice of asking the NSW Police Service if a section 87 certificate is required whenever it submits material for classification. Statistically, this results in an overlap between those items counted in the section 87 evidentiary category and in other categories, thereby inflating the total figure of applications for NSW. In short, the figures presented in Table 5 must be read with great care.

With all these qualifications in place, Table 5 indicates that the enforcement operation of the NSW Police Service compares favourably with that of other jurisdictions. Still, in terms of volume its enforcement work appears to be modest, perhaps very modest bearing in mind the actual volume of illegal material reported anecdotally to be on sale in NSW.

Another indication of enforcement activity is the number of prosecutions brought under those provisions of the Classification Enforcement Act 1995 relevant to X rated films. This is shown in Table 6, along with the outcome in each case. Table 7 sets out the penalties awarded by the Lower Courts for those cases where there was a finding of guilt, although only where the classification offence was the principal offence at issue. In other words, Table 6 captures all cases where a person was charged and prosecuted for a classification offence in the Lower Courts, whereas Table 7 captures only those outcomes for principal offences.

Table 6: NSW Local Criminal Courts Statistics, 1996-2001 - Classification Enforcement Act 1995 (NSW)⁶⁵

Section	Outcome	1996	1997	1998	1999	2000	2001
6 (a)	Dismissed: after hearing	3	1	-	2	-	-
	Dismissed: no evidence offered	-	1	-	9	1	1
	Defendant convicted in his absence	-	-	1	-	1	-
	Offence proven	5	8	5	13	4	3
6 (b)	Offence proven	-	3	-	-	-	-
14 (1)	Dismissed: no evidence offered	-	-	-	1	1	-
	Dismissed: stood out of list	-	-	1	-	-	-
	Offence proven	-	-	-	-	-	1
14 (2)	Offence proven	-	-	1	-	1	-
16 (1)	Defendant convicted in his absence	-	-	-	1	-	-
	Offence proven	1	-	-	-	-	-
17(1) (a)	Offence proven	-	1	-	-	-	-
17(1) (b)	Offence proven	-	1	-	-	-	-
18(1) (a)	Dismissed: after hearing	-	-	-	-	1	-
	Defendant convicted in his absence	-	-	-	-	1	-
	Office proven	-	-	-	1	1	1
	Offence proven	-	-	-	-	-	1
18(2) (a)	Dismissed: after hearing	-	-	-	-	1	-

⁶⁵

Source: NSW Bureau of Crime Statistics and Research.

Table 7: NSW Local Criminal Courts Statistics, 1996-2001 - Number of persons found guilty whose principal offence* was under selected provisions of the Classification Enforcement Act 1995 (NSW) ⁶⁶

Section	Outcome	1996	1997	1998	1999	2000	2001
6 (a)	Bond without conviction	-	-	1	-	-	2
	Fine	4	4	4	5	2	-
	No conviction recorded	1	2	-	3	1	-
6 (b)	Fine	-	1	-	-	-	-
	No conviction recorded	-	1	-	-	-	-
14 (1)	Bond without supervision	-	-	-	-	-	1
14 (2)	Bond without conviction	-	-	1	-	-	-
	Fine	-	-	-	-	1	-
16 (1)	Fine	1	-	-	-	-	-
17(1) (a)	Bond without conviction	-	1	-	-	-	-
17(1) (b)	Fine	-	1	-	-	-	-
18(1) (a)	Fine	-	-	-	1	-	1

* The principal offence is defined to be that offence which received the most serious penalty.

At least two conclusions can be drawn from Tables 6 and 7. One is that relatively few cases are brought under the relevant provisions of the Classification Enforcement Act 1995. The second is that, for those cases where a finding of guilty is recorded for a principal offence, most occur under section 6 (a), where a fine is the most common outcome. Section 6(a) provides for the offence of selling or exhibiting a film classified RC or X.

7. THE ACT CLASSIFICATION ENFORCEMENT ACT 1995 – OPERATION OF THE X FILM LICENCING SCHEME

7.1 The ACT X film licencing scheme

Note should be made of the ACT *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995*. It is under this legislation, as amended in 1996,⁶⁷ that the licensing scheme for X films currently operates. Its introduction followed a period of controversy about the legality of X rated films in the ACT. The scheme also replaced the revenue raising licensing arrangements under the *Business Franchise (X Videos) Act 1990* (ACT), declared by the High Court to constitute an ‘excise’ and therefore to be constitutionally invalid.⁶⁸

In place under the 1996 amendments is a regulatory scheme, administered by a Registrar of X Film Licences and policed by inspectors with defined powers of search and entry (s. 54W). Areas where X rated films can be exhibited for sale to the public are prescribed under the Regulations (these are defined to be the Divisions of Hume, Fyshwick and Mitchell).

As to the operation of the scheme, the current Registrar for X film licences and Director of the ACT Office of Fair Trading, Mr Tony Brown, states:

The basis of the scheme and the powers of the Registrar of X film licences are contained in the Act. Importantly, I have the power to impose conditions on X film licences (and I have done so). The conditions are primarily aimed at facilitating compliance with the obligations that arise under the Act and to assist this office in its inspectorial role that it has. We undertake regular inspections of X film licensees to ensure that they are only duplicating and selling classified films.

When we first started to regulate the industry in 1996 there was a very high level of unclassified or refused classification material being duplicated and sold (our estimate at the time was somewhere in the order of 50% of material). Through a series of inspections (and one or two prosecutions) which involved the seizure of large quantities of material from licensees we have seen the number of unclassified or refused classification material dramatically reduce to about 1 or 2% of films sold. And some of these arise due to often highly technical breaches arising from the inclusion of unclassified trailers or other material....

We have also been aided in our compliance activities by the fact that the industry is now controlled by a smaller number of players and in the main these are publicly listed companies. This has meant that levels of compliance have risen appreciably due to these companies other obligations to such places as the Stock

⁶⁷ *Classification (Publications, Films and Computer Games) (Enforcement) (Amendment) Act (No 2) 1996* (ACT).

⁶⁸ *Capital Duplicators Pty Ltd v ACT* (1993) 178 CLR 561; *Rainsong Holdings Pty Ltd v ACT* (1993) 178 CLR 634.

Exchange (it would not do them much good to have one of their principal assets placed in jeopardy by selling unclassified material).

The industry has also become very easy to deal with and we don't have too many problems with licensees where we find problems. There is a general preparedness to do whatever is required to ensure compliance.

There has been no formal evaluation of the scheme, however, the levels of compliance that are apparent from our inspection program compared to the earlier situation (which was probably not much different to that which currently exists in other States and Territories) is testament enough to the success of the scheme.⁶⁹

The conditions as at 1 July 2003 attaching to X film licences under the ACT Licencing Scheme are set out at Appendix C.

7.2 The Northern Territory Classification of Publications, Films and Computer Games Act

Brief note can also be made of the legislative position in the Northern Territory. There X rated films can be displayed, sold and hired under certain conditions in 'a restricted publication area located in premises in an area prescribed by the Minister' (s. 49). However, unlike the position in the ACT, the production or copying of X films is not permitted (s. 56B). The publication of such material would be legal in NSW under the Draft Classification Enforcement Amendment Bill 2003.

8. RESEARCH FINDINGS ABOUT X RATED FILMS – THE SOCIAL SCIENCE LITERATURE ON THE EFFECTS OF PORNOGRAPHY

8.1 Contested findings

Every aspect of the debate about X rated films is contested, none more so than research findings on the effects, or lack of effects, of viewing sexually explicit material. Research which purports to demonstrate harmful effects tends to be challenged on methodological grounds by the anti-censorship lobby. Likewise, research findings suggesting a lack of impact or influence on attitude or behaviour is treated with the same skepticism by pro-censorship campaigners. In summary, this area of research is characterised by conceptual, methodological and technical controversies. Debates between advocates of the contrasting positions can be acrimonious, as indicated by the transcripts of evidence from hearings held on 23 and 30 March 2000 by the Senate Legal and Constitutional Legislation Committee into the Classification (Publications, Films and Computer Games) Amendment Bill (No 2) 1999.

That the debate about X rated films is contested is only to be expected. One reason relates to the obvious and well-documented problems encountered by the social sciences in

⁶⁹ Correspondence with author, 14 July 2003.

providing causal explanations of either attitudes or behaviour. The human world is complex and therefore any adequate explanation is likely to be ‘multi-causal’ in nature. Correlational findings are also highly problematic. A study may observe a correlation between some activities, such as viewing sexually explicit material, and certain attitudes (aggression towards women) or forms of behaviour (the committing of acts of sexual abuse/violence). However, where a correlation is claimed to exist between exposure to sexually explicit material and sex offences, difficult questions remain. For example:

- can such a correlation be established for the viewing of both violent and non-violent sexually explicit material?
- can it be established for the viewing of non-violent representations of sex which are not explicit in nature?
- can it be established for non-aggressive as well as for aggressive personality types?
- can it be established across cultures? If not, then awkward comparative problems arise.

8.2 Report of the Joint Select Committee on Video Material 1988

The conflicting findings of the 1988 Commonwealth Joint Select Committee on Video Material serve as an example of the contested nature of this area of research. The Joint Committee, based on a review of the available social science research evidence, was split down the middle on the question of pornography’s effects. Its reference in this respect was to inquire into ‘*the likely effects upon people, especially children, of exposure to violent, pornographic or otherwise obscene material*’. One thing upon which there was agreement was that ‘This is the most difficult Term of Reference’. It is enough here to cite the contrasting conclusions.

Six members of the Committee, constituting the majority, reported:

Adverse effects upon people, and especially upon children, of exposure to material containing various degrees of violence, pornography, or obscenity have been demonstrated.

Claims were made that in some cases the viewing of such videos may lead to aggressive behaviour, and in others may lead to desensitization and psychological harm.

Because of the number of variables in the subjects of such studies, it is almost impossible to prove conclusively, a direct or sole causal link between viewing particular videos and the commission of crime.

The other five members of the Committee, including the Chairman⁷⁰, reported:

We are not satisfied with the adequacy of the social research evidence.

⁷⁰ Parliament of the Commonwealth of Australia, *Report of the Joint Select Committee on Video Material, Volume One*, AGPS, 1988, p 295.

Adverse effects upon adults and children of exposure to material containing various degrees of violence, 'pornography' or obscenity have not been clearly demonstrated.

Claims have been made that in some cases it [that is, the matters set out in the above paragraph] may lead to aggressive behaviour causing physical harm to others and in others it may lead to desensitization and psychological harm. We are not satisfied that causality has been established.

With regard to detailed and gratuitous depictions of acts of considerable violence or cruelty, explicit depictions of sexual violence, child pornography and bestiality we feel that there is a possible risk of harm or at least sufficient revulsion in the community to justify the refusal of classification.

The argument by some advocates for increased censorship on the grounds of the protection of moral attitudes, especially sexual standards of behaviour is rejected. The defence of 'community standards' is a matter for rational debate and education and not for protection by censorship, even if such protection were considered effective.⁷¹

8.3 Baxter's Australian study, 1990

A review of relevant research findings from this period was conducted in Background Paper No1/1996, *Censorship: A Review of Contemporary Issues*. Noted there was research conducted in an Australian context by Mike Baxter and published in *New Scientist* in 1990. Baxter analysed the relationship between the availability of pornography and the level of rape reports in two States. He found that 'Queensland... has maintained the strictest controls on pornography and has a comparatively low rate of rape reports. By contrast, South Australia, the most liberal State in relation to pornography, has escalating reports of rape since the early 1970s'. Baxter tended to support the view that a causal relationship exists between pornography and sexual violence, but at the same time acknowledged that the observed correlation in his study did not establish that relationship: 'any number of social or cultural factors could be the actual cause of the apparent relationship between pornography and rape'.⁷²

8.4 Malamuth's overview of social science research, 2001

An overview of the types of social science studies and their findings is set out in Malamuth's entry on 'Pornography' in the *International Encyclopedia of Social and Behavioural Sciences*. He distinguishes between laboratory/experimental studies, on one side, and correlational methodologies based on naturalistic settings, on the other. The findings he reports are mainly from 'meta-analyses' of pornography that combine research findings, including from different types of study. In summary, Malamuth reported:

⁷¹ Parliament of the Commonwealth of Australia, *Report of the Joint Select Committee on Video Material, Volume Two*, AGPS, 1988, p 622.

⁷² M Baxter, 'Flesh and blood', *New Scientist*, 5 May 1990, p 19.

Experiments on the effects of pornography on attitudes: ‘The meta-analysis revealed that across the various studies conducted, there was a significant though modest effect, with violent pornography resulting in significantly greater increase in attitudes supporting aggression than exposure to nonviolent pornography (although there was also some effect for both types of pornographic exposure).

Experiments on the effects of pornography on laboratory aggression: The meta-analysis of the laboratory research ‘concluded that men exposed to non-violent or violent pornography portraying sexual acts were more aggressive than those exposed to neutral content’.

Pornography and attitudes favouring sexual aggression in naturalistic settings:⁷³ The analysis found ‘a weak positive correlation that was judged not to be statistically significant, between amount of exposure to pornography and attitudes favouring sexual aggression. Therefore, the correlational data for attitudes in naturalistic settings did not yield supportive data for the conclusions emerging from the experimental studies conducted in controlled settings’.

Pornography and aggression in naturalistic settings – sex offenders and the general population compared: Several types of dependent measures were examined: (a) frequency of pornography use; (b) age of first exposure; (c) the degree to which pornography was a direct prelude to some sexual act; (d) and degree of sexual arousal. ‘The findings across all of the studies and measures combined did not show that criminality was associated with frequency of pornography exposure nor with age of first exposure’. On the other hand, after viewing pornography, sexual criminal offenders were more likely than non-criminals to engage in some sexual acts (including forced sex). These findings were based on self-reporting methods. In laboratory studies examining physiological arousal to sexual stimuli, researchers found that sexual criminals ‘were generally more sexually aroused than non-criminals’. In studies that separated portrayals of consenting and non-consenting sex, it was found that, in comparison with non-criminals, sex offenders were more aroused by violent sex.

The research referred to here was that undertaken by Allen et al in 2000. Their broad conclusion was as follows:

The simple argument that criminal sexual offenders use pornography more often than others finds no support in this summary. Our meta-analysis did find a difference between sexual criminals and controls – not in the function and frequency of use of sexual material, but in physiological reactions to it. Criminal sexual offenders have been shown to react physiologically more strongly to sexual materials than do non-offender controls. This difference is heightened when the content of the material matches the sexual offence of the criminal. This correspondence indicates that it is the use of and reaction to the material that differentiates sexual criminal offenders from non-offenders. Although the evidence fails to establish a clear causal pattern, the inference of causality is not unwarranted.⁷⁴

⁷³ The term ‘naturalistic settings’ refers primarily to research conducted outside the laboratory, in a ‘real world’ context.

⁷⁴ A Allen, D D’Alessio and TM Emmers-Sommer, ‘Reactions of criminal sexual offenders to

Pornography and aggression in naturalistic settings – aggressive and non-aggressive men: A national probability study from 2000 found that for ‘the majority of men, high pornography use is not indicative of high risk for sexual aggression’. However, for the minority of aggressive men designated to be ‘high risk individuals’, it was found that ‘those who additionally were very frequent users of pornography were much more likely to have engaged in sexual aggression than their counterparts who consumed pornography less frequently’. A causal link was not established. However, it was speculated that, for aggressive men, pornography may reinforce already existing coercive tendencies and ‘hostile orientations towards sexuality’. In this way, ‘associations between pornography consumption and aggression toward women could be explained by a circular relationship...’. The point was also made that ‘The way relatively aggressive men interpret and react to the same pornography may differ from that of non-aggressive men’.

Malamuth is actually referring to his own research here, where he concluded:

The current findings do suggest that for the majority of American men, pornography exposure (even at the highest levels assessed here) is not associated with high levels of sexual aggression...But among those at the highest ‘predisposing’ risk level for sexual aggression (a little above 7% of the entire sample), those who are very frequent pornography users (about 12% of this high risk group) have sexual aggression levels approximately four times higher than their counterparts who do not frequently consume pornography.⁷⁵

Pornography and sexual offences - cross-cultural comparisons: If pornography causes aggression then the rate of sexual offences should increase as such material becomes more available. This is not borne out by the relevant research. Malamuth describes this as one ‘glaring contradiction’ in the social science literature on pornography, noting that ‘In research conducted primarily in Denmark and in Japan there has not been evidence of increased criminal sexual acts as a function of the wider availability of pornography’. It is suggested that cultural factors may account for this contradiction. The Danes are said to ‘enjoy a more natural approach to sex’ and levels of trust between people there are said to be ‘considerably higher than in the USA’. Relevant Japanese cultural factors were not elaborated upon.

Malamuth’s general conclusion is worth quoting in full, not only because he is a major figure in this area of research, but also because it captures the complexities and pitfalls involved:

pornography: a meta-analytic summary’, in *Communications Yearbook 22*, edited by M Roloff, 139-169.

⁷⁵ NM Malamuth, T Addison and M Koss, ‘Pornography and sexual aggression: are there reliable effects and can we understand them?’, *Annual Review of Sex Research*, Volume 11, pp 26-91. This research was based on a nationwide random survey of about 3000 American males with a mean age of 21, assessing their degree of exposure to the leading men-oriented sexually explicit magazines and their sexual and non-sexual aggression against women, sexual experience and gender-related attitudes.

Pornography research has often been influenced by ideological/political perspectives with vested interests in particular conclusions. This may have led to framing of research questions and design of some studies in ways that encourages simple conclusions, while not readily accommodating more nuanced conclusions...In future work, it is essential not to use an ‘either – or’ lens in which research is cast simply into questions such as whether pornography exposure is generally harmful or not. As suggested in the research summarized here, depending on such factors as the cultural milieu, the individual’s background, the particular content of the stimuli, the types of responses focused on, the content of exposure, the consumer’s environmental circumstances, and the way ‘harm’ is defined, differing conclusions may result. Some may wish for a ‘one handed’ set of conclusions, but the research more accurately justifies a ‘multi-handed’ perspective that reveals the richness and complexity of the issues related to the study of pornography.⁷⁶

8.5 Flood and Hamilton – Youth and Pornography in Australia/Regulating Youth Access to Pornography (2003)

Certain to attract considerable attention in the immediate debate about X rated films are two recent studies by Michael Flood and Clive Hamilton, published by the Australia Institute in February and March 2003, *Youth and Pornography in Australia: Evidence on the extent of exposure and likely effects* and *Regulating Youth Access to Pornography* respectively. Much of this work is concerned with the availability of sexually explicit material (including sexually violent material) on the Internet. That is not the subject of this briefing paper. However, research on the effects of pornography in X rated films is also dealt with by Flood and Hamilton, as is the exposure of the young to this material and the effectiveness of current regulatory arrangements.⁷⁷

Their findings on the *effects of exposure to pornography* include:

- **Harm to minors:** The harms envisaged are moral, developmental and psychological, as well as specifically imitative in nature. Empirical research to substantiate most of these harms is sparse.⁷⁸
- **The effects of sexual content on minors:** There is almost no research evidence available concerning the impact on children of viewing pornography.⁷⁹
- **Pornography’s impact on adults:** Based largely on the work of Malamuth et al (2000), it is said that there is ‘consistent and reliable evidence that exposure to or

⁷⁶ N Malamuth, ‘Pornography’ in *International Encyclopedia of Social and Behavioural Sciences*, Volume 7, edited by NJ Smelser and PB Bates, 2001, pp 11816-11821.

⁷⁷ The ‘summary’ of their findings from *Youth and Pornography in Australia: Evidence on the extent of exposure and likely effects* is available at – www.tai.org.au

⁷⁸ M Flood and C Hamilton, *Youth and Pornography in Australia: evidence on the extent of exposure and likely effects*, The Australia institute, 2003, p 36.

⁷⁹ *Youth and Pornography in Australia: evidence on the extent of exposure and likely effects*, n 78, p 39.

consumption of pornography is related to male sexual aggression against women'. This association is strongest for violent pornography and still reliable for nonviolent pornography, particularly when used frequently.⁸⁰ They add that this 'association' is not straightforward, that it is mediated by cultural and personal factors, and later comment on the speculative findings of Malamuth et al, to the effect that a 'circular relationship' exists 'between highly coercive tendencies and interest in certain content in pornography'. Noted, too, is the finding that 'high pornography use is not necessarily indicative of a high risk of sexual aggression'.⁸¹ Flood and Hamilton argue that 'pornography clearly plays a role in helping foster the kinds of attitudes and values which may predispose some men to rape women'.⁸²

- ***Pornography's impact on teenagers:*** Flood and Hamilton speculate that, for teenagers as for adults, consumption of pornography, particularly high frequency use and consumption of violent portrayals, is associated with sexually aggressive attitudes and behaviours. 'This association may be particularly strong for the four to five per cent of 16-17 year old boys in our study who watch X rated videos and view Internet sex sites every week'.⁸³

Findings on *the exposure of youth to X rated films* were based on a telephone survey conducted by Newspoll in September 2002 and included 200 respondents (100 boys and 100 girls) aged 16 to 17 years. The survey was restricted to Sydney and Melbourne. Flood and Hamilton found:

- ***Perceptions of exposure to X-rated videos among youth:*** 84% of 16-17 year old boys believe that watching X rated videos is widespread among boys of the same age. Girls have the same perception of the extent to which boys watch X rated videos. Among 16-17 year old girls, only 4% believe that watching X rated videos is widespread among girls of the same age. However, 15% of boys believe that watching X rated videos is widespread among girls. 17% (of boys?) said that they did not know.⁸⁴

⁸⁰ *Youth and Pornography in Australia: evidence on the extent of exposure and likely effects*, n 78, pp 40-41.

⁸¹ *Youth and Pornography in Australia: evidence on the extent of exposure and likely effects*, n 78, p 46.

⁸² *Youth and Pornography in Australia: evidence on the extent of exposure and likely effects*, n 78, p 41.

⁸³ *Youth and Pornography in Australia: evidence on the extent of exposure and likely effects*, n 78, pp 46-7.

⁸⁴ *Youth and Pornography in Australia: evidence on the extent of exposure and likely effects*, n 78, p 15.

Perceptions of exposure to X-rated videos among young (%)		
Question: Watching X-rated videos is widespread amongst girls and boys of your age – agree or disagree?*		
Respondent Gender – ‘agree’	Boys	Girls
Boys	84	84
Girls	15	4

* The exact formulation of the question(s) asked is not available.

- **Exposure to X rated videos among youth:** 73% of boys report that they have watched X rated videos. Of these, 5% said they watched on a weekly basis, 16% every three to four weeks, 11% every two to three months, and 40% less often. The remaining 27% said they had not watched X rated videos. Among girls, only 11% report that they have watched an X rated video, all of them less often than once every two to three months.⁸⁵

Exposure to X rated videos among youth (%)		
Question: Respondents were asked ‘Have you ever watched X-rated videos yourself?’ If ‘yes’, then they were asked ‘How often would that be?’*		
	Boys	Girls
Total ‘yes’ respondents	73	11
Every week	5	0
Every 3 to 4 weeks	16	0
Every 2 to 3 months	11	0
Less often	40	11

* The exact formulation of the question(s) asked is not available.

- **Exposure to X rated videos and Internet sex sites among youth:** 84% of boys and 60% of girls report accidental exposure to Internet sex sites, while 38% of boys and 2% of girls report a deliberate use of such sites. Around a third of homes are connected to the Internet.⁸⁶

On *the effectiveness of current regulatory arrangements for X rated films*, Flood and Hamilton found:

- **Commercial availability to minors:** The commercial sale and hire of X rated videos to minors is probably rare and, for premises in the ACT that are licensed to deal in this material, the age restriction ‘appears to be enforced vigorously’.⁸⁷
- **Failure of the system:** Findings on exposure to X rated films suggest that the regulatory system fails to prevent many youths from having access to X rated

⁸⁵ Youth and Pornography in Australia: evidence on the extent of exposure and likely effects, n 78, p 16.

⁸⁶ Youth and Pornography in Australia: evidence on the extent of exposure and likely effects, n 78, pp 17-20.

⁸⁷ M Flood and C Hamilton, *Regulating Youth Access to Pornography*, The Australia Institute, 2003, p 4.

videos.⁸⁸

- **Content of X rated videos:** These portray sex in ways that are dehumanizing and, arguably, subordinating and degrading to women.⁸⁹
- **The existing classification system:** The existing classification and regulatory system is appropriate. It would be futile to attempt to use the classification system to address the broader aspects of gender relations in Australian society.⁹⁰
- **Effectiveness of the existing system:** The existing system screens out portrayals of activities that may result in significant psychological and emotional harm and therefore does not require substantial change. There may be a need to develop and apply additional enforcement of existing laws.⁹¹

8.6 Comments on Flood and Hamilton

Predictably, these findings proved to be controversial and several aspects of the work of Flood and Hamilton have been critically debated.⁹² Generally, the following questions can be raised about this research:

- To what extent, if any, were the teenagers surveyed informed of the differences between material classified R18+, X and Refused Classification?
- Flood and Hamilton argue that ‘The figures in our study are likely to underestimate the true incidence of pornography consumption’. The opposite might also apply. Some respondents may have been ‘reluctant to admit to these activities, but equally others may have exaggerated their exposure to X rated films.
- How many teenagers declined to participate in the poll?
- As Flood and Hamilton note, ‘The fact that teenagers view X-rated videos more than Internet sex sites is surprising as access to the Internet is much easier than access to X-rated videos’. Is this a plausible finding, even taking into account their explanations (that only a third of homes have the Internet, that minors may self-censor to avoid extreme material, and that X rated videos are legitimised by adult use)?
- To what extent does the survey of content take account of recent restrictions to the X classification, notably in relation to depictions of fetishes?
- Do Flood and Hamilton give sufficient weight to the role that should be played by parental responsibility in preventing children from accessing inappropriate material?

⁸⁸ *Regulating Youth Access to Pornography*, n 87, p 4.

⁸⁹ *Regulating Youth Access to Pornography*, n 87, p v.

⁹⁰ *Regulating Youth Access to Pornography*, n 87, pp 4-5.

⁹¹ *Regulating Youth Access to Pornography*, n 87, p 5.

⁹² For example – B Greig ‘Parents the best Internet censors’, *The Canberra Times*, 6 March 2003; K Albury, ‘Curious teenagers need to be informed about sex, not controlled’, *Sydney Morning Herald*, 4 March 2003; The Eros Foundation, ‘Paper on pornography unreliable’, *Media Release*, 3 March 2003.

- Do they deal with the apparent anomaly whereby 16 and 17 year olds can legally have sex but not legally view depictions of other people actually having sex?

More specific methodological issues can also be raised, as follows:

- By their concluding emphasis on frequency of consumption, Flood and Hamilton may obscure the particular point that Malamuth et al seek to make, namely, that frequency of viewing pornography is not of itself associated with sexual aggression. For Malamuth et al ‘it may be that the effects of pornography are important for some individuals but not for others and that they may be relatively powerful only as they interact with some other factors’, such as coming from a home with parental violence and/or child abuse.⁹³ In other words, one must place frequency of exposure in a broader interpretative framework, taking personality, cultural, family and other influences into account.
- Flood and Hamilton do note that cultural factors may play a role in assessing the effects of pornography. However, they do not discuss in any concerted way the problems posed by comparative analysis. Almost all the research findings they rely on come from North America and the issues involved in translating these to Australian conditions are not raised. Note that in their discussion of ‘correlational studies on sexual assault’ they comment on the research from Denmark and Japan. As noted, that research does not find positive correlations between the availability of pornography and rates of sexual aggression. Flood and Hamilton’s interpretation (following Malamuth et al) is that ‘this is not surprising given that cross-cultural factors such as norms of sexuality and gender, which themselves shape men’s risks of sexual aggressiveness, are likely to modify the role and influence of media stimuli’.⁹⁴ That may be so. The question is, what implications does this observation have for the application of North American research findings to the study of exposure to X rated material under Australian cultural conditions? Is it their view that Australia is now so ‘Americanised’ that cross-cultural factors are irrelevant?

8.7 Harm/offence and Australian law and policy

At this stage, social science research is unlikely to answer the legal and policy questions at issue in the X rated debate in any definitive way. What can be said is that:

- Australian law and policy recognises the potential harmful effects that may be caused by sexually violent pornography. For this reason, such material is banned.
- Australian law and policy also recognises the potential harmful effects that exposure to any sexually explicit material may have on children. For this reason, where such material is legal its availability is restricted to adults only. In NSW the private exhibition in the presence of minors of a film classified RC or X or an

⁹³ NM Malamuth, T Addison and M Koss, n 75, p 54.

⁹⁴ *Youth and Pornography in Australia: evidence on the extent of exposure and likely effects*, n 78, pp 44-5.

unclassified film that would, if classified, be classified RC or X is an offence (Classification Enforcement Act 1995, s. 14).

- Australian law and policy recognizes that some sexually explicit material contains depictions that are purposefully demeaning, which again may have harmful effects on attitudes and/or behaviour. Such material is banned.
- Australian law and policy recognizes, too, that sexually explicit material is offensive to some adults. For this reason, special conditions as to its sale and hire must apply.
- Australian law and policy also recognizes that some sexually explicit material contains depictions (of bestiality for example) that are offensive to reasonable persons to the extent that it should be banned.

From one standpoint, over recent years the base line of Australian law and policy has moved beyond a primary concern with ‘harm’ towards a greater emphasis on ‘offensiveness’, as seen in the banning of all fetishes from the X classification. From another standpoint, recent policy has reflected a different and broader conception of ‘harm’, one that encompasses a concern for the physical (and psychic) well-being of participants in sexually explicit material, as well as a concern for the ‘social harm’ that may be caused by such material. This reminds us that very different results on the harmful effects (or lack thereof) of pornography can be reached depending on how ‘harm’ is defined.

9. STATISTICAL FINDINGS ON X RATED FILMS – SURVEYS AND OPINION POLLS

9.1 Australian Perceptions of Films, Videos and Computer Games – an ABS/OFLC Survey, 1994

Surveys and opinion polls can be useful guides to community standards about censorship issues. However, as indicated by the discussion of the work of Flood and Hamilton, such sources of information can also be problematic. This is particularly so in an area where the level of awareness of the classification system is in doubt, where there may be confusion about classification categories for films and TV, and where a question mark hangs over the understanding of the actual content of each classification category. One published survey that attempted to place views and viewing habits about X rated films in this broader context, thereby allaying certain concerns about the reliability of findings, was that conducted by the Australian Bureau of Statistics on behalf of the OFLC in 1994, *Australian Perceptions of Films, Videos and Computer Games*.

The ABS survey was based on a Population Survey Monitor, using questionnaires received from private households from a random sample of Census Collector Districts selected systematically throughout Australia. For each quarterly survey of this kind an initial sample of approximately 3,000 private dwellings is chosen. For this survey complete questionnaires were obtained from 2,337 households. A complex ratio estimation procedure was used to ensure that the survey was representative across age, sex and area. The survey also included sections on other subjects, including sport and health issues. Further, a sealed envelope was provided to respondents so that they could indicate their viewing habits and attitudes to X

and R rated films in private. To further assist people in providing a more informed response on access to X rated films, the envelope also contained a concise statement on what constitutes an X rating.

Without prompting, respondents were able to recall the following classification categories, although some of these were TV (not film) classifications:

Table 8: Persons aged 18 years and over: Awareness of Classifications

Classification	%
PG	42.5
PGR	21.4
M	61.8
MA	15.8
R	49.5
X	24.5
AO	30.3
A	7.4
Other*	6.8
Don't know any	18.1

* Some respondents named OFLC consumer advice lines, such as 'Adult Themes', as classification categories. Such responses were coded to 'Other'.

The findings indicated two major influences on classification awareness: age and whether or not one has children. The survey confirmed that adults with children are more aware of the classifications than those without children, although it also indicated that this difference only applies at the lower end of the classification scheme (PG and M). On the other hand, the influence of age applied across all classification categories, as shown in Table 9.

Table 9: Persons aged 18 years and over: % of persons aware of classifications by age

Classification	18-24 yrs	25-39 yrs	40-54 yrs	55+ yrs	All households
PG	62.1	53.1	40.3	20.4	42.5
PGR	26.8	26.5	20.1	13.4	21.4
M	74.9	70.6	61.8	43.3	61.8
MA	28.1	17.6	14.7	7.5	15.8
R	69.8	63.8	45.1	24.9	49.5
X	36.2	28.1	22.7	15.1	24.5
AO	40.4	35.2	31.7	17.1	30.3
A	11.0	7.3	8.3	4.4	7.4
Other	9.6	7.4	5.9	5.2	6.8
Don't know	4.4	9.1	17.1	38.1	18.1
Total Adults Australia (000's)	1,893	4,061	3,338	3,306	12,599

Of course the problem with this data is that it is nearly a decade old. When the survey was conducted the MA classification was new and therefore relatively unknown, and the whole debate about Internet regulation had not started at that point, thereby raising awareness

generally about censorship issues. As well, by the passage of time the age differentiation in classification awareness can be expected to fall away. As noted, for the purposes of the survey the level of understanding of the X classification was assisted by provision of relevant information. Findings as to consumption rates and attitudes to the legal availability of X films are set out in Table 10.

Table 10: Persons aged over 18 and over: Selected viewing habits, February 1994

Age (%)	18-24	25-39	40-54	55+	All households
<i>Viewed an X rated film</i>					
Yes	21.6	16.4	10.5	5.6	12.8
No	75.8	81.1	88.0	90.0	84.5
Don't know	2.6	2.5	1.5	4.4	2.7
<i>Should adults have access to X rated videotapes?*</i>					
Yes	67.5	65.0	53.8	40.0	56.0
No	13.9	20.1	34.7	42.7	29.0
Don't know	18.6	14.9	11.5	17.3	15.0

* This represents the finding, not the exact question that was asked.

Table 10 indicates that, as at February 1994, 12.8% of respondents said they had watched an X rated film. Those under 40 were more likely than those over 40 to have viewed this material. As to the issue of adult access to sexually explicit material, all age groups, except the over 55s, supported the availability of X rated films. Overall, 2 out of 3 adults holding a firm opinion on the availability of X rated films believed that persons 18 and over should have access to such material.

9.2 Opinion polls – commissioned by the Eros Foundation

Various opinion polls on the subject of X rated films have been conducted over the years. The publicly available findings are set out at Appendix D. Note that these polls were commissioned by the peak adult industry body, the Eros Foundation. It stated in its submission to the Legislative Council Standing Committee on Social Issues that, in April 1999, Roy Morgan Research conducted the sixth in a series of opinion polls on legalising X-rated videos. Results were set out in the submission, but only for 1992, 1997 and 1999. Also included was an AGB McNair poll from April 1996, commissioned by the Eros Foundation. Note that the results for the 1996, 1997 and 1999 polls are for NSW only. Note, too, that the exact formulation of the question(s) asked in each of the polls varied. Explicit mention was made in the 1992 and 1996 questions of X rated videos, whereas in 1997 reference was made to 'sexually explicit non-violent erotica' and in 1999 to 'non-violent erotic videos' (as well as 'non-violent erotic' magazines or other publications). With the omission of any reference to sexual explicitness, this last survey encompassed 'hard' and 'soft' core material in X and R rated films respectively. The 1999 results (for NSW only) were as follows:

<i>Question: In your opinion, should non-violent erotic videos be available to adults in Australia from properly licensed adult bookstores or should they be banned?*</i>	
Should be available	76.3%
Should be banned	19.1%
Can't say	4.6%
<i>Question: In the last 12 months have you done any of the following? (Respondents could choose more than one)</i>	
Watched at least part of a non-violent erotic film or video	21.3%
Read or looked into a non violent erotic magazine, book or other publication	23.8%
Have you accessed any non violent erotica on the Internet	5%

- Roy Morgan poll, commissioned by the Eros Foundation, April 1999

The 1996, 1997 and 1999 results for the other States have been made available and are set out at Appendix D.

9.3 Survey of Australian consumers of X rated videos – Hugh Potter, 1996

The most detailed survey conducted into Australian consumers of X rated films, into their socio-demographic background, consumption history and other factors, was published by Hugh Potter in 1996. The study presented results of a nation-wide survey of 348 mail order and adult shop purchasers of X rated videos. The sample was drawn from those who purchased X rated videos from a nation-wide distributor in late 1992. A Table showing selected demographic characteristics of respondents to this survey is set out in Appendix D.

Not all of Potter’s findings are reproduced here. A major finding was that

the socio-demographic profile of purchasers of X rated videos in Australia participating in this research does not fit the ‘rain coat brigade’ image often encountered in the popular and/or academic literature. The picture which emerges here is of working- and middle-class persons who enjoy a high attainment in education, occupation, and income in Australian society.

As to the representative nature of his sample, Potter warned that the purchasers of X rated videos could ‘represent a special segment of the pornography consuming market, distinctive from those who have access to rentals of these videos or who purchase more readily accessible print pornography’. A factor noted by Potter was the high cost of X rated videos, relative to such publications as *Playboy* or *Penthouse*. He commented:

From this emerges a hazy picture of the types of people who purchase and consume X rated videos in Australia. Again, it cannot be said that these people are representative of all those who regularly purchase or consume X rated videos. But it is certainly different than the general profile of North American university students and community volunteers upon whom most of our social science data are based, or what might be expected from some feminist, popular, and social science literature.

Potter further reported:

One major new finding is the involvement of women in the purchase of X rated videos. While only 10 percent of the purchasers were women, 69 percent of the males who reported being in a relationship also report that their partners are supportive of their purchasing and viewing of these videos. For females, 83 percent report that their partners are supportive of their purchasing and viewing.⁹⁵

10. OVERVIEW OF THE X RATED FILM INDUSTRY IN AUSTRALIA

Worldwide the legitimate pornography industry is an enormous enterprise, in which the major entertainment corporations are increasingly involved. Malamuth et al commented in this respect:

Forbes magazine recently described the companies that produce sexually explicit depictions as constituting a 56 billion dollar global pornography industry that is becoming increasingly mainstream.⁹⁶

The legitimate X rated film industry (and adult products industry generally) in Australia is also a significant undertaking, although legal restrictions obviously restrict its size. The X film industry is based in the ACT and, to a lesser extent, the Northern Territory. An article from the *Good Weekend* in October 1995 reported that the industry sold more than 500,000 videos a year, costing \$30 each, resulting in a total turnover of around \$20 million. Noted, too, was that there were 640,182 on the X rated video mailing lists.⁹⁷

According to figures supplied by Fiona Patten, a consultant for the adult industry, there are currently around 30 adult retail outlets in the ACT and Darwin. The numbers on their mailing lists have decreased in recent years, down to 430,000.⁹⁸ More detailed information was not available.

As noted, the Registrar for the ACT X film licensing scheme, Tony Brown, states there is a high level of compliance with the relevant licensing conditions, something that is helped 'by the fact that the industry is now controlled by a smaller number of players and in the main these are publicly listed companies'.⁹⁹

⁹⁵ RH Potter, 'Potential criminals?: Australian consumers of X-rated videos' (1996) 14 *Behavioral Sciences and the Law* 231 at 241; for a more detailed account of this study see – H Potter, *Pornography: Group Pressures and Individual Rights*, The Federation Press, 1996.

⁹⁶ NM Malamuth, T Addison and M Koss, n 75, p 27.

⁹⁷ D Barnett, 'The Porn industry's quest fro the really swinging voter', *Good Weekend*, 28 October 1995, pp 50-9.

⁹⁸ F Patten, *Industry Figures*, copy with author.

⁹⁹ Correspondence with author, 14 July 2003.

11. STAKEHOLDER VIEWPOINTS – ARGUMENTS AGAINST X RATED FILMS

11.1 Sex offenders and child sex abuse

In March 2000 the Senate Legal and Constitutional Legislation Committee heard evidence from a clinical psychologist opposed to the X classification, Jari Evertsz of the Centre for Children, Australians Against Child Abuse. The following exchange occurred:

Senator Harradine: Could I come to the question of the utilization of this sort of material, X-rated videos, to break down inhibitions of young people for the purposes of abusing them?? In other words, it is used by the perpetrator. Have you come across that at all?

Ms Evertsz: Frequently. It is a frequent tool used by adult sexual offenders against children – for two reasons actually. Firstly, such material enlivens the curiosity of a child because it is something that is understood to be forbidden...They would be fascinated, and so that is a means by which sexual offenders do seek to break down the boundaries and sexualize children.

The other function that it performs, secondly, is to entrap the child in guilt and to prevent the child from telling. Once a child realizes that they have seen material that perhaps would normally be forbidden to them they feel as guilty as the perpetrator and therefore they feel that it is very difficult for them to disclose what may have been done to them.¹⁰⁰

Likewise, the Senate Committee heard (in evidence given in a private capacity) from Spencer Gear, from the Youth Counselling Service of Bundaberg in Queensland. He said:

We see the devastating effects on children and young teens who have been sexually abused while molesters watched pornographic videos – non-violent porn videos, might I add. Men have shattered the sexual innocence of these children – most of them girls, but certainly not all. Some of these men, about 20 per cent of our sexual abuse cases, obtained their sexual stimulation while watching X-rated videos.¹⁰¹

11.2 Pornography and the violation of women

The Senate Legal and Constitutional Legislation Committee heard evidence from Associate Professor Sheila Jeffreys, Public Officer of the Coalition Against Trafficking in Women. She encapsulated the argument that pornography is the ‘propaganda of women hatred’,

¹⁰⁰ Commonwealth of Australia, Official Committee Hansard, Senate Legal and Constitutional Legislation Committee, *Reference: Classification (Publications, Films and Computer Games) Amendment Bill (No 2) 1999*, 23 March 2000, pp 4-5.

¹⁰¹ Commonwealth of Australia, Official Committee Hansard, Senate Legal and Constitutional Legislation Committee, *Reference: Classification (Publications, Films and Computer Games) Amendment Bill (No 2) 1999*, 30 March 2000, p 76.

stating:

We see pornography as in direct contradiction to the rights of women to equality and justice in a social democracy in the ways in which it shows women. We see pornography as encouraging contempt towards and violence against women by brutalizing men's emotions and undermining those social controls which normally prevent them from acting abusively towards women. Pornography, we consider, causes men to develop callous attitudes because it shows women simply as objects loving to be used for men's sexual satisfaction....Pornography, we say, educates boys and men to have contempt for women... We do not accept the position that male individuals should be able to watch what they like in the privacy of their homes....The rights of those men who wish to enjoy sexual exploitation in their homes should not be seen to be more important than all the harm done by porn to the women abused in the industry and to the status of all women in Australia.¹⁰²

Jennifer Stokes, Research Director of Salt Shakers, a Christian Ethics Action Group, told the Committee:

Pornography is such that you can take the violence out of it but you cannot take the violation out of it. Pornography will always cause women and children to be violated.¹⁰³

11.3 Sexual deviance in children

In his submission to Legislative Council Standing Committee on Social Issues inquiry into the Classification (Publications, Films and Computer Games) Enforcement Amendment Bill 2001, the Reverend Fred Nile MLC, NSW President of the Christian Democratic Party, wrote in part:

On 18 June 1999, *The Age* reported that 84 kindergarten and primary school students with deviant sexual behaviour in Melbourne's outer eastern suburbs were referred to a clinic for treatment in 1998:

- Most had used force to trap or trick other children into having sex with them.
- The director of the clinic said that the trigger that damaged their sexual development and turned them into abusers was their exposure to sexually explicit material. The children's access to X rated videos was a major factor.¹⁰⁴

Jari Evertsz of the Centre for Children, Australians Against Child Abuse also commented on this matter before the Senate Legal and Constitutional Legislation Committee, stating:

The program that I run receives an increasing number of referrals each year. Last year it was 95 referrals. We service only the outer eastern region of Melbourne. As far as I am aware, it is the only program of its kind in Australia. The types of

¹⁰² Senate Legal and Constitutional Legislation Committee, 23 March 2000, n 100, pp 7-9.

¹⁰³ Senate Legal and Constitutional Legislation Committee, 23 March 2000, n 100, p 20.

¹⁰⁴ Submission No 33, Legislative Council Standing Committee on Social Issues Inquiry into the Classification (Publications, Films and Computer Games) Enforcement Amendment Act 2001.

sexualised behaviour we observe in these children, both boys and girls – 75 per cent boys and 25 per cent girls – are usually what we call of a high tariff nature. They are highly age-inappropriate, highly sexualised and they tend to be persistent and non-responsive to redirection... We identify that for a proportion of the children who present to us the sexualising component in their lives has been exposure to sexually explicit material on video. That is reasonably common. That can be by two ways: one is that they live in a house or visit a house on access where there are poor boundaries around such material, so they can access such material themselves. The other way they see such material is that adults deliberately show it to them, basically for their own gratification, to see the impact on these children.¹⁰⁵

11.4 Impact on isolated and indigenous communities

Also in his submission to the Legislative Council Standing Committee on Social Issues, Reverend Nile made reference to the Aboriginal and Torres Strait Islander Women’s Task Force on Violence, which reported to the Queensland Parliament on 2 December 1999. Reverend Nile said the Task Force found that:

- Pornographic videos had led to sexual assaults on females.
- Isolated communities had received consignments of pornographic videos worth up to \$5000.
- ‘The incidence of sexual violence is rising and is [in] a direct relationship to negative and deformed male socialization associated with alcohol and other drug misuse, and the prevalence of pornographic videos in some communities’.
- One community with a history of pornographic videos usage has the highest rates of men imprisoned for sexual offences in Queensland.
- The incidence of kids committing sexual offences on other kids is increasing.

It is not only indigenous communities that are being affected in this way. The same material is traumatizing isolated non-indigenous communities, including mining communities, but the problems have not yet been officially revealed.¹⁰⁶

12. STAKEHOLDER VIEWPOINTS – ARGUMENTS FOR X RATED FILMS

12.1 Sex positive feminism

In March 2000 the Senate Legal and Constitutional Legislation Committee also took evidence from two ‘sex positive feminists’, Kath Albury and Linda Jaivin. Albury testified:

I would like to say that many feminists oppose the censorship of explicit sexual images whether they are termed erotica or pornography. Sex positive feminists do not believe that all sex is good. Rather we believe that sex is part of a complex social structure which contains good and bad. We do not believe that any sex acts are inherently safe or dangerous or inherently uplifting or

¹⁰⁵ Senate Legal and Constitutional Legislation Committee, 23 March 2000, n 100, p 2.

¹⁰⁶ Submission No 33, n 104.

demeaning. Context is essential in understanding sexuality. We believe that women have a right to make their own decisions regarding sexual expression.¹⁰⁷

Linda Jaivin said she did

not believe that consensual, non-violent erotica or pornography – call it what you will – is in any meaningful sense degrading or harmful to women. Indeed, I would argue the opposite, helping women recognise that their sexual desires and fantasies are nothing to be ashamed of, that they are normal and healthy aspects of the human condition.¹⁰⁸

12.2 The protection of children

At the same Senate Committee hearing the following exchange occurred:

Senator McKiernan: There is real concern in the community to protect children from having access to this type of material.

Ms Jaivin: Children do not have access to this material. It is for over 18-year olds, so children are already protected by law from access to this material. If adults have this material in their house and allow children to see it, either accidentally or as part of a program of abuse, that is abuse and that is a separate issue. An adult is capable of abusing a child without pornography. An adult who is going to abuse a child needs to be locked up. That is outside the issue. We are talking about the legitimate distribution of these materials and that excludes children.¹⁰⁹

On the reported relationship between X rated films and child sexual abuse, the report of the Senate Legal and Constitutional Legislation Committee concluded:

While the Committee was concerned by accounts of the effects of the use of such material, the Committee believes that the restriction of videos would have a minimal effect on such persons. Their behaviour reflects much more serious problems, including a lack of awareness of the consequences of their actions, and apparent indifference to community standards of sexual behaviour and treatment of children.¹¹⁰

12.3 Black market and the failure of enforcement

The evidence of Fiona Patten, President of the Eros Foundation before the Senate

¹⁰⁷ Senate Legal and Constitutional Legislation Committee, 23 March 2000, n 100, p 57.

¹⁰⁸ Senate Legal and Constitutional Legislation Committee, 30 March 2000, n 101, p 57.

¹⁰⁹ Senate Legal and Constitutional Legislation Committee, 23 March 2000, n 100, p 61.

¹¹⁰ The Parliament of the Commonwealth of Australia, Senate Legal and Constitutional Legislation Committee, *Inquiry into the provisions of the Classification (Publications, Films and Computer Games) Amendment Bill (No 2) 1999*, April 2000, p 19. The Committee did, however, recommend that 'a prominent label on the video cover clearly state the penalties for contravention of legislation'.

Committee was similar in outline to that submitted in 2001 to the Legislative Council Standing Committee on Social Issues on behalf of SharonAusten.com. Before the Senate Committee she testified:

more X-rated material is sold in New South Wales and Victoria than in the ACT. It is sold illegally; there is a huge black market. We estimate that we have about 1.2 million buyers on our X-rated video mailing list. That is 650,000 plus 70 per cent of that number watching with partners. From our industry statistics, it looks like a similar 1.2 million buyers in the States buying it illegally – buying material that is not just X but that is refused classification... just last year there was a report that 20,000 X-rated Chinese videos made their way into Chinatown into the little video shops there. I see illegal material available all over.¹¹¹

In her submission to the Legislative Council Standing Committee on Social Issues, Patten offered more detailed estimates of the illegal or ‘grey’ market in NSW. Among other things it was claimed that: NSW has the largest adult media industry in Australia; an estimated 200 stores sell unclassified films, averaging 600 sales each per month; an estimated 2 million plus illegal films are sold annually in NSW, with a turnover of more than \$45 million in video sales alone; 85% of adult films sold in NSW are unclassified and many would fall into the RC category; and an estimated 90% of adult videos sold in NSW are pirated copies.¹¹²

Similar views had been expressed in 1995 by Terry Connolly, an ALP member of the ACT Legislative Assembly. In a debate on censorship legislation he said:

Mr Speaker, when colleagues from other States would accuse the ACT of being the hotbed of pornography, I would offer them a challenge. I would say, particularly if we happened to be in the larger cities of Sydney and Melbourne, that I would guarantee that if they gave me an hour I could show them not just X material for sale but probably unclassified material for sale...I also point out to them that in the ACT they would not find X material other than in the lawful sale points outside the residential areas of Canberra.

He continued:

Evidence given only in the last month to the royal commission in New South Wales has clearly established that a number of detectives in the Kings Cross area were in receipt of regular payment by video distributors to turn a blind eye to the offering for sale of X-rated or unrated video material in Kings Cross, which would be a kilometer or so from Parliament House in Sydney.¹¹³

¹¹¹ Senate Legal and Constitutional Legislation Committee, 30 March 2000, n 101, pp 68-9.

¹¹² *Submission No 32*, Legislative Council Standing Committee on Social Issues Inquiry into the Classification (Publications, Films and Computer Games) Enforcement Amendment Act 2001.

¹¹³ *ACT Parliamentary Debates*, 5 December 1995, p 2676.

The apparent contrast between the enforcement position in NSW and in the ACT was also made by representatives of Sharon Austen Limited in evidence to the Legislative Council Social Issues Committee. In response to a question on the issue, the company's managing director, Craig Ellis, said:

In the ACT we can only sell videos that are allowable under the law. New South Wales retailers pay no attention to the law... We, of course, are opposed to that. We would like the opportunity to come in and compete on a level playing field with these people and open shops in New South Wales and sell fully classified and legal product.

Ellis said, too, that in the ACT the X film licencing scheme is 'closely policed':

At any one time, officers from that department can walk into our duplicating plant and demand to see records of classifications, they can sit down and time the movie, we have to have all the markings on the tape and it is a very effective licencing system.¹¹⁴

12.4 Community standards and public opinion

The submission of SharonAusten.com to the Legislative Council Standing Committee on Social Issues also argued that the current ban on X rated films 'is not in line with community standards and public opinion'. It was submitted:

In April 1999, Roy Morgan Research conducted the sixth in a series of opinion polls on legalising X-rated videos. The poll recorded that in NSW, 76.3% believed that non-violent erotic (X rated) videos should be available to adults from licensed adult shops.

It also showed that 21.3% of those who responded in NSW had watched a non-violent erotic film or video over the previous 12 months. If that figure is extrapolated to include the adult population of the state then it indicates that well over a million adults in NSW are regular viewers of this product.¹¹⁵

¹¹⁴ Legislative Council Standing Committee on Social Issues Inquiry into the Classification (Publications, Films and Computer Games) Enforcement Amendment Act 2001, *Transcript of evidence*, 11 April 2002.

¹¹⁵ *Submission No 32*, Legislative Council Standing Committee on Social Issues Inquiry into the Classification (Publications, Films and Computer Games) Enforcement Amendment Act 2001.

13. COMPLICATING ISSUES - SEXUALLY EXPLICIT MATERIAL IN THE ‘R18+’ CLASSIFICATION

13.1 A landmark decision - *Romance*

A factor in the debate about X rated films are those mainstream cinema releases that contain sexually explicit material, some of which have been classified ‘R18+’ in Australia. The landmark decision was that of the Classification Review Board in 2000, overturning the Classification Board’s decision at first instance to ban the French language art house film, *Romance*. Then, as now, under the classification guidelines the rule in the R18+ category is

Sexual activity may be realistically simulated. The general rule is ‘simulation’, yes – the real thing, ‘no’.

With its decision in *Romance*, the Classification Review Board accepted that exceptions could be made to the general prohibition against sexually explicit material in the R18+ category, stating:

The ‘rule’ referred to above is expressed to be a ‘general’ rule, implying the possibility of exceptions in a limited number of instances.¹¹⁶

Of the film, *Romance*, the Classification Review Board found it was: (a) of serious intent and considered by many to have artistic merit; (b) not exploitative or gratuitous; (c) generally a thought provoking discourse on the role and experience of a woman in a couple relationship from a radical feminist perspective and that it contains few popular entertainment values; and (d) likely to appeal to a relatively sophisticated section of the public with some familiarity with the issues it raises.¹¹⁷

13.2 *Baise-Moi* and sexual violence

Since that decision other mainstream films containing sexually explicit material have been classified R18+, including the English language film, *Intimacy*. At the same time the limited exception that has permitted some films to be accommodated within the R18+ category has not applied to all cases of films depicting sexually explicit material. In 2002 another French language film, *Baise Moi*, was rated R18+ by the Classification Board with a consumer advice that read ‘Strong Sexual Violence, High Level Violence, Actual Sex and Adult Themes’. On an application from the Commonwealth Attorney General, Daryl Williams, *Baise Moi* was subsequently Refused Classification by the Classification Review Board. In doing so it described the film as one of ‘unrelenting violence’ and based its decision primarily on the consideration that some of the scenes of sexual violence were ‘gratuitous and exploitative’. It was not the film’s sexual explicitness as such that warranted refusal of classification, but rather its inextricable linking of strong scenes of sex and

¹¹⁶ Classification Board and Classification Review Board, *Annual Report 1999-2000*, p 163.

¹¹⁷ *Annual Report 1999-2000*, n 116, p 163.

violence, including depictions of a demeaning nature.

Disputing the decision and arguing for the right of adults to see the film, Premier Carr commented:

I'm sure it's a lousy film, but I don't like the idea of adults being told what they can see and what they can read. I don't like the idea of State police going into cinemas, seizing films.¹¹⁸

The Review Board explained that the film could not be accommodated in the X category 'due to the strong and extensive scenes of realistic and gratuitous violence, sexual violence and coercion'. Of the relationship between the two restricted classifications of R and X, the Review Board indicated an ascending scale in which material banned from the higher X category (notably sexual violence) cannot be accommodated in the lower R classification. According to the Review Board:

The Act [the *Classification (Publications, Films and Computer Games Act 1995* (Cth)] states that the classifications are listed in ascending order with R (restricted) appearing in the list prior to X (restricted).

This is somewhat misleading. Sexual violence has always been permitted in the R classification on certain conditions. In the words of the 2003 guidelines, 'Sexual violence may be implied, if justified by context'. Such a scene of sexual violence was depicted in the film, *Romance*, which the Review Board said could be accommodated in R, even though the scene clearly exceeded anything that could be permitted in X. Some depictions of sexual violence can also be accommodated under the M and MA classifications. Indeed, even the G and PG classifications may contain some violence (although not sexual violence).

Conversely, since the adoption of the revised guidelines in November 1984, violence and sexual violence have not been permitted in X under any conditions. Unlike the other classifications, from G to R, the X classification is a special, single purpose category, designed exclusively to accommodate, under restricted conditions, the sale and distribution of sexually explicit material involving consenting adults. It is not the next step in a general classification hierarchy, ascending from innocuousness to offensiveness.

With the limited acceptance of sexually explicit material in R, the exclusivity of X, as a category set aside for such material, becomes less clear-cut. Questions about the basic policy consistency of the classification system have also been raised. Robbie Swan of the Eros Foundation, the adult industry lobby group, commented:

What they are saying is that sexually explicit and extremely violent films should be allowed on cinema screens... That's fine, but not when the X-rated end of the market is totally illegal.¹¹⁹

¹¹⁸ 'Carr backs cinemas to screen *Baise Moi*', *The Australian*, 13 May 2002.

¹¹⁹ L Morris, 'Nile and Co star as banned *Baise Moi* meets the usual suspects', *Sydney Morning Herald*, 14 May 2002.

Certainly there is a blurring of boundaries, with the line between R and X presumably being redrawn around such contested notions as artistic merit and the sophistication of a film’s likely audience. Commenting on the decision of the Classification Review Board to award *Romance* an R classification, Helen Vnuk said this was

partly because the film was ‘likely to appeal to a relatively sophisticated audience’. In other words, people who watch French films can see anything and not be affected – you just can’t trust the working class with this kind of thing.¹²⁰

13.3 *Ken Park* and actual sex by people depicted as minors

These last remarks by Vnuk were made in the aftermath of the banning of the American film *Ken Park*, directed by the Larry Clark and Ed Lachman. The film had been due to be screened at the Sydney Film Festival, but was refused classification by the Classification Board on 21 May 2003, a decision that was upheld by the Classification Review Board on 6 June. Among other things, the Classification Board stated its reason for refusing to classify *Ken Park* was that it contained ‘actual sexual activity involving characters that are portrayed as minors that could not be accommodated within the R18+ classification’.¹²¹ The Classification Review Board commented that the film ‘included scenes of child sexual abuse, actual sex by people depicted as minors and sexualised violence’.¹²² There was no question of attempting to accommodate *Ken Park* in the X classification.

Hon R Debus MP, the NSW Attorney General, is reported to have said that he would propose a change in the law to permit films refused classification to be shown at film festivals.¹²³ At the law stands, film festivals are exempt from classification. However, they cannot show films that have been refused classification. As Piers Akerman commented, *Ken Park* ‘could possibly have been shown if an application for a festival screening had been made *before* the more general classification was sought’.¹²⁴

13.4 Sex education in R18+

By way of a coda to these comments, it can be added that sexually explicit material has been available on a specific and limited basis in R since the early 1990s. This refers to *bona fide* sex education films, available originally on video only. The first such classification was made in 1991 for the sex education film, *The Lover’s Guide*.

¹²⁰ H Vnuk, ‘Adult enough to do, watch and choose’, *Sydney Morning Herald*, 7 July 2003.

¹²¹ OFLC, ‘Classification Board refuses classification for *Ken Park*’, *Media Release*, 22 May 2003.

¹²² Classification Review Board, ‘Classification Review Board determines *Ken Park* refused classification’, *Media Release*, 6 June 2003.

¹²³ G Maddox, ‘Debus wants festival film rethink’, *Sydney Morning Herald*, 18 June 2003.

¹²⁴ P Akerman, ‘Screaming foul over screen smut’, *The Daily Telegraph*, 8 July 2003.

14. COMMENTARY AND CONCLUSION

The debate about X rated films is many sided. There is the philosophical debate about the right of adults to see, read and hear what they want, alongside the legal and regulatory debate about the appropriate limits to be placed on that right. There is the controversy about the ‘harmful effects’ of sexually explicit material, the contested nature of which is well recorded, as are the definitional conflicts over what is meant by ‘harm’ and ‘pornography’. From a ‘liberal’ standpoint, the question is whether ‘pornography’ is the immediate cause of identifiable physical (or possibly psychic) ‘harm’. From a ‘moral conservative’ standpoint, in addition to the issue of specific harm in individual cases, the question is whether ‘pornography’ causes ‘social harm’, in the sense that it damages the general social and cultural environment, resulting in a breakdown of norms and standards.¹²⁵ There is further disagreement about the identification of community standards where this issue is concerned, what they are and should be. In effect, any finding of any sort is contested; every law and every policy is found to be in some error from one quarter or another.

The result for law and policy in Australia is that, at present, a curious ‘federal’ compromise is in place, arrived at in 1984 and maintained ever since. Under that arrangement, the ACT is the ‘capital of pornography’, selling and hiring X rated films to the nation, whereas the States only permit such material to be possessed by adults and viewed by them in private. The size of the Canberra (and Darwin) based X film industry has been noted. Speculative comment on the scope of the illegal market in NSW has also been discussed.

A major consideration for the Legislative Council Standing Committee on Social Issues was that the prohibition against the sale of sexually explicit material is not adequately enforced in NSW. The Committee heard evidence on the illegal black or ‘grey’ market from representatives of the adult film industry to this effect, although it is fair to add that the same point has been made many times before and by those with no commercial interest in the matter. It can be assumed that an undefined quantity of sexually explicit film material is for sale in this State, especially in the larger urban centers, either X rated or unclassified in nature, and including material that would be Refused Classification. It was on this basis that the Legislative Council Standing Committee on Social Issues concluded:

The Committee considers that this position should be revisited by the Attorney-General so that there is either a commitment to enforcing the current restrictions on adult films in NSW or a consideration of legalising their sale within an appropriately regulated licensing scheme.¹²⁶

The Legislative Council Standing Committee on Social Issues heard evidence that the illegal market in unclassified films in NSW is not restricted to ‘adult’ material, but that the

¹²⁵ For a commentary on these conflicting philosophical standpoints see – G Griffith, *Censorship: a review of contemporary issues*, NSW Parliamentary Library Research Service, Background Paper No 1/1996, pp 3-18.

¹²⁶ Legislative Council Standing Committee on Social Issues, *Safety net? Inquiry into the Classification (Publications, Films and Computer Games) Enforcement Amendment Bill 2001 – Final Report: On-Line Matters*, Report 25, Parliament of NSW, June 2002, p 45.

avoidance of the compulsory classification system extends to a large and ethnically diverse black market in foreign language videos and DVDs. The Standing Committee was told, ‘There are quite literally tens of thousands of unclassified films from Asia, the Middle East and the Indian sub-continent circulating in video outlets in suburban stores’.¹²⁷

From an enforcement standpoint, it should be said that this unregulated ‘ethnic’ market in films is distinct from the more specific issue of the sale of illegal material from adult outlets in Kings Cross and other areas. One solution to this last enforcement problem would be a licencing scheme, along the lines of that operating in the ACT. Almost certainly it would not be designed to deal with the more diffuse and unregulated ‘ethnic’ film market, operating from countless corner stores and retail outlets in many Sydney suburbs. It may be that some of the material available in these stores is sexually explicit and that some may warrant refusal of classification; on the other hand, the bulk of these films may be the standard product of the Hong Kong or Bombay film industries, or pirated foreign language versions of Hollywood films.

The undoubted existence of this large ‘grey’ market in ethnic films raises difficult policy issues. For the Censorship Board to classify this material on an ongoing basis would have significant resource implications, including the employment of many language specialists. For this reason, a ‘blind eye’ has effectively been turned towards this market in the past. It could be that a licencing scheme for X films would have little or no impact on this market. That is not an argument against such a licencing scheme. It is only to point out that, in all probability, such a scheme would only serve defined and limited policy objectives relevant to the sale of sexually explicit material in identified ‘restricted areas’, either in premises wholly concerned with adult products, or in premises where an area is designated for the sale and display of such products.

Under section 21 of the Classification Enforcement Act 1995 it is already the case that Category 2 publications can only be displayed in a ‘restricted publications area’. This means that the premises (or part of any premises) must be so constructed that the interior is not visible from outside, that the premises are fitted with a door or gate that must be kept closed, and that the area is properly supervised and signposted. The scheme envisaged under the Draft Classification Enforcement Amendment Bill 2003 would build on these foundations.

Whether a licencing scheme would prove as effective in Sydney as in the less complex market place of Canberra, where the sale of X films is restricted to designated non-residential areas, is open to debate. What can be said, based on evidence from the ACT, is that the adult film industry in Australia is a lawful, mainstream enterprise, with a vested interest in maintaining the legitimacy and effectiveness of any regulatory scheme that permits it legal operation.

¹²⁷

Legislative Council Standing Committee on Social Issues Inquiry into the Classification (Publications, Films and Computer Games) Enforcement Amendment Act 2001, *Transcript of evidence*, 11 April 2002. The evidence was that of David Haines in his capacity as chairman of Sharon Austen Limited.

Whatever the merits or demerits of an X film licencing scheme, ultimately the debate will revolve around competing and conflicting perceptions of the content of X rated films. Under the classification guidelines the category is defined to exclude all violence and sexual violence, as well as fetishes, sexually assaultive language and purposefully demeaning depictions. It might be argued that certain anomalies have arisen as between the X category and other classifications. There is the ongoing debate about sexually explicit material in art-house films in the R classification. Anomalies aside, for those opposed in principle to X rated material, no definition can exclude its inherent violation of women and children, nor the harm they claim it causes to the moral fabric of society. For others it is an issue of civil liberties.

APPENDIX A
National classification code

SCHEDULE

NATIONAL CLASSIFICATION CODE

Classification decisions are to give effect, as far as possible, to the following principles:

- (a) adults should be able to read, hear and see what they want;
- (b) minors should be protected from material likely to harm or disturb them;
- (c) everyone should be protected from exposure to unsolicited material that they find offensive;
- (d) the need to take account of community concerns about:
 - (i) depictions that condone or incite violence, particularly sexual violence; and
 - (ii) the portrayal of a person in a demeaning manner.

PUBLICATIONS

Publications are to be classified in accordance with the following Table:

Description of publication	Classification
1. Publications that: <ul style="list-style-type: none">(a) describe, depict, express or otherwise deal with matters of sex, drug misuse or addiction, crime, cruelty, violence or revolting or abhorrent phenomena in such a way that they offend against the standards of morality, decency and propriety generally accepted by reasonable adults to the extent that they should not be classified; or(b) describe or depict in a way that is likely to cause offence to a reasonable adult, a person who is, or who looks like, a child under 16 (whether the person is engaged in sexual activity or not); or(c) promote, incite or instruct in matters of crime or violence.	RC
2. Publications (except RC publications) that: <ul style="list-style-type: none">(a) explicitly depict sexual or sexually related activity between consenting adults in a way that is likely to cause offence to a reasonable adult; or(b) depict, describe or express revolting or abhorrent phenomena in a way that is likely to cause offence to a reasonable adult and are unsuitable for a minor to see or read.	Category 2 restricted

<p>3. Publications (except RC publications and Category 2 restricted publications) that:</p> <ul style="list-style-type: none">(a) explicitly depict nudity, or describe or impliedly depict sexual or sexually related activity between consenting adults, in a way that is likely to cause offence to a reasonable adult; or(b) describe or express in detail violence or sexual activity between consenting adults in a way that is likely to cause offence to a reasonable adult; or(c) are unsuitable for a minor to see or read.	Category 1 restricted
4. All other publications.	Unrestricted

FILMS

Films are to be classified in accordance with the following Table:

Description of film	Classification
<p>1. Films that:</p> <ul style="list-style-type: none"> (a) depict, express or otherwise deal with matters of sex, drug misuse or addiction, crime, cruelty, violence or revolting or abhorrent phenomena in such a way that they offend against the standards of morality, decency and propriety generally accepted by reasonable adults to the extent that they should not be classified; or (b) depict in a way that is likely to cause offence to a reasonable adult, a person who is, or who looks like, a child under 16 (whether the person is engaged in sexual activity or not); or (c) promote, incite or instruct in matters of crime or violence. 	RC
<p>2. Films (except RC films) that:</p> <ul style="list-style-type: none"> (a) contain real depictions of actual sexual activity between consenting adults in which there is no violence, sexual violence, sexualised violence, coercion, sexually assaultive language, or fetishes or depictions which purposefully demean anyone involved in that activity for the enjoyment of viewers, in a way that is likely to cause offence to a reasonable adult; and (b) are unsuitable for a minor to see. 	X
<p>3. Films (except RC films and X films) that are unsuitable for a minor to see.</p>	R
<p>4. Films (except RC films, X films and R films) that depict, express or otherwise deal with sex, violence or coarse language in such a manner as to be unsuitable for viewing by persons under 15.</p>	MA

5. Films (except RC films, X films, R films, MA films) that cannot be recommended for viewing by persons who are under 15.	M
6. Films (except RC films, R films, X films, MA films and M films) that cannot be recommended for viewing by persons who are under 15 without the guidance of their parents or guardians.	PG
7. All other films.	G

COMPUTER GAMES

Computer games are to be classified in accordance with the following Table:

Description of computer game	Classification
<p>1. Computer games that:</p> <p>(a) depict, express or otherwise deal with matters of sex, drug misuse or addiction, crime, cruelty, violence or revolting or abhorrent phenomena in such a way that they offend against the standards of morality, decency and propriety generally accepted by reasonable adults to the extent that they should not be classified; or</p> <p>(b) depict in a way that is likely to cause offence to a reasonable adult, a person who is, or who looks like, a child under 16 (whether the person is engaged in sexual activity or not); or</p> <p>(c) promote, incite or instruct in matters of crime or violence; or</p> <p>(d) are unsuitable for a minor to see or play.</p>	RC
2. Computer games (except RC computer games) that depict, express or otherwise deal with sex, violence or coarse language in such a manner as to be unsuitable for viewing or playing by persons under 15.	MA (15+)

3. Computer games (except RC and MA (15+) computer games) that cannot be recommended for viewing or playing by persons who are under 15.	M (15+)
4. Computer games (except RC, MA (15+) and M (15+) computer games) that cannot be recommended for viewing or playing by persons who are under 8.	G (8+)
5. All other computer games.	G

APPENDIX B
Guidelines for the Classification of Films and Computer Games, 2003

In accordance with subsection 12(3) of the Commonwealth *Classification (Publications, Films and Computer Games) Act 1995*, the *Guidelines for the Classification of Films and Computer Games* were agreed to by Commonwealth, State and Territory Censorship Ministers to come into effect on 30 March 2003.



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Guidelines for the Classification of Films and Computer Games

❖ Introduction to the Guidelines

BACKGROUND

The *Guidelines for the Classification of Films and Computer Games* (the **Guidelines**) are a tool for classifying films and computer games. They help explain the different classification categories, and the scope and limits of material suitable for each category. They are revised from time to time, with extensive community input.

THE LEGAL CONTEXT

The national classification scheme is based on:

- the Commonwealth *Classification (Publications, Films and Computer Games) Act 1995* (the **Act**), and;
- a cooperative agreement between Commonwealth, State and Territory governments.

Under the scheme, the Commonwealth makes the classification decisions, and the States and Territories enforce them.

The Act contains a National Classification Code (the **Code**). It also allows Guidelines to be made. By agreement, the Commonwealth, State and Territory Ministers can vary the Code and the Guidelines.

The Act requires films and computer games to be classified, using the Code and the Guidelines, before they are released or advertised.

Classification decisions are made by the Classification Board. Its decisions can be reviewed by the Classification Review Board. Administrative support for both Boards is provided by the Commonwealth Office of Film and Literature Classification.

CLASSIFICATION CATEGORIES

The Act names the classification categories for films and computer games, and the Code describes them. The categories are:

- G
- PG/G(8+)
- M/M(15+)
- MA/MA(15+)
- R
- X
- RC

NOTE: R and X apply to films only.

Classification criteria

THE ACT

Under the Act, each of the following matters must be taken into account in classifying films and computer games:

- (a) the standards of morality, decency and propriety generally accepted by reasonable adults;
- (b) the literary, artistic or educational merit (if any) of the publication, film or computer game;
- (c) the general character of the publication, film or computer game, including whether it is of a medical, legal or scientific character;
- (d) the persons or class of persons to or amongst whom it is published or is intended or likely to be published.

THE CODE

Under the Code, classification decisions are to give effect, as far as possible, to the following principles:

- (a) adults should be able to read, hear and see what they want;
- (b) minors should be protected from material likely to harm or disturb them;
- (c) everyone should be protected from exposure to unsolicited material that they find offensive;
- (d) the need to take account of community concerns about:
 - (i) depictions that condone or incite violence, particularly sexual violence; and
 - (ii) the portrayal of persons in a demeaning manner.

CONSUMER ADVICE

Except for G classifications, the Act requires the Classification Board to provide consumer advice about the content of films and computer games it classifies. (For G classifications, the Act gives the Board the option whether to provide consumer information.) This information helps consumers make informed choices.

∴ The Guidelines

USING THE GUIDELINES: ESSENTIAL PRINCIPLES

Three essential principles underlie the use of the Guidelines:

- the importance of context
- assessing impact
- the six classifiable elements

Except for the X category, each classification category takes a similar form. It begins with an “impact test” that determines the threshold for the category. It then lists the six classifiable elements, with a statement limiting the content of each element.

IMPORTANCE OF CONTEXT

Context is crucial in determining whether a classifiable element is justified by the story-line or themes. In particular, the way in which important social issues are dealt with may require a mature or adult perspective. This means that material that falls into a particular classification category in one context may fall outside it in another.

ASSESSING IMPACT

The Guidelines use the following hierarchy of impact:

- very mild – G
- mild – PG/G(8+)
- moderate – M/M(15+)
- strong – MA/MA(15+)
- high – R
- very high – RC

Assessing the impact of material requires considering not only the treatment of individual classifiable elements but also their cumulative effect. It also requires considering the purpose and tone of a sequence.

Impact may be higher where a scene:

- contains greater detail, including the use of close-ups and slow motion
- uses accentuation techniques, such as lighting, perspective and resolution
- uses special effects, such as lighting and sound, resolution, colour, size of image, characterisation and tone
- is prolonged
- is repeated frequently
- is realistic, rather than stylised
- encourages interactivity.

Interactivity includes the use of incentives and rewards, technical features and competitive intensity. As a general rule:

- except in material restricted to adults, nudity and sexual activity must not be related to incentives or rewards
- material that contains drug use and sexual violence related to incentives or rewards is Refused Classification.

Impact may be lessened where reference to a classifiable element is verbal rather than visual. For example, a verbal reference to sexual violence is generally of less impact than a visual depiction. Also, some visual impacts have less impact than others: for example, an incidental depiction may have less impact than a direct one.

THE CLASSIFIABLE ELEMENTS

The six classifiable elements in a film or computer game are:

- themes
- violence
- sex
- language
- drug use
- nudity

The classification takes account of the context and impact of each of these elements, including their frequency and intensity, and their cumulative effect. It also takes account of the purpose and tone of a sequence, and how material is treated.

∴ CATEGORIES



G – GENERAL



IMPACT TEST

The impact of the classifiable elements for material classified G should be very mild only.

NOTE: The G classification is for a general audience. However, it does not necessarily indicate that children will enjoy the film or computer game. Some G films and games contain themes, story-lines or game play that do not interest children.

CLASSIFIABLE ELEMENTS

THEMES

The treatment of themes should have a very low sense of threat or menace, and be justified by context.

VIOLENCE

Violence should have only a low sense of threat or menace, and be justified by context.
Sexual violence is not permitted.

SEX

Sexual activity should be very mild and very discreetly implied, and be justified by context.

LANGUAGE

Coarse language should be very mild and infrequent, and be justified by context.

DRUG USE

Drug use should be implied only very discreetly, and be justified by context.

NUDITY

Nudity should be justified by context.

NOTE: Some of the terms used in this category are defined in the List of Terms at the end of these Guidelines.



PG – PARENTAL GUIDANCE
G(8+) – GENERAL



IMPACT TEST

The impact of the classifiable elements for material classified PG/G(8+) should be no higher than mild.

NOTE: Material classified PG/G(8+) may contain material which some children find confusing or upsetting, and may require the guidance of parents or guardians. It is not recommended for viewing by persons under 15 without guidance from parents or guardians.

CLASSIFIABLE ELEMENTS

THEMES

The treatment of themes should generally have a low sense of threat or menace and be justified by context.

VIOLENCE

Violence should be mild and infrequent, and be justified by context.
Sexual violence is not permitted.

SEX

Sexual activity should be mild and discreetly implied, and be justified by context.

LANGUAGE

Coarse language should be mild and infrequent, and be justified by context.

DRUG USE

Drug use should be justified by context.

NUDITY

Nudity should be justified by context.

NOTE: Some of the terms used in this category are defined in the List of Terms at the end of these Guidelines.



M – MATURE
M(15+) – MATURE



IMPACT TEST

The impact of the classifiable elements for material classified M/M(15+) should be no higher than moderate.

NOTE: Material classified M/M(15+) is not recommended for persons under 15 years of age. There are no legal restrictions on access.

CLASSIFIABLE ELEMENTS

THEMES

The treatment of themes may have a moderate sense of threat or menace, if justified by context.

VIOLENCE

Moderate violence is permitted, if justified by context.
Sexual violence should be very limited and justified by context.

SEX

Sexual activity should be discreetly implied, if justified by context.

LANGUAGE

Coarse language may be used.
Aggressive or strong coarse language should be infrequent and justified by context.

DRUG USE

Drug use should be justified by context.

NUDITY

Nudity should be justified by context.

NOTE: Some of the terms used in this category are defined in the List of Terms at the end of these Guidelines.



MA – MATURE ACCOMPANIED
MA(15+) – MATURE RESTRICTED



IMPACT TEST

The impact of material classified MA/MA(15+) should be no higher than strong.

NOTE: Material classified MA/MA(15+) is considered unsuitable for persons under 15 years of age. It is a legally restricted category.

CLASSIFIABLE ELEMENTS

THEMES

The treatment of strong themes should be justified by context.

VIOLENCE

Violence should be justified by context.
Sexual violence may be implied, if justified by context.

SEX

Sexual activity may be implied.

LANGUAGE

Strong coarse language may be used.
Aggressive or very strong coarse language should be infrequent.

DRUG USE

Drug use should be justified by context.

NUDITY

Nudity should be justified by context.

NOTE: Some of the terms used in this category are defined in the List of Terms at the end of these Guidelines.



R – RESTRICTED

IMPACT TEST

The impact of material classified R should not exceed high.

NOTE: This classification category applies only to films. Material classified R is legally restricted to adults. Some material classified R may be offensive to sections of the adult community.

CLASSIFIABLE ELEMENTS

THEMES

There are virtually no restrictions on the treatment of themes.

VIOLENCE

Violence is permitted.

Sexual violence may be implied, if justified by context.

SEX

Sexual activity may be realistically simulated. The general rule is “simulation, yes – the real thing, no”.

LANGUAGE

There are virtually no restrictions on language.

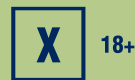
DRUG USE

Drug use is permitted.

NUDITY

Nudity is permitted.

NOTE: Some of the terms used in this category are defined in the List of Terms at the end of these Guidelines.



X – RESTRICTED

CONTAINS CONSENSUAL SEXUALLY EXPLICIT ACTIVITY

(Restricted to adults 18 years and over*)

**Available only for sale or hire in the ACT and Northern Territory.*

NOTE: This classification category applies only to films. This classification is a special and legally restricted category which contains only sexually explicit material. That is material which contains real depictions of actual sexual intercourse and other sexual activity between consenting adults.

No depiction of violence, sexual violence, sexualised violence or coercion is allowed in the category. It does not allow sexually assaultive language. Nor does it allow consensual depictions which purposefully demean anyone involved in that activity for the enjoyment of viewers.

Fetishes such as body piercing, application of substances such as candle wax, ‘golden showers’, bondage, spanking or fisting are not permitted.

As the category is restricted to activity between consenting adults, it does not permit any depictions of non-adult persons, including those aged 16 or 17, nor of adult persons who look like they are under 18 years. Nor does it permit persons 18 years of age or over to be portrayed as minors.

NOTE: Some of the terms used in this category are defined in the List of Terms at the end of these Guidelines.

RC – REFUSED CLASSIFICATION

NOTE: Films that exceed the R and X classification categories will be Refused Classification. Computer games that exceed the MA(15+) classification category will be Refused Classification.

Films and computer games will be refused classification if they include or contain any of the following:

CRIME OR VIOLENCE

Detailed instruction or promotion in matters of crime or violence.

The promotion or provision of instruction in paedophile activity.

Depictions of child sexual abuse or any other exploitative or offensive depictions involving a person who is or who looks like a child under 16 years.

Gratuitous, exploitative or offensive depictions of:

- (i) violence with a very high degree of impact or which are excessively frequent, prolonged or detailed;
- (ii) cruelty or real violence which are very detailed or which have a high impact;
- (iii) sexual violence.

SEX

Depictions of practices such as bestiality.

Gratuitous, exploitative or offensive depictions of:

- (i) sexual activity accompanied by fetishes or practices which are offensive or abhorrent;
- (ii) incest fantasies or other fantasies which are offensive or abhorrent.

DRUG USE

Detailed instruction in the use of proscribed drugs.

Material promoting or encouraging proscribed drug use.

NOTE: Some of the terms used in this category are defined in the List of Terms at the end of these Guidelines.

❖ List of Terms

NOTE: Words which are used in the Guidelines but which are not contained in this List of Terms take their usual dictionary meaning. Refer to the latest edition of The Macquarie Dictionary.

Coercion:

The use of threat or power to force agreement to sexual activity.

Demean:

A depiction or description, directly or indirectly sexual in nature, which debases or appears to debase the person or the character depicted.

Elements:

Themes, violence, sex, coarse language, drug use and nudity.

Exploitative:

Appearing to purposefully debase or abuse for the enjoyment of others, and lacking moral, artistic or other values.

Fetish:

An object, an action or a non-sexual part of the body which gives sexual gratification.

Intensity:

Strength of the treatment or subject matter; strength of engagement or involvement.

Offensive:

Material which causes outrage or extreme disgust.

Sexual Activity:

Matters pertaining to sexual acts, but not limited to sexual intercourse.

Sexual Violence:

Sexual assault or aggression, in which the victim does not consent.

Sexualised Violence:

Where sex and violence are connected in the story, although sexual violence may not necessarily occur.

Themes:

Social issues such as crime, suicide, drug and alcohol dependency, death, serious illness, family breakdown and racism.

Treatment:

The way in which material is handled or presented.

Violence:

Acts of violence; the threat or effects of violence.

APPENDIX C
Conditions attaching to X Film licences
under the ACT Licensing Scheme – Licensed to Sell and Copy – as at 1 July 2003.

Conditions attaching to X Film licences under the ACT Licensing Scheme – Licensed to Sell and Copy – as at 1 July 2003.

1. The licence must be displayed on the licensed premises.
2. A copy of the classification certificate for each X film title copied, or the original if you hold the copyright for the title, must be kept on the licensed premises.
3. Each copy of an X film copied must have affixed to the spine of the video tape cartridge, or on the cover of the film if it is in the form of a CD Rom or DVD disk, at the time of copying or in the case of a CD Rom or DVD disk before being offered for sale, the reference number issued for the film by the Classification Board, the X Film licence number of the copier and the date the film was copied. From 1 April 2003 the details required by this condition shall be in a print size not less than 3.5mm (10 points) high.
4. The invoice for an X film sold to an X Film licensee must contain the reference number issued for the film by the Classification Board.
5. A production record must be maintained for all X films copied. The production record must contain, as a minimum, the following information; title, date film copied, length of film, quantity copied, rejected copies, copies put in stock. The production records must be kept at the licensed premises for a minimum of 2 years from the date they are created.
6. All advertisements in catalogues, magazines or other publications, in any medium including the Internet, where the advertisement refers specifically to a title of a film classified as X rated must include the classification number for the film immediately after the title of the film or immediately under the pictorial representation for the film, as the case requires. If the title of the film is mentioned more than once in an advertisement then the classification number needs only to be included on the first occasion the title is mentioned. If the catalogue, magazine or other publication includes a listing of all X Films advertised in that publication, it is sufficient for the purposes of this condition to display the classification number for each X Film in the listing.
7. For each X Film on the licensed premises, not purchased or obtained from an X Film licensee or which does not already display the following information, the licensee must, prior to displaying the film for sale or selling the film, include the classification number of the film, the licence number of the selling licensee and the date on which this information was included, on the spine label of the video tape cartridge or on the cover if the film if it is in the form of a CD Rom or DVD disk. The date on which the information was included is to be preceded by an asterisk. From 1 April 2003 the details required by this condition shall be in a print size not less than 3.5mm (10 points) high.
8. The term "reference number" or "classification number" in these conditions means, for a film classified prior to 18 May 1998, the T Number or the unique classification number issued for the film by the Classification Board, and for a film classified after 18 May 1998 the unique classification number issued for the film by the Classification Board.

(Terms in these conditions have the same meaning as in the Classification (Publications, Films and Computer Games) (Enforcement) Act 1995, or the Commonwealth Act as defined in that Act.)

APPENDIX D
Surveys and Opinion Polls

"X" Rated Films and the Regulation of Sexually Explicit Material

1996 survey of consumers of X rated videos/ Hugh Potter

SELECTED DEMOGRAPHIC CHARACTERISTICS OF THE RESPONDENTS*		
	Percentage (%)	Number (n)
<i>CURRENT MARITAL STATUS</i>		
Married, intact	41	(156)
De facto	5	(19)
Living together	2	(7)
Gay/Lesbian relationship	8	(29)
Married, separated	2	(9)
Divorced	7	(28)
Widowed	2	(6)
Never married	33	(123)
		(377)
<i>EDUCATIONAL ATTAINMENT</i>		
Year 10	22	(82)
HSC or equivalent	29	(106)
TAFE	13	(47)
CAE	8	(29)
Uni degree	20	(76)
Post-grad degree	9	(32)
		(372)
<i>Annual Household Income</i>		
<\$10,000	4	(14)
\$10,000 – 19,999	13	(46)
\$20,000 – 29,999	22	(79)
\$30,000 – 39,999	23	(83)
\$40,000 – 49,999	25	(50)
>\$50,000		(92)
		(364)
<i>Occupation</i>		
Blue-collar	35	(121)
Service	21	(73)
Prof/Managerial	44	(154)
		(348)
<i>Religious affiliation (Y/N)</i>		
Yes	49	(181)
No	51	(191)
		(372)
Please note: Rounding errors result in some totals exceeding 100 percent		

* Source: H Potter, *Pornography: Group Pressures and Individual Rights*, The Federation Press, 1996, p 100.

Australian Bureau of Statistics/OFLC Survey, 1994*

Persons aged over 18 and over: Selected viewing habits, February 1994

Age (%)	18-24	25-39	40-54	55+	All households
<i>Viewed an X rated film</i>					
Yes	21.6	16.4	10.5	5.6	12.8
No	75.8	81.1	88.0	90.0	84.5
Don't know	2.6	2.5	1.5	4.4	2.7
<i>Should adults have access to X rated videotapes?***</i>					
Yes	67.5	65.0	53.8	40.0	56.0
No	13.9	20.1	34.7	42.7	29.0
Don't know	18.6	14.9	11.5	17.3	15.0

* Source: OFLC, *Australian Perceptions of Films, Videos and Computer Games*, April 1994.

** This represents the finding, not the exact question that was asked.

October/November 1992 Roy Morgan Research/Eros Foundation*

<i>Question: Next about non-violent videos and films of an erotic nature with an X rating or the equivalent. Which way best describes how you think X rated non-violent videos or films of an erotic nature should be available? (Respondents could choose more than one)</i>	
Purchased from restricted adult shops	53.8%
Shown only in restricted adult cinemas	38.3%
Purchased through mail order	31.6%
Purchased from family video store	3.3%
Should be banned / not available	1.9%
Can't say	6.5%

* Source: *Submission No 32*, Legislative Council Standing Committee on Social Issues Inquiry into the Classification (Publications, Films and Computer Games) Enforcement Amendment Act 2001.

"X" Rated Films and the Regulation of Sexually Explicit Material

April 1996 AGB McNair/Eros Foundation - NSW results only*

<i>Question: Under current law, X-rated videos can show actual depictions of consenting non-violent sex between adults. In which of the following ways do you think X-rated videos should be available? (Respondents could choose more than one)</i>		
Response	Metro	Country
Available from restricted adult shops	71%	57%
Shown in restricted adult cinemas	32%	21%
Available by mail order	25%	22%
Available from ordinary video shops	12%	7%
Banned	11%	28%
Don't know	5%	1%

* Source: *Submission No 32*, Legislative Council Standing Committee on Social Issues Inquiry into the Classification (Publications, Films and Computer Games) Enforcement Amendment Act 2001.

1996 April AGB McNair / Eros Foundation – Results for all States*

<i>Question: Under current law, X-rated videos can show actual depictions of consenting non-violent sex between adults. In which of the following ways do you think X-rated videos should be available? (Respondents could choose more than one)</i>											
Response	Five Mainland Cities					Country					
	Syd	Melb	Bris	Adel	Perth	NSW -ACT	Vic	Qld	SA/NT	WA	Tas
	<i>%</i>	<i>%</i>	<i>%</i>	<i>%</i>	<i>%</i>	<i>%</i>	<i>%</i>	<i>%</i>	<i>%</i>	<i>%</i>	<i>%</i>
Available from restricted shops	71	62	55	59	71	57	72	61	63	61	54
Shown in restricted adult cinemas	32	30	26	28	25	21	28	27	6	10	22
Available by mail order	25	22	23	21	23	22	14	37	9	18	12
Available from ordinary video shops	12	11	20	14	12	7	2	11	16	18	9
Banned	11	16	16	17	9	28	15	24	12	17	29
Don't know	5	11	5	6	5	1	2	2	-	-	-

* Fiona Patten, Body Politics.

September 1997 Roy Morgan Research/Eros Foundation – NSW results only*

<i>Question: Should state governments allow the sale of sexually explicit non-violent erotica to people 18 years and over from a licensed adult store?</i>	
Yes	66.8%
No	29.2%
Can't say	4.1%

* Source: *Submission No 32*, Legislative Council Standing Committee on Social Issues Inquiry into the Classification (Publications, Films and Computer Games) Enforcement Amendment Act 2001.

September 1997, Roy Morgan Research / Eros Foundation – Result for all States*

<i>Question: Should State governments allow the sale of sexually explicit non-violent erotica to people 18 years and over from a licensed adult store?</i>						
	Qld %	NSW %	Victoria %	Tas %	SA %	WA %
Yes	61.8	66.8	65.0	71.6	65.9	61.2
No	32.3	29.2	33.4	25.1	27.4	32.2
Can't say	5.9	4.1	1.6	3.3	6.6	6.6

* Fiona Patten, Body Politics.

April 1999 Roy Morgan Research/Eros Foundation – NSW results only*

<i>Question: In your opinion, should non-violent erotic videos be available to adults in Australia from properly licensed adult bookstores or should they be banned?</i>	
Should be available	76.3%
Should be banned	19.1%
Can't say	4.6%
<i>Question: In the last 12 months have you done any of the following? (Respondents could choose more than one)</i>	
Watched at least part of a non-violent erotic film or video	21.3%
Read or looked into a non violent erotic magazine, book or other publication	23.8%
Have you accessed any non violent erotica on the Internet	5%

* Source: *Submission No 32*, Legislative Council Standing Committee on Social Issues Inquiry into the Classification (Publications, Films and Computer Games) Enforcement Amendment Act 2001.

“X” Rated Films and the Regulation of Sexually Explicit Material

April 1999 Roy Morgan Research / Eros Foundation - Results for all States*

<i>Question: In your opinion, should non-violent erotic videos be available to adults in Australia from properly licensed adult bookstores or should they be banned?</i>						
	Queensland	NSW	Victoria	Tasmania	South Australia	Western Australia
Should be available	72.3%	76.3%	68.9%	73.5%	70.1%	77.9%
Should be banned	24.8%	19.1%	23.3%	22.3%	25.6%	16.5%
Can't say	2.9%	4.6%	7.9%	4.1%	4.3%	5.6%

<i>Question: In the last 12 months have you done any of the following? (Respondents could choose more than one)</i>						
	Queensland	NSW	Victoria	Tasmania	South Australia	Western Australia
Watched at least part of a non-violent erotic film or video?	26.2%	21.3%	14.8%	18.4%	24.6%	31.3%
Read or looked into a non-violent erotic magazine, book or other publication?	21.6%	23.8%	11.3%	14.2%	20.7%	24.3%
Have you accessed any non-violent erotica on the Internet?	3.9%	5.0%	9.4%	3.6%	3.8%	9.5%

* Fiona Patten, Body Politics.

Newspoll Survey/The Australia Institute 2003*

Perceptions of exposure to X-rated videos among young (%)		
<i>Question: Watching X-rated videos is widespread amongst girls and boys of your age – agree or disagree?***</i>		
Respondent Gender – ‘agree’	Boys	Girls
Boys	84	84
Girls	15	4

* Source: M Flood and C Hamilton, *Youth and Pornography in Australia: evidence on the extent of exposure and likely effects*, Discussion Paper No 52, The Australia Institute, February 2003.

*** The exact formulation of the question(s) asked is not available.

Exposure to X rated videos among youth (%)		
<i>Question: Respondents were asked ‘Have you ever watched X-rated videos yourself?’ If ‘yes’, then they were asked ‘How often would that be?’*</i>		
	Boys	Girls
Total	73	11
Every week	5	0
Every 3 to 4 weeks	11	0
Every 2 to 3 months	11	0
Less often	40	11

* The exact formulation of the question(s) asked is not available.