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**Censorship in Australia:
Regulating the Internet and
other recent developments**

by

Gareth Griffith

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CONTENTS

EXECUTIVE SUMMARY

1. INTRODUCTION	1
2. WHAT'S IN A NAME? CENSORSHIP OR CLASSIFICATION?	2
3. CENSORSHIP IN AUSTRALIA BEFORE 1996.....	4
3.1 Overview	4
3.2 Landmark developments	5
3.3 The community standards test.....	5
3.4 Reform of film censorship	6
3.5 Reform of literature censorship	7
3.6 Legislative reform in 1983-84	8
3.7 The ACT Ordinance	9
3.8 Legislative reform in the States	10
3.9 A complex network of laws	10
3.10 Classification guidelines	11
3.11 Consumer advice	11
3.12 Computer Games.....	12
3.13 Comment.....	12
4. CENSORSHIP IN AUSTRALIA AFTER 1996	13
4.1 The ALRC report on censorship procedure.....	13
4.2 The Commonwealth Classification Act 1995 – administrative reform	13
4.3 The Commonwealth Classification Act 1995 – the classification system	14
4.4 A national uniform system?.....	17
4.5 Legislation in the States and Territories	18
4.6 Prohibited imports	19
4.7 The regulation of TV content.....	19
5. INTERNET CONTENT REGULATION IN AUSTRALIA.....	22
5.1 Overview	22
5.2 Background developments	22
5.3 The ABA scheme.....	23
5.4 Internet Industry Association codes of practice	25
5.5 The role of the Classification Board	25
5.6 The role of NetAlert	26
5.7 Reporting on the scheme.....	27
5.8 Comments on the scheme.....	28
5.9 The transparency of the scheme	30
5.10 Internet content regulation – State laws	31
5.11 Western Australia and the Northern Territory	31
5.12 Victoria	32
5.13 Internet content regulation and the criminal law in NSW	33

6.	THE CLASSIFICATION (PUBLICATIONS, FILMS AND COMPUTER GAMES) ENFORCEMENT AMENDMENT BILL 2001 (NSW).....	35
6.1	Overview	35
6.2	Background to Internet content regulation in NSW	36
6.3	The South Australian On-Line Services Bill 2001.....	37
6.4	Summary of proposed Part 5A (online content regulation)	37
6.5	Arguments for and against in the South Australian Report	41
6.6	Part 5A and existing criminal laws.....	42
6.7	Policy objectives of Part 5A– child protection, uniformity and consistency ...	44
6.8	The ‘adult themes’ debate	46
6.9	Judging online material by the standards applicable to films and computer games	47
6.10	Comment.....	48
7.	OTHER ISSUES AND DEVELOPMENTS.....	48
7.1	Convergence and the review of classification guidelines.....	48
7.2	The ‘X’ classification for films	49
7.3	Community assessment panels.....	50
7.4	Standing to appeal	51
7.5	R v Hughes and the question of constitutional validity.....	52
8.	CONCLUSION	53

APPENDIX A

Schedule 2, Amendments relating to on-line services. Classification (Publications, Films and Computer Games) Enforcement Amendment Bill 2001

APPENDIX B

National Classification Code

APPENDIX C

Analysis of issues raised in evidence

Parliament of South Australia

Report of the Select Committee on The Classification (Publications, Films and Computer Games) (Miscellaneous) Amendment Bill (No. 2) 2001

EXECUTIVE SUMMARY

The Classification (Publications, Films and Computer Games) Enforcement Amendment Bill 2001 was passed by the Legislative Council on 4 December 2001. The next day the Attorney General, the Hon Bon Debus MP, announced that, owing mainly to concerns about the 'scope and enforceability of the online provisions', he would refer the Bill to the Legislative Council's Standing Committee on Social Issues. This paper presents a background to the main issue arising from the Bill, namely the regulation of Internet content, by placing it in the broader context of censorship law administration in Australia. The paper's main findings are as follows:

- Before the current censorship system was established in 1996 Australian censorship law was a complex network consisting of federal Customs legislation, the ACT *Classification of Publications Ordinance 1983*, plus a plethora of State and Territory laws. This diversity reflected the fact that, although the Commonwealth can use its customs powers to regulate what is imported into Australia, it does not have a direct head of power to deal with censorship. Whatever degree of uniformity has been achieved therefore has always been the product of inter-government cooperation. Under this scheme of things, enforcement has always remained a State and Territory responsibility (p.4).
- Two landmark developments inaugurating the modern era of censorship in Australia were: the 1969 High Court decision in *Crowe v Graham* (1969) 121 CLR 375; and the reforms introduced in 1971 by Don Chipp, Commonwealth Minister for Customs and Excise (1969-1972), and developed under the Whitlam Government (p 5).
- The underlying philosophy behind these reforms was that: adults are entitled to read, hear and see what they wish in private and in public; people should not be exposed to unsolicited material offensive to them; and children must be adequately protected from material likely to harm or disturb them. A fourth principle, enunciated by Chipp in 1970, was that 'censorship should be open to public scrutiny' (p 5).
- By 1973 the Film Censorship Board was a full-time 9 member statutory Board. An Annual Report was first published in 1980. In 1986 the part-time Films Board of Review also reported on its activities and, in the following year, its decisions were published in full in the Annual Report. In 1988 the Film Censorship Board was incorporated for administrative purposes into the Office of Film and Literature Classification (OFLC). The Films Board of Review (re-titled the Film and Literature Board of Review in 1990) received secretarial support from the OFLC (p 6).
- Only in 1996 was literature censorship, prior to appeal, made the responsibility of a statutory Board – the new Classification Board (p 8).
- A third reform landmark was the 1983-84 legislative package based, at the federal level, on the ACT Ordinance. The Ordinance provided for a scheme of classification covering both films and literature. Literature remained a voluntary scheme, whereas the classification of films and videos was compulsory (p 8).
- A separate classification system, with a distinct set of guidelines, was introduced in 1994 for computer games. No 'R18+' classification applied for computer games (p 12).
- The Australian Law Reform Commission's 1991 report, *Censorship Procedure*, formed the basis of the new national classification scheme under the *Classification (Publications, Films and Computer Games) Act 1995* (Cth). It also formed the basis of

the enforcement legislation subsequently enacted in the States (p 13).

- The national scheme commenced on 1 January 1996. It established a Classification Board in place of the former Film Censorship Board and a Classification Review Board in place of the Film and Literature Board of Review (p 13).
- Under the national scheme classification decisions are to be made in accordance with a National Classification Code and Guidelines agreed to between Commonwealth and State and Territory censorship Ministers (p 14).
- A number of jurisdictions have reserved the power to review decisions made under the national classification scheme. NSW is not one of these jurisdictions (pp 17-19).
- Under the *Broadcasting Services Act 1992* the classification regime for free-to-air commercial TV is largely based on self-regulation, under which the stations classify programs in accordance with the Australian Broadcasting Authority (ABA) approved Codes of Practice. Television programs (other than those for children) are classified by classification officers employed by the networks (p 20).
- Neither commercial free-to-air television nor Pay TV is able to broadcast 'R' rated films in an unmodified form (p 20).
- The national broadcasters, the ABC and SBS, are also required to develop Codes of Practice which are to be notified to the ABA but not registered (p 21).
- The ABA is also the key Commonwealth agency for the regulation of online content, established under the *Broadcasting Services Amendment (OnLine Services) Act 1999* (Cth). That Act inserted Schedule 5 headed, 'Online Services' into the broadcasting legislation, which makes it clear that the Commonwealth scheme administered by the ABA regulates Internet Service Providers (ISPs) and Internet Content Hosts (ICHs). It does not regulate: producers of content; or persons who upload or access content (p 22).
- Online content creators and end users are to be regulated instead by a combination of State and Territory online enforcement laws and the criminal laws of the various Australian jurisdictions. The current NSW Bill is in fact this State's response to the agreed policy of formulating model online provisions relevant to 'producers of online content'. This is in similar terms to the South Australian Classification (Publications, Films and Computer Games) (Miscellaneous) Amendment Bill (No 2) 2001. Both Bills reflect, in a modified form, the model online content provisions released for public consultation in 1999 by the censorship Ministers (p 22).
- Before the Commonwealth enacted its online legislation in 1999, three jurisdictions had already passed their own legislative schema – Victoria, Western Australia and the Northern Territory (pp 32-33).
- In terms of the existing criminal law in NSW, at least two sections of the *Crimes Act 1900* are relevant in this context – section 578B (possession of child pornography) and section 578C (publishing child pornography and indecent articles) (pp 33-35).
- Under the current NSW Bill 'Part 5A On-line services' would be inserted into the *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (NSW) (p 36).
- The current NSW Bill would create two new offences: (a) making available or supplying objectionable matter on on-line service; and (b) making available, or supplying, to another person, any matter unsuitable for minors (pp 38-41).
- The main policy objectives behind the Bill are: the protection of children; the establishment of a uniform system of criminal laws in respect to online content; and the

consistent regulation of material on- and offline (pp 44-46).

1. INTRODUCTION

The last two decades or so have witnessed an array of new developments in media technologies, from the video revolution of the 1980s, through the introduction of computer games in the early 1990s and on to the current proliferation of DVDs. By making available many titles which would never reach an Australian cinema screen, videos provided unprecedented choice in entertainment for individual consumers, all of which could be accessed at home. No longer was the home viewer restricted to the limited fare on offer on free-to-air TV. With the arrival of Pay TV the range of consumer choice expanded exponentially. Moreover, a new alternative in home entertainment arrived in the form of computer games and, hard on its heels, came the Internet which shifted the boundaries of human communication as never before. In a hundred years, the limits of home entertainment had moved on from the paradigmatic Victorian family gathered around the piano to the precocious ten-year old sitting at a computer with the world of human discourse – good, bad or indifferent - at its fingertips.

Each technological development has brought its own challenges for the censorship regime of the day, sharpening the tension between the regulation of content, on one side, and the right of adults to read, hear and see what they want, on the other. Should 'X' rated videos be available, by mail order or otherwise, is a question which has provoked sustained controversy? One issue which emerged in the 1990s was whether 'R' classified films could be shown on Pay TV. Another was whether the equivalent of 'R' classified material should be available on computer games. In censorship as in other areas, some issues are hardy perennials, whereas others are of more fleeting interest. The possible desensitisation of the censors, plus the issue of the potentially harmful effects on children resulting from media portrayals of violence are among the longstanding issues in the modern censorship debate. On the other hand, even the most hotly contested controversies over particular censorship decisions can fizzle out quickly enough, as in the case of the recent debate over the original 'MA15+' classification of the film *Hannibal* by the Classification Board, a decision later overturned by the Classification Review Board which raised the classification to 'R18+'.¹ An even better example, perhaps, was the Review Board's decision to grant an 'R18+' classification to the art house French language film, *Romance*,² thereby quenching the controversy over the original 'Refuse Classification' decision and the processes by which it had been arrived at by the Classification Board.³ A constant feature are the claims made by 'moral' conservatives, on one side, and civil libertarians, on the other, that particular decisions reflect trends in censorship towards, as the case may be, excessive leniency or restrictiveness.

¹ An urgent review of the film was requested by the Federal Attorney General (at the request of the Queensland Attorney General) as the film was about to be publicly released. The Review Board's decision was handed down on 22 February 2001.

² The film, which included depictions of explicit sexual activity, had originally been Refused Classification by the Classification Board. The Review Board's decision was handed down on 28 January 2000.

³ G Griffith, 'Censorship controversies: asking questions about the OFLC' (2000) 4 *TeleMedia* 1; T Kaufman, 'Calls for public scrutiny of classification system', *Communications Update*, Issue 163 March-April 2000 at 13.

One issue which has occupied a central place in the censorship debate in recent years is the regulation of the Internet. Without a doubt, for the Australian, as for all other censorship regimes, this is the most problematic of all developments. It may indeed call the practicability of meaningful content regulation into question. Conversely, from the standpoint of the right to free speech it may be the most liberating of developments. At any rate, it is a truism to say that the debate about Internet regulation is marked by deep differences of opinion. It is also the case that, as a result of the technical difficulties involved in constructing a relevant legislative schema, the legal response to the regulation of online material has not been quick for whatever reason. In NSW a draft regulatory schema was first developed in 1996, but only in November 2001 was a Bill introduced into the Parliament for the express purpose of enforcing the regulation of Internet content generally.

The above Bill, the Classification (Publications, Films and Computer Games) Enforcement Amendment Bill 2001 [**the Classification Enforcement Amendment Bill 2001**],⁴ was passed by the Legislative Council on 4 December 2001. The next day the Attorney General, the Hon Bon Debus MP, announced that, owing mainly to concerns about the ‘scope and enforceability of the online provisions’, he would refer the Bill to the Legislative Council’s Standing Committee on Social Issues. The inquiry’s terms of reference require the Committee to report on the ‘scope and operation’ of the Bill with regard to:

- (a) Whether the provisions of the Bill meet its stated policy objectives;
- (b) Whether the provisions contained in Schedule 2 of the Bill provide an effective and enforceable regime for the regulation of online material;
- (c) The social and legal impact of the online regulation of offensive material, and its implications for fair reporting of news and current affairs and legitimate Internet use; and
- (d) Any related matter.

This ‘enforcement’ legislation is part of a broader national framework and one purpose of this paper is to set out the background to that cooperative scheme. The paper starts by discussing terminology, before presenting the pre-1996 background to the current censorship system. In this latter respect it consolidates previous Research Service papers which have dealt with this subject. The paper then outlines the core elements of the national classification scheme which has been in place since 1996.⁵ Next, it discusses Internet content regulation, which is the subject of the current NSW Classification Enforcement Amendment Bill 2001. In a final section the paper considers other key developments and issues in censorship since the publication of the NSW Parliamentary Library Briefing Paper No 3/1999, *Censorship Law: Issues and Developments*.

2. WHAT’S IN A NAME? CENSORSHIP OR CLASSIFICATION?

This paper uses the terms censorship and classification more or less interchangeably. In

⁴ Schedule 2 to the Bill is set out at Appendix A.

⁵ The Classification (Publications, Films and Computer Games) Act 1995 was proclaimed to commence on 1 January 1996.

recent decades the word ‘classification’ has been the term of choice in Australian official circles and this is reflected in most of the recently enacted current legislation in the States and Territories, the titles of which reflect the Commonwealth’s *Classification (Publications, Films and Computer Games) Act 1995*.⁶ The argument, as formulated by the federal Attorney General, Daryl Williams, is that ‘We have a system which classifies material into appropriate categories rather than looking for reasons why it should be banned’.⁷

For all jurisdictions other than Western Australia, therefore, the word ‘censorship’ is actually removed from their legislative schema. According to the former Chief Censor, John Dickie, ‘The significance of this is that it recognises the reality of the process of regulation of material submitted to us’. He went on to explain, ‘We do not cut films any more. We give films a classification and if the distributor wishes to seek a lower classification, the distributor can either appeal to the Film Board of Review or seek the reasons from us for a classification decision and then decide whether to edit the film and resubmit it’.⁸ However, certain material continues to be banned in effect, but now reference is to the ‘Refused Classification’ category.

Does it matter? *Prima facie* classification implies that nothing is banned only restricted if necessary. Classification has certainly a more neutral flavour than the more pejorative term censorship. Classification, by suggesting the assigning of particular things to general classes, has a stolidly objective, scientific feel, far removed from the Roman conception of censorship as a formative instrument in the shaping and maintaining of public morality. Whereas censorship is suggestive of public order and the idea of the public good, classification is associated with the facilitation of informed choice in a community of diverse standards. It is the work of those expert in applying the classification guidelines to particular products or manifestations of popular culture, from films to song lyrics and Internet sites. It speaks of orderliness not order and it does so in the language of what might be called cultural management – a place for everything and everything in its place.

One point to make is that there is nothing mechanical about this process. Another is that it can accommodate a fair amount of ‘censorious’ decision making. The judgements of the classifiers are based on guidelines which are, for want of a better term, normative constructs. From ‘G’ to ‘R’ and ‘X’ (in relation to films) they offer a graded guide of what is appropriate viewing for different age groups, in doing so using language which strives to be as ‘objective’ as possible, but in the end requires sensitive judgements to be made of an aesthetic and moral kind about whether, for example, depictions of violence are ‘excessive’, ‘gratuitous’ or ‘exploitative’. The classifiers play a dual role, as experts who are also representative of the community at large, who are charged with the task of interpreting and applying this normative schema on the community’s behalf. Further up the classification hierarchy, the legislation uses the language of ‘morality, decency and propriety’, judged

⁶ The exception is the Western Australia, *Censorship Act 1996*.

⁷ DR Williams, ‘From Censorship to Classification’, *address to Murdoch University, 31 October 1997*.

⁸ J Dickie, ‘After the first hundred years’ (1995) 14 (4) *Communications Law Bulletin* 18 at 20.

from the standpoint of the reasonable adult person, to define what is not appropriate viewing for anyone. Moreover, the standards by which this judgment is to be made is not consistent as between films, on one side, and computer games, on the other.⁹ In relation to computer games, for which the classification guidelines are stricter¹⁰ in any case and for which there is no 'R18+' category, there seems to be considerable scope for restriction. Similar considerations would seem to apply under the terms of the NSW Classification Enforcement Amendment Bill 2001 which would make it an offence to knowingly or recklessly make available to another person on-line 'any matter unsuitable for minors', thereby effectively banning 'R' rated material from the Internet unless it could be proved that some approved restricted access system was in place.

The upshot is that both the terms 'censorship' and 'classification' remain relevant to some extent or other. For this reason, no hard and fast distinction between them is made in this paper.

3. CENSORSHIP IN AUSTRALIA BEFORE 1996

3.1 Overview

Before the current censorship system was established in 1996 Australian censorship law was a complex network consisting of federal Customs legislation, the ACT *Classification of Publications Ordinance 1983* [the ACT Ordinance], plus a plethora of State and Territory laws. This diversity reflected the fact that, although the Commonwealth can use its customs powers to regulate what is imported into Australia, it does not have a direct head of power to deal with censorship. Whatever degree of uniformity has been achieved therefore has always been the product of inter-government co-operation. Under this scheme of things, enforcement has always remained a State and Territory responsibility. This applies across films and literature, as well as more recently to computer games. Prosecution is a matter for the New South Wales Attorney General therefore where, for example, a cinema in this State shows an inappropriate film trailer, or a video store sells or hires a hard core pornographic product, or a newsagent fails to comply with the conditions for the display of restricted material.

⁹ The current review of classification standards for films and computer games is due to address issues arising 'from the convergence of entertainment media' – OFLC, *A Review of the Classification Guidelines for Films and Computer Games: Discussion Paper*, 2001, p 2.

¹⁰ This is because the censorship Ministers 'are concerned that games, because of their "interactive" nature, may have greater impact, and therefore greater potential for harm or detriment, on young minds than film and videotape' - *Guidelines for the Classification of Computer Games*.

3.2 Landmark developments

The three landmark developments which inaugurated the modern era of censorship in Australia were: first, the 1969 High Court decision in *Crowe v Graham*¹¹; secondly, the reforms introduced in 1971 by Don Chipp, Commonwealth Minister for Customs and Excise (1969-1972), and developed under the Whitlam Government; and, thirdly, the further amendments to the censorship system in 1983-84, largely in response to the introduction of videos. The underlying philosophy behind these reforms was that:

- adults are entitled to read, hear and see what they wish in private and in public;
- people should not be exposed to unsolicited material offensive to them; and
- children must be adequately protected from material likely to harm or disturb them.¹²

A fourth principle, enunciated by Chipp in 1970, was that ‘censorship should be open to public scrutiny’.¹³ Further to this, a meeting of Commonwealth and State Ministers on 24 January 1974 recommended that ‘the reasons for censorship decisions be published’.¹⁴ The challenge was to change a closed and highly interventionist model of censorship into a more open and liberal regime.

3.3 The community standards test

In *Crowe v Graham* the High Court pointed the way towards reforming the conceptual basis of the censorship system by substituting the ‘community standards’ test for the older ‘tendency to deprave and corrupt’ test, as formulated in *Hicklin’s Case* of 1868.¹⁵ At issue after *Crowe v Graham* was not the tendency of obscene material to deprave and corrupt; rather, it was whether the material offended against contemporary community standards. Offensiveness was the key concept, therefore, something which was to be understood contextually, having regard to audience – ‘the persons, classes of persons, and age groups to whom or amongst whom the matter was published’ – and judged in terms of the likely degree of offence to the reasonable adult. As explained by the Commonwealth Attorney-General, Daryl Williams, ‘The “reasonable adult” test is used in two different senses – as a measure of community standards and also as an acknowledgment that adults have different personal tastes...In other words, although some reasonable adults may find the material offensive, and thus justify a restricted classification for it, other may not’.¹⁶ Windeyer J made it clear that the standard applied is that of the general community, having regard to

¹¹ (1969) 121 CLR 375.

¹² See for example – Commonwealth Attorney-General’s Department, ‘Joint Ministerial Meeting on Censorship’, *Media Release*, 31 August 1973.

¹³ D Chipp, ‘Statement on Censorship’, June 1970, p 8.

¹⁴ Commonwealth Attorney-General’s Department, ‘Ministerial meeting on Censorship’, *Media Release*, 24 January 1974.

¹⁵ (1868) LR 3 QB 360.

¹⁶ DR Williams, n 7.

contemporary Australian standards. It was an approach which could be applied to the censorship of films for public exhibition, TV programs and literature.

3.4 Reform of film censorship

Although the Commonwealth has no direct power over censorship, through its customs power it does regulate imported material and, as a result, it has long played a leading role in the censorship of films. The Commonwealth Film Censorship Board was established in 1917 and delegation by the States of film censorship functions to the Board occurred in the late 1940s and early 1950s.¹⁷ The Board's role was to: examine imported films under Commonwealth customs regulations; and register and classify films for public exhibition under State legislation. Enforcement remained a responsibility of the States.

In the 1966 edition of *Freedom in Australia* Campbell and Whitmore had savaged the Commonwealth Film Censorship Board, saying it was a law unto itself, working in secret, free of judicial and political control. Encapsulating the Board's *modus operandi* was the Commonwealth Censor's outright banning of horror films as 'undesirable in the public interest'.¹⁸ Reforming the system, Chipp introduced a reporting mechanism requiring the Film Censorship Board to publish which films it had cut or banned in the Commonwealth Gazette. By agreement with the States the 'R' classification was introduced in 1971, along with the compulsory display of film classifications in advertising material. In January of the same year a part-time Films Board of Review was established, replacing the single appeal censor.¹⁹ These were the first steps towards accountability and transparency in Australian censorship.

By 1973 the Film Censorship Board was a full-time 9 member statutory Board comprising the Chief Censor, the Deputy Chief Censor and 7 Board members, all appointed for limited terms by the Governor General.²⁰ An Annual Report was first published in 1980 and from 1981 on these included the resumés of Board members, as well as a statistical breakdown of the Board's work. In 1986 the Films Board of Review also reported on its activities and, in the following year, its decisions were published in full in the Annual Report, thus offering at last an easily accessible and detailed insight into the work of a censorship authority.

In 1988 the Film Censorship Board was incorporated for administrative purposes into the Office of Film and Literature Classification [OFLC], at that time a non-statutory government agency. Under these arrangements, the Films Board of Review (re-titled the Film and Literature Board of Review in 1990) received secretarial support from the OFLC. It remained a part-time statutory body.

¹⁷ According to the Film Censorship Board's 1980 Annual Report, Western Australia, Queensland and Tasmania signed agreements delegating their film censorship powers and functions to the Commonwealth. The other States eventually followed suit.

¹⁸ G Dutton and M Harris ed, *Australia's Censorship Crisis*, Sun Books 1970, p 56.

¹⁹ I Bertrand, *Film Censorship in Australia*, University of Queensland Press 1978, pp 185-188.

²⁰ Unlike at present there was no statutory limit on the number of years a person could serve in total as a Board member.

Queensland, South Australia and Western Australia retained a secondary level of censorship capable of reviewing decisions made by the Film Censorship Board. The Queensland Films Board of Review was abolished by the *Classification of Films Act 1991* (Qld).²¹

3.5 Reform of literature censorship

Although the same division of constitutional powers applied to publications as to films, traditionally literature censorship had always been as much a State as a Commonwealth concern. Just as the importation of books was regulated federally under the customs scheme, so the censorship regimes in place under State legislation governed all locally produced publications. If the banning of works by Nabokov and DH Lawrence was the work of the Commonwealth Customs Minister, regulation of the magazine *Oz* was a matter for the State courts.²² Indeed, whereas film censorship was rarely, if ever, the subject of legal dispute, in the absence of a national statutory body responsible for literature censorship Australian courts were regularly called upon to decide questions of obscenity or indecency in respect to controversial publications.²³

Reform of literature censorship was a long term project. Following, in January 1974, an in principle agreement of Commonwealth and State Ministers responsible for censorship the conceptual basis of literature censorship was revised in keeping with the approach set out in *Crowe v Graham*. Under the NSW *Indecent Articles and Classified Publications Act 1975*, 'Restricted category' publications were not to be sold or displayed to persons under 18; 'direct sale' category publications were to be sold to persons over 18 only on direct personal request. The scheme was to be administered by classification officers in the Commonwealth Attorney General's Department who were responsible for initial classification of imported and locally produced publications. The emphasis by this time was more on 'classification' than 'censorship' per se and the material under consideration was almost exclusively 'hard' or 'soft' core pornography. Review and appeal mechanisms were available through State Classification Boards and the courts. Review on the merits of decisions made under the Commonwealth *Customs (Prohibited Imports) Regulations* was not available²⁴.

²¹ The current status of these review bodies is discussed in a later section of this paper. Queensland makes provision for a film and computer games classification officer whose decisions can be appealed to the Films Appeal Tribunal and the Computer Games Appeals Tribunal respectively. Neither body has ever been required to make a decision since their establishment in the 1990s. Moreover, neither body is empowered to review decisions made by the Commonwealth Classification Board and Classification Review Board.

²² *Neville v Lewis* (1965) NSW 1571.

²³ A National Literature Board of Review was established in 1967, but its recommendations were advisory only. It was abolished in 1977 – RG Fox, 'Censorship policy and child pornography' (1978) 52 *ALJ* 361. See generally – P Coleman, *Obscenity, Blasphemy, Seditious*, Duffy & Snellgrove 2000.

²⁴ Administrative Review Council, *Report No 24 - Review of Customs and Excise Decisions: Stage Four: Censorship*, para 19.

Guidelines for the classification of publications were included in Annual Reports after the establishment of the OFLC in 1988. Two years later literature censorship decisions were made subject to appeal by the re-titled Film and Literature Board of Review. Still, the decisions themselves were seldom reported either on appeal or otherwise and, at first instance, were still made almost exclusively by Commonwealth public servants.²⁵ Only in 1996 was literature censorship, prior to appeal, made the responsibility of a statutory Board – the new Classification Board.²⁶

3.6 Legislative reform in 1983-84

The legal framework in place prior to the current system was established in 1983-84 in a new round of legislative reform, concerned with both film, including videos, and literature censorship. The focus at a Commonwealth level was on the ACT Ordinance, which was seen as the basis for a uniform national scheme. Changes were also made to the Commonwealth customs and State legislation at this time. The classification of films and videos was compulsory, whereas literature classification was voluntary in nature.

The main impetus behind this reform was the ‘video revolution’ of this period. Videos for use in the home increased dramatically in number and availability. Also, with the advent of videos, pornography became as significant an issue in film regulation as it was for publications. Violence in ‘video nasties’ was another cause for concern.

A major problem for the Film Censorship Board was that it lacked legislative power to classify videos for sale or hire for private use. The relevant State statutes provided only for the classification of films for public exhibition. Following a meeting of Commonwealth and State Ministers in July 1983 it was agreed to implement a voluntary scheme for the classification of videotapes, similar in fact to the scheme for publications, using the ACT Ordinance as model legislation. The States were to pass laws imposing appropriate points of sale restrictions for videos classified ‘R’ and ‘X’ (that is, those videos restricted to persons 18 years and over). The requirement that videos be registered on importation was abolished. Stating the original philosophy behind these reforms, the then Attorney-General, Senator Gareth Evans, stated that ‘Only child pornography and similar very extreme material would be refused classification altogether’.²⁷

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

²⁵ G Griffith, *Censorship: Law and Administration*, NSW Parliamentary Library Background Paper 1993, pp 23-24.

²⁶ As discussed in later section of this paper, not all jurisdictions agreed to participate in the national system.

²⁷ Press Release, 13 July 1983. Subsequently the Attorney-General stated that material refused classification would ‘include child pornography and other very extreme material of that order of offensiveness’: Senate, Parliamentary Debates, 21 September 1983, p857.

Implementation of the scheme for videos proved just as problematic. Intense public debate and controversy followed its announcement, regarding both the voluntary nature of the scheme and its content. In April 1984 it was agreed at a meeting of Commonwealth and State Ministers to make the video classification system compulsory.²⁸ Controversy then focussed around the 'X' classification and its administration by the Film Censorship Board. In all, in an attempt to reach agreement on what should be permitted in 'X', as well as to define the levels of violence acceptable in 'M' and 'R', five sets of Guidelines were agreed to in 1984. Gradually the concept of 'X' as a non-violent erotica category developed and by November 1984 the Guidelines had been revised to exclude any material with a suggestion of coercion or non-consent from the 'X' classification. However, that was not enough to gain the approval of the States. The outcome of the debate was that the 'X' classification was restricted to the ACT and the Northern Territory.

Continuing the debate, in October 1984 a Senate Select Committee on Video Material was established. It reported in March 1985 recommending, among other things, a moratorium on the sale and hire of 'X' rated videos in the ACT. That Committee's work was continued by the Joint Select Committee on Video Material which reported in 1988, recommending by majority a new classification to be called non-violent erotica (NVE) to replace the 'X' classification. That 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. In November 1988 the ALP Caucus voted not to accept this move.²⁹

3.7 The ACT Ordinance

At the federal level the ACT Ordinance was the centrepiece of the 1983-84 legislative reform package. The Ordinance provided for a scheme of classification covering both films and literature (defining both as 'publications'). Literature remained a voluntary scheme, whereas the classification of films and videos was compulsory.³⁰ Under the voluntary scheme for literature censorship, it was left to the publishers of mainly soft and hard core pornographic magazines to decide whether they wanted to submit their publications to the Department for classification, thus avoiding risk of prosecution.

Much of the conceptual schema of the Ordinance is reflected in the current law. Under the Ordinance, the same conceptual basis was in operation for the regulation of restricted and refused categories of films and literature. For films and videos the restricted categories were 'R' and 'X'; for literature they were Category 1 and Category 2. Fundamental to both, as well as to the refused categories, was the degree of offence material is likely to cause a reasonable adult person. Thus the 'R' and 'X' classifications were designed to accommodate

²⁸ Press Release, Commonwealth Attorney-General, 6 April 1984. A compulsory scheme for videos was achieved by amendment to the ACT Ordinance made by the Governor General on 4 June 1984.

²⁹ K Jackson, *Censorship and Classification in Australia*, Commonwealth Parliamentary Library Current Issues Brief, p 2.

³⁰ The actual administration of film and literature censorship remained entirely separate until the establishment of the Office of Film and Literature Classification in 1988.

films which are 'likely to cause offence to a reasonable adult person' (s.25 (2)); a film could be refused classification where it offends against the standards of 'morality, decency and propriety accepted by reasonable adult persons *to the extent* that it should not be classified' (emphasis added). Identical provision for Category 1 and 2 publications and for refusal of publication are found in s.19(2) and s.19(3) respectively. In its report of December 1983 the ACT House of Assembly Standing Committee on Education and Community Affairs defined a 'reasonable adult' for the purpose of the Ordinance as 'someone who is independent of extremes or idiosyncrasies and is generally representative of ordinary people'.³¹

Further specific prohibitions were provided against child pornography and terrorist manuals.

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

3.8 Legislative reform in the States

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

3.9 A complex network of laws

In fact a complex network of laws remained in place. Videos and publications³³ were classified by Ministerial agreement under the ACT Ordinance. However, films for public exhibition had to be 'registered' for importation under the now repealed Customs (Cinematograph Films) Regulations. Alternatively, a film might be refused registration, usually on grounds of 'indecenty'. In formal terms the Film Censorship Board had first to register a film and only then proceed to award it a classification. Where cinema films for public exhibition were concerned the classification was determined by the laws of the States and Territories.

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

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

³³ Following agreement between the Commonwealth, New South Wales, Victorian, South Australian and Northern Territory governments, classification of literature was undertaken by OFLC publications officers. From 1991 on Queensland also adopted the classification decisions of the OFLC. As with videos for sale or hire, literature was classified under the ACT Ordinance, but regard was had in this context to the relevant State legislation. Tasmania and Western Australia operated their own schemes.

Further, films, videos and publications were also dealt with under the *Customs (Prohibited Imports) Regulations*. This applied to material seized at the customs barrier. As at present, the Censorship Board provided an opinion as to whether the material should be declared a prohibited import or released.³⁴

3.10 Classification guidelines

Another development of continuing significance resulting from the legislative reforms of 1983-84 was the formulation and publication of classification guidelines. These were drawn up in consultation with Commonwealth and State Ministers with censorship responsibilities. Legislation covering film censorship in two States, New South Wales and Victoria, made direct reference to the Guidelines. Thus section 5A of the *Film and Video Tape Classification Act 1984 (NSW)* provided: 'In exercising their functions under this Act, the censor and appeal censor are to have regard to any guidelines issued to them from time to time by the Minister relating to the classification of films'. The purpose of the Guidelines was to flesh out the very general words of the law in this area and, as such, to form the real basis of accountable decision making.

In its 1991 report, *Censorship Procedure*, the Australian Law Reform Commission said the Guidelines should not be binding on the Boards, 'but their existence should enhance consistent decision making and improve community understanding of the classification system'.³⁵ It recommended that the Guidelines and amendments should be released for public comment for at least three months before being issued by the federal Attorney-General. Since that time all the classification guidelines have undergone extensive review. With one exception - the introduction of the guidelines for computer games in 1994 - subsequent guideline developments have been subject to public consultation.

3.11 Consumer advice

A further innovation to note from this period was the introduction in 1988 of consumer advice for films and videos classified 'PG' and above. This followed a recommendation of the Joint Select Committee on Video Material. As a means of assisting the members of the community, parents especially, to make informed decisions about the classification system, the use of consumer advice has since been extended to computer games and TV.

³⁴ Films and videos are not classified under the Prohibited Imports Regulations and cannot upon release be sold, hired or exhibited in public.

³⁵ Australian Law Reform Commission, *Report No 55 – Censorship Procedure*, 1991, p 19.

3.12 Computer Games

A separate classification system, backed by a distinct set of guidelines, was introduced in 1994 for computer games. A compulsory scheme was set in place, subject to two exceptions: (a) 'Bulletin Board Systems' were not regulated; and (b) business, accounting or educational software was not regulated unless it contained 'adult' type material. This latter exemption scheme has been retained and has been extended in a revised form to films.³⁶

At the direction of the censorship Ministers, the computer games guidelines were to be applied 'more strictly than those for the classification of film and videotape'. The OFLC Annual Report for 1993-94 explained that 'The Ministers are concerned that games, because of the "interactive" nature, may have greater impact, and therefore greater potential for harm or detriment, on young minds than film or videotape'.³⁷ The highest available computer games classification was 'MA15+'. No adults only 18+ category similar to the 'R' classification for films was in place. Amendment to the ACT Ordinance was made on 22 June 1994 to remove the 'R' and 'X' classifications for computer games following a decision by all jurisdictions to ban such games.

At the other end of the classification scheme, a new category 'G(8+)' was introduced for games suitable for children 8 years and over. This was said to reflect 'concern expressed by child psychologists about the impact of even very mild levels of violence on children too young to distinguish between fantasy and reality when playing computer games'.³⁸

3.13 Comment

The previous comment on consumer advice suggests a contemporary approach emphasising what might be called the 'classification' perspective, the notion of expert classifiers assisting adults to make rational and informed choices about what they, and their children, wish to read, see and hear. In contrast, this last comment, setting out the rationale behind the restrictive computer games classification system, is suggestive of the 'censorship' perspective, emphasising ideas associated with 'protection from harm' and the public good. All of which indicates that the familiar tensions between what the Federal Attorney-General has called 'civil rights and social responsibility' remain to be debated and decided upon.³⁹

³⁶ One purpose of the NSW Classification Enforcement Amendment Bill 2001 is to facilitate the expansion of the range of films that are exempt from classification to include certain current affairs, hobbyist, sporting and other films where the material is suitable for children at the 'G' or 'PG' level.

³⁷ OFLC, *Annual Report 1993-94*, p 33.

³⁸ OFLC, *Annual Report 1993-94*, p 48.

³⁹ 'Classification of film and literature balancing civil rights and social responsibility', *Media Release*, 31 October 1997.

4. CENSORSHIP IN AUSTRALIA AFTER 1996

4.1 The ALRC report on censorship procedure

As the Federal Attorney-General, Daryl Williams, has said the ‘so called “national scheme” that existed prior to 1996 was complex and lacked real uniformity. It was a mess’.⁴⁰ The first step taken to sort out this mess was the reference in 1990 by the then federal Attorney-General, Michael Duffy, to the Australian Law Reform Commission on censorship procedure. The ALRC’s report was released in 1991 and was to form the basis of the legislation that followed, the *Classification (Publications, Films and Computer Games) Act 1995* (Cth) [**the Commonwealth Classification Act 1995**]. By extension, it also formed the basis of the enforcement legislation subsequently enacted in the States.

4.2 The Commonwealth Classification Act 1995 – administrative reform

The new national scheme thus enacted commenced on 1 January 1996. The scheme involves a Federal Act for the Australian Capital Territory (thereby replacing the ACT Ordinance), based on the Territories power in section 122 of the Australian Constitution. This Act – the Commonwealth Classification Act 1995 – establishes the classification bodies and sets out the procedure for classification. Section 4 of the Act permits the Commonwealth bodies to exercise the classification powers and functions conferred on them under an arrangement between the Commonwealth and a State or the Northern Territory.⁴¹ Giving effect to this cooperative scheme is State and Territory legislation for the enforcement of the classification decisions made under the Commonwealth Act.

That Act established a Classification Board in place of the former Film Censorship Board (section 45) and a Classification Review Board in place of the Film and Literature Board of Review (section 72). In both cases the maximum period of membership is limited to 7 years (sections 51(3) and 76(3)).⁴² The Classification Board is to have no more than 20 members (section 47). The head of the Classification Board is to be called the Director and not the Chief Censor as in the past. The Act also made it explicit that, in appointing members of the Boards, regard is to be had to the desirability of ensuring that the membership is *broadly representative* of the Australian community (sections 48(2) and 74(2)).⁴³ Consultation with the participating Ministers is also required in the appointment process (sections 48(3) and 74(3)).

⁴⁰ DR Williams, n 7.

⁴¹ *Commonwealth Classification Act 1995*, section 4. Powers and functions can also be exercised by the Director of the Classification Board. The Commonwealth reserved to itself the censorship power for the ACT which means that an ‘arrangement’ is not required in this case. The ACT does, however, have its own enforcement legislation.

⁴² The ALRC recommended a maximum period of membership of 6 years.

⁴³ This is consistent with the ALRC’s recommendations which commented: “Beyond this, however, it would be undesirable to prescribe qualifications for membership of the Board” - ALRC Report, n 35, p 33.

Under the Act, the Classification Board classifies all materials - films, computer games and, for the first time, publications. As the federal Attorney General commented, 'Under this scheme, publications will be classified by the new Classification Board and not departmental officers, as at present'.⁴⁴ It should be noted in this respect that, under section 59(3) the Classification Board may, by resolution, delegate its power if it has 'determined that the delegation is desirable for the efficient running of the Board'. In the words of the ALRC, this provision should ensure 'that the power to delegate will not be at large but will be subject to appropriate controls'.⁴⁵ Section 59(2) contemplates delegation to 'an officer of the Australian Public Service and who is performing duties in the Office of Film and Literature Classification'. Following the suggestion in the ALRC's report, this could then permit such officers to deal with the more straightforward matters of classification, including the classification of some publications.

Under the Commonwealth Classification Act 1995 the former 'voluntary' scheme for the classification of publications has been replaced by a partially compulsory scheme based on 'submittable publications' (those containing material that would fall within the restricted categories).⁴⁶ For all practical purposes, however, most publications continue to operate under the same rules as applied before 1996.

In relation to computer games likely to be classified as 'G', 'G8' or 'M', the legislation allows an 'approved assessor', a person who has undergone training by the OFLC, to submit an application for classification of a computer game accompanied by a recommended classification and consumer advice.⁴⁷ It has been said that the OFLC Annual Report for 1997-98 'indicates that the training undertaken is of a few hours only, and no information is provided evaluating the correlation between approved assessors recommendations and the final classification awarded'.⁴⁸

4.3 The Commonwealth Classification Act 1995 – the classification system

In place under the Act 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

⁴⁴ Commonwealth Parliamentary Debates, HR, 22 September 1994, p 1381.

⁴⁵ ALRC Report, n 35, pp 35-36.

⁴⁶ The definition of 'submittable publication' under section 5 of the Commonwealth Classification Act 1995 has been amended by Classification (Publications, Films and Computer Games) Amendment Act (No 1) 2001, section 11. The effect is still to define 'submittable publication' in terms of those falling within the restricted categories.

⁴⁷ Commonwealth Classification Act 1995, section 17 (3)-(5).

⁴⁸ Parliament of Victoria, Family and Community Development Committee, *Inquiry into the Effects of Television and Multimedia on Children and Families in Victoria*, October 2000, p 127.

censorship Ministers (section 9).

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. In some ways it forms the central aspect of this exercise in cooperative federalism. Under the Code, classification categories and criteria would not be legislated by any State or Territory, nor by the Commonwealth; but would instead be the product of an agreement between all the participating jurisdictions. Thus, the Code's purpose is to set out the classification categories and criteria, as well as to formulate the principles which should inform classification decisions. For the most part these principles restate those underlying the pre-1996 regime, notably that:

- adults should be able to read, hear and see what they want,
- children should be protected from material likely to harm or disturb them,
- and everyone should be protected from exposure to unsolicited material they find offensive.

The innovative aspect of the Code in this regard is that it also recognises 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 following table:

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

The full text of the National Classification Code is set out at Appendix B. By way of example, the ‘Refused Classification’ (RC) category can be granted for *films* 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 propriety etc. However, mere offence against these standards is not sufficient to warrant refusal of classification. As under the ACT Ordinance, 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 ‘R18+’ classification – ‘likely to cause offence to a reasonable adult’.⁴⁹
- 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. The same test applies in relation to publications and was discussed at length in the *Rabelais case*.⁵⁰ The

⁴⁹ The second test for ‘R’ is that the film is ‘unsuitable for a minor to see’.

⁵⁰ *Brown and Others v Members of the Classification Review Board of the OFLC* (1998) 154 ALR 67.

full Federal Court favoured a purposive construction of the test, but one that is to be applied objectively, without regard to either the actual or likely effect of the publication, or the actual intent of the author or publisher. This is in contrast to the way either the 'R18+' offence test, or the 'RC' depiction of persons under 16 test, are to be applied.⁵¹

4.4 A national uniform system?

On the issue of uniformity, it should be noted that the Commonwealth Act makes provision for an 'X' classification for films. On the other hand, the highest classification available for films under the enforcement legislation in NSW and the other States is the 'R' classification. Thus, the production and distribution (but not possession) of films classified 'X' will continue to be prohibited in the States.

In relation to publications, the situation is more complicated still. When the national scheme came into operation in January 1996 neither Western Australia nor Tasmania agreed to participate. In Western Australia, the part-time Censorship Advisory Committee continued to recommend appropriate classifications to the Minister. Tasmania also retained its part-time Publications Classification Board. In fact, under recently passed (but as yet not commenced) amendments to its *Classification (Publications, Films, Computer Games) Enforcement Act 1995* Tasmania is about to join the Commonwealth scheme for publications.⁵² Western Australia may soon follow suit.⁵³ Queensland, on the other hand, does participate at present in the national classification system for publications by adopting decisions made by the Classification Board. However, it also prohibits all those publications classified restricted 'Category 1' or 'Category 2'. In other words, the only publications legally for sale in Queensland are those classified 'Unrestricted'. Moreover, Queensland has its own publications classification officer who can make classification decisions for the State where no relevant decision of the Classification Board is in place, notably in respect to material seized by the Queensland Police Service. The decisions of the Queensland classification officer can be appealed to the Publications Appeals Tribunal, although no appeal has in practice been heard by that body since it was established in 1992.⁵⁴

A number of jurisdictions reserve the power to review decisions made under the national classification scheme. South Australia and Western Australia retain a secondary level of classification for films, computer games and (in the case of South Australia) publications.

⁵¹ G Griffith, *Censorship Law: Issues and Developments*, NSW Parliamentary Library Briefing Paper No 3/1999, pp 7-13. Note, too, that under the Code the classifiers are to give effect to the principle that 'minors should be protected from material *likely to harm or disturb* them'.

⁵² *Classification (Publications, Films, Computer Games) Enforcement Amendment Act 2001* (Tas). This amending Act repeals Division 1 and 2 of the Principal Act, thereby abolishing the Publications Classification Board and the classification scheme it operated.

⁵³ Based on telephone advice from the WA censorship officer – 7 February 2002.

⁵⁴ The Publications Appeals Tribunal is established under the Classification of Publications Regulation 1992 (Qld). Queensland also makes provision for a film and computer games classification officer whose decisions can be appealed to the Films Appeal Tribunal and the Computer Games Appeals Tribunal respectively. Again, neither body has ever been required to make a decision since their establishment in the 1990s.

For Western Australia, this is the Censorship Advisory Committee.⁵⁵ For South Australia, it is the Classification Council, established under the State's classification legislation.⁵⁶ According to its 2000-2001 Annual Report, the Classification Council met twice on an 'as required' basis in that year; it did not review any publications or computer games; it reviewed two films, but in both cases upheld the classifications assigned by the Commonwealth Classification Board. Tasmania also has arrangements in place for a State-based review of film classification decisions, but only in respect to 'films for sale'.⁵⁷ In other words, the classification awarded under the Commonwealth system for films for 'public exhibition' in cinemas cannot be reviewed, but classifications for videos and DVDs 'for sale' can, in theory, be overturned in Tasmania. In reality, this has been a very rare occurrence, perhaps limited to three instances from the 1980s.⁵⁸ The Northern Territory also makes provision for its own Publications and Films Board of Review for the purpose, it is claimed, of reviewing decisions made under the national classification scheme.⁵⁹ It seems the Board has never met.

4.5 Legislation in the States and Territories

A checklist of the relevant State and Territory legislation is as follows:

NSW - *Classification (Publications, Films, Computer Games) Enforcement Act 1995*

Queensland – *Classification of Computer Games and Images Act 1995*; *Classification of Publications Act 1991*; *Classification of Films Act 1991*

South Australia - *Classification (Publications, Films, Computer Games) Act 1995*

Tasmania - *Classification (Publications, Films, Computer Games) Enforcement Act 1995*

Victoria - *Classification (Publications, Films, Computer Games) Enforcement Act 1995*

Western Australia – *Censorship Act 1996*

⁵⁵ *Censorship Act 1996* (WA), section 118. Again, based on telephone advice, this body may be abolished in the near future.

⁵⁶ *Classification (Publications, Films, Computer Games) Act 1995* (SA), section 7.

⁵⁷ *Classification (Publications, Films, Computer Games) Enforcement Act 1995* (Tas), Part 3, Division 3 as amended in 2001. Before the 2001 amendments, the review was to be conducted by the Tasmanian Board. As amended, section 41A permits the Minister to establish a Review Committee if he 'considers that a classified film unduly emphasises matters of cruelty or violence'. It is hard to see these arrangements having much, if any, practical importance in the near future.

⁵⁸ A number of 'video nasties' were banned in Tasmania in the 1980s, including 'I Spit on Your Grave'.

⁵⁹ *Classification of Publications, Films and Computer Games Act* (NT), section 7. Successive OFLC Annual Reports describe the powers of the Northern Territory Board in these terms. However, section 16 of the Act which sets out the Board's functions and powers is not so clear on this point. It provides the Territory Board with the same powers as the Commonwealth Classification Board (not the Review Board) but only in relation to 'any matter not subject to an arrangement between the Territory and the Commonwealth referred to in section 4 of the Commonwealth Act'. It may be that the Board's powers are more akin to the powers of the Queensland censorship officer – where no relevant Commonwealth decision applies - than to the State-based review powers of WA and SA.

ACT - *Classification (Publications, Films, Computer Games) Enforcement Act 1995*
Northern Territory – *Classification of Publications, Films, Computer Games Act*

NSW participates fully in the cooperative national classification system. As such, 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. For example, 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. For the purposes of the NSW Act, all relevant classifications are made by the Commonwealth censorship bodies.

4.6 Prohibited imports

Continuing in operation is the Commonwealth Customs (Prohibited Imports) Regulation. As noted, this applies to material seized at the customs barrier. The Classification Board continues to provide an opinion as to whether material seized under Regulation 4A should be declared a prohibited import or released.⁶⁰ In 2000-2001 advice on 551 seized items was sought by the Australian Customs Service: the Board advised on 166 films, 242 publications and no computer games, with a further 143 applications for advice being withdrawn.⁶¹

4.7 The regulation of TV content

Brief note can also be made of the development of the regulation of TV content. Section 92 of the Commonwealth Classification Act 1995 makes it clear that the legislation does not apply to the regulation of broadcasting content to which the *Broadcasting Services Act 1992* (Cth) applies. A cooperative national scheme is not required in this context. This is because the Commonwealth has a direct head of power in respect to telecommunications (broadcasting), as a result of which it has always had a central role in TV classification. From the time TV was introduced in Australia in 1956 the Film Censorship Board examined and classified imported television programs and some locally produced programs on behalf of the Australian Broadcasting Control Board (1956-1976) and the Australian Broadcasting Tribunal (1977-1986), in accordance with the TV Program Standards. Until 1970 the Film Censorship Board's decisions were subject to appeal by the Appeals Censor, an arrangement which ended in 1970 when the appeals function was taken over by the Australian Broadcasting Control Board and, afterwards, the Australian Broadcasting Tribunal.⁶² Programs produced by commercial TV stations were classified by themselves in accordance with the TV Program Standards. As for the ABC, although it was not legally obliged to adhere to those Standards, it voluntarily elected to do so.

⁶⁰ The criteria for declaring an item a prohibited import reflect the 'RC' requirements for publications, films and computer games under the National Classification Code.

⁶¹ OFLC, *Annual Report 2000-2001*, p 90.

⁶² For an account of the history of TV classification see – Australian Broadcasting Tribunal, *TV Violence in Australia: Volume IV – Conference and Technical Papers*, January 1990, Appendix 12.

The uniformity achieved by these arrangements ended when SBS started operating in October 1980. Its legal position was similar to that of the ABC, but in the SBS case a decision was taken to apply its own classifications to programs. The Film Censorship Board's function was restricted to the registering of imported material.⁶³

These arrangements were further disturbed when, in February 1985, the ABC began classifying its own imported programs. The Film Censorship Board's role in TV classification ended entirely in January 1986 with the commencement of amendments to the *Broadcasting and Television Act 1942* (Cth) confining the Australian Broadcasting Tribunal's pre-classification powers to children's programs.⁶⁴ From this time on the commercial TV stations were responsible for classifying all imported and local programs, with the exception of 'C' programs which were classified by the Tribunal through its Children's Programs Committee.

A similar system has remained in place since the passing of the *Broadcasting Services Act 1992* and the establishment of the Australian Broadcasting Authority (ABA). For commercial stations, the current regime is largely based on self-regulation, under which the stations classify programs in accordance with the ABA approved Codes of Practice.⁶⁵ Television programs for free-to-air and Pay TV channels are classified by classification officers employed by the television networks. The exception are programs classified Children's (C) and Preschool Children's (P) which must be classified prior to broadcast by the ABA in accordance with its Children's Television Standards.⁶⁶ The OFLC film guidelines provide a basis for the standards that are used in the classification of commercial free-to-air television and Pay TV.⁶⁷ Neither is able to broadcast 'R' rated films in an unmodified form.⁶⁸ Compliance with these standards, which also contain rules regarding the Australian content of children's programs, is a condition of the licence of a commercial broadcaster.

⁶³ This account is based on the 1980 Annual Report of the Film Censorship Board.

⁶⁴ According to the 1985 Annual Report the Board agreed to provide an advisory classification service until 28 February 1986.

⁶⁵ *Broadcasting Services Act 1992* (Cth), section 123. The relevant code for commercial free-to-air TV is that developed by the Federation of Australian Commercial Television Stations (FACTS). The first such FACTS Code was produced in 1993. The current code dates from April 1999, as does the Australian Subscription TV Code of Practice which regulates Pay TV. There is, in addition, a separate code for community broadcasting services. Similar arrangements are in place for radio content regulation. For an overview of the regulation of broadcasting see – S Walker, *Media Law: Commentary and Materials*, LBC Information Services 2000, Chapter 20.

⁶⁶ *Broadcasting Services Act 1992* (Cth), section 122. The system is discussed in - K Aisbett, *20 years of C: Children's Television Programs and Regulation 1979-1999*, March 2000.

⁶⁷ *Broadcasting Services Act 1992* (Cth), sections 123.

⁶⁸ *Broadcasting Services Act 1992* (Cth), Schedule 2, Part 7. A blanket prohibition applies to films classified 'X' or 'Refused Classification' by the OFLC. Pay TV cannot broadcast 'R' rated programs until the ABA has completed research on community attitudes, recommended the broadcast of such programs to Federal Parliament and that recommendation has been approved by resolution of each House. No such resolution has been passed to date.

Complaints about material broadcasted under the code of practice by the commercial stations are, in the first instance, to be directed to the relevant station; but if not responded to in 60 days, or where the response is considered to be inadequate, then the person may make a complaint to the ABA which is empowered to conduct an investigation.⁶⁹

The same complaints mechanism is in place for the national broadcasters, the ABC and SBS.⁷⁰ They are also required to develop Codes of Practice which are to be notified to the ABA but not registered.⁷¹

Certain variations exist between free-to-air broadcasters, both in terms of the types of consumer advice offered in association with a program classification, as well as in the range of classifications used.⁷² For example, the new 'AV' rating used by commercial TV stations to indicate material unsuitable for 'MA' classification has not been adopted by the national broadcaster, the ABC.⁷³ On the other hand, the SBS does have a comparable 'MAV' rating for programs 'unsuitable for MA classification because of the intensity and/or frequency of violence'. Both 'AV' and 'MAV' programs on commercial TV and SBS respectively can only be shown between 9.30 pm and 5.00 am, whereas in the case of the ABC it is 'MA' rated material which is subject to this time restriction.

The common factor in all this is that both the commercial and national broadcasters make reference to the OFLC Guidelines for the Classification of Films and Videotapes. However, the assiduous cross-referencing to the OFLC Guidelines does not, nor for good reason is it intended to, create strict uniformity in classification standards. Thus, a program classified 'M' by a commercial free-to-air TV broadcaster is not necessarily equivalent to an 'M' rated program on SBS; moreover, neither is necessarily the equivalent of a film classified 'M' by the Classification Board.

Special rules apply in respect to news and current affairs programs for commercial and non-commercial TV broadcasters alike. For example, the FACTS Code of Practice makes provision for warnings to be given before broadcasting news and current affairs material, which does not carry consumer advice, but is 'likely to seriously distress or seriously offend a substantial number of viewers'.

⁶⁹ *Broadcasting Services Act 1992* (Cth), section 149.

⁷⁰ *Broadcasting Services Act 1992* (Cth), sections 150.

⁷¹ However, the ABC is required to 'take account of' program standards in providing broadcasting services – *Australian Broadcasting Corporation Act 1983* (Cth), section 6 (2)(a).

⁷² For a discussion of these differences see Parliament of Victoria, n 48, pp 132-133.

⁷³ But note that under the FACTS Code of Practice the standards for 'M' and 'MA' level violence are defined in identical terms, thereby requiring the higher 'AV' classification for stronger material. This apparently anomalous situation does not apply to the ABC.

5. INTERNET CONTENT REGULATION IN AUSTRALIA

5.1 Overview

The ABA is also the key Commonwealth agency for the regulation of online content, established under the *Broadcasting Services Amendment (OnLine Services) Act 1999* (Cth). That Act inserted Schedule 5 headed, 'Online Services' into the broadcasting legislation, which makes it clear that the Commonwealth scheme administered by the ABA regulates Internet Service Providers (ISPs) and Internet Content Hosts (ICHS). It does not regulate:

- producers of content, or
- persons who upload or access content.

These last categories of online content creators and end users are to be regulated instead by a combination of State and Territory online enforcement laws and the criminal laws of the various Australian jurisdictions. The current NSW Classification Enforcement Amendment Bill 2001 is in fact this State's response to the agreed policy of formulating model online provisions relevant to 'producers of online content'. This is in similar terms to the South Australian Classification (Publications, Films and Computer Games) (Miscellaneous) Amendment Bill (No 2) 2001. Both Bills reflect, in a modified form, the model online content provisions released for public consultation in 1999 by the censorship Ministers.

Note that the Commonwealth legislation provides ISPs and ICHs with immunity from State and Territory laws in respect to the carriage or hosting of prohibited material where the ISP or ICH was not aware of the content.⁷⁴ ISPs and ICHs are also exempted from any State or Territory requirement to monitor, make inquiries about, or keep records of, Internet content carried or hosted by them.⁷⁵

5.2 Background developments

Prior to the establishment of the Commonwealth scheme in 1999, several Senate Committee reports were published, and the ABA was also active in this field. In June 1998 the CSIRO published, *Blocking Content on the Internet: A Technical Perspective*.⁷⁶ The first report of the Senate Select Committee on Community Standards Relevant to the Supply of Services Utilising Electronic Technologies was released in 1993.⁷⁷ The recommendations of its June 1997 report included that:

- It should be an offence to use a computer service to transmit, obtain possession of, demonstrate, advertise or request the transmission of material equivalent to the 'RC',

⁷⁴ *Broadcasting Services Act 1992* (Cth), Schedule 5, cl 91 (a) and (c).

⁷⁵ *Broadcasting Services Act 1992* (Cth), Schedule 5, cl 91 (b) and (d).

⁷⁶ G Griffith, n 51, pp 25-31.

⁷⁷ Select Committee on Community Standards Relevant to the Supply of Services Utilising Electronic Technologies, *Report on Video and Computer Games and Classification Issues*, October 1993.

- 'R and 'X' categories under the National Classification Code.
- A system of self-regulation for the Internet industry involving codes of practice and an independent complaints handling body.
 - Personal Identification Numbers (PINs) should be mandatory for those wishing to access restricted material.⁷⁸

On 15 July 1997 the Federal Government announced its own approach to Internet content regulation, in the form of a proposed national regulatory framework based to a large extent on the ABA's 1996 report, *Investigation into the Content of On-Line Services*. In a joint news release, the Federal Minister for Communications and the Arts and the Attorney-General announced a largely self-regulatory scheme designed to 'encourage the on-line service provider industry to develop codes of practice in relation to on-line content, in consultation with the ABA'. However, as the Attorney-General noted, there would still be a need for legislative safeguards 'to deal with matters of serious public concern and flagrant breaches of codes or relevant laws within Australia'.⁷⁹ In a media release of 12 December 1997 the Federal Attorney-General appeared to emphasise a more stringent 'criminal' approach to Internet content regulation. However, by 19 January 1998 a more conciliatory note was struck in another joint media release which reaffirmed the Government's 'commitment to a balanced and effective regulatory regime for the Internet'.⁸⁰ On 19 March 1999 the Minister for Communications, Information Technology and the Arts issued a further press release outlining the ABA administered scheme now established under Schedule 5 to the *Broadcasting Services Act 1992* (Cth).

At every stage of these developments the Internet industry mounted a vigorous debate which, if nothing else, raised the standard of informed discussion of censorship in Australia to a previously unknown level of sophistication.

5.3 The ABA scheme

The scope of the regulatory scheme is defined to include online content as stored information using an Internet carriage service, including material on the World Wide Web, postings on newsgroups and bulletin boards, and other files that can be downloaded from an archive or library. For the purposes of the scheme Internet content does not include ordinary email, information that is transmitted in the form of a broadcasting service, or information that is accessed in real time without being previously stored, such as chat services and voice over the Internet.

As administered by the ABA, the scheme is 'complaints driven'. Basic to it is the right of a person to complain to the ABA about '*prohibited content*' or '*potential prohibited*

⁷⁸ Select Committee on Community Standards Relevant to the Supply of Services Utilising Electronic Technologies, *Report on Regulation of Computer On-Online Services, Part 3*, June 1997.

⁷⁹ Joint Media Release, *National Framework for on-line content regulation*, 15 July 1997.

⁸⁰ Joint Media Release, *Regulation of Internet content*, 19 January 1998.

content' on the Internet which, if valid, the ABA must then investigate.⁸¹ A distinction is made for this purpose between Internet content hosted in Australia, on one side, and overseas, on the other. Internet content hosted in Australia is '**prohibited content**' if it has been classified 'Refused Classification' or 'X' by the Classification Board, or where it has been classified 'R' by the Board⁸² (and is therefore deemed unsuitable for people under 18) and access to the Internet content is not subject to an approved restricted access system.⁸³ On the other hand, only Internet content classified 'RC' or 'X' is 'prohibited content' where it is hosted overseas. If Internet content has not been classified (which must surely apply in most cases), but there is a substantial likelihood that, if classified, it would be prohibited content, then it is regarded as *potential prohibited content*.

If the content is hosted in Australia and is prohibited, or is likely to be prohibited, the ABA will direct the ICH to remove the content from their service. Pending classification of the content, an *interim take-down notice* will be issued to the content host. If the content is found to be prohibited content, the ABA must give the relevant ICH a *final take-down notice*. Failure to comply with a notice is an offence.

For overseas prohibited content, the ABA must direct ISPs to carry out blocking measures in accordance with a registered industry code of practice⁸⁴ or, if there is no such code, direct each ISP to take all reasonable steps to block the content. The legislation refers to 'recognised alternative access-prevention arrangements' in this context: such arrangements, it is explained, might include 'the use of regularly updated Internet content filtering software' or 'the use of a "family-friendly" filtered Internet carriage service'.⁸⁵ If the content is also sufficiently serious (for example, illegal material such as child pornography), the ABA may refer the material to the appropriate law enforcement agency⁸⁶ ABA decisions under the regulatory scheme are subject to review, notably by the

⁸¹ The ABA is not required to proactively search for and deal with all Internet content that may be prohibited.

⁸² As in the case of the NSW Classification Enforcement Amendment Bill 2001, Internet content is to be classified as if it were a 'film' or a 'computer game'. No reference is made to the restricted publications categories – Category 1 and 2. According to the Revised Explanatory Memorandum for the Broadcasting Service Amendment (Online Services) Bill 1999 'References in the Bill are generally to Internet content consisting of a film. This is because on the Internet material is usually not in the form of a physical object (such as a videotape) from which an image can be derived. Rather, what is of interest is the images and accompanying material themselves' (p 11). Note that 'film' is defined to have the same meaning as in the Commonwealth Classification Act 1995 where it includes 'any other form of recording from which a visual image, including a computer generated image, can be produced'. This issue is discussed further in the context of the NSW Bill.

⁸³ *Broadcasting Services Act 1992* (Cth), Schedule 2, cl 4. In approving such a system the ABA must have regard to 'the objective of protecting children from exposure to Internet content that is unsuitable for children'.

⁸⁴ For example, notifying the site to manufacturers of filter products.

⁸⁵ *Broadcasting Services Act 1992* (Cth), Schedule 2, cl 40 (6).

⁸⁶ ABA, *Six Month Report on Co-regulatory Scheme for Internet Content Regulation*, September 2000, p 8.

Administrative Appeals Tribunal.

5.4 Internet Industry Association codes of practice

As in the case of commercial TV content regulation, the scheme the ABA administers is an example of co-operative regulation, based as it is on industry codes of practice. The main difference is that, whereas in the case of commercial TV complaints are first directed to the relevant broadcaster, in the case of Internet content complaints are received directly by the ABA.

According to the ABA's Annual Report for 1999-2000, three industry codes were registered by the time the content regulation scheme was operative on 1 January 2000, two covering the activities of Internet Service Providers (ISPs), the other setting out the responsibilities of Internet Content Hosts (ICHs). These codes apply to all participants in the relevant segments of the industry and compliance is mandatory. The codes include ways that ISPs and ICHs can:

- assist parents and responsible adults to supervise and control children's access to Internet contents;
- inform customers about their right to make complaints about Internet content;
- assist in the development and implementation of Internet filtering technologies;
- ensure that customers have the option of subscribing to a filtered Internet carriage service; and
- ensure that an ICH is told that it is hosting content prohibited in Australia.

The code for ISPs also deals with: a means of notifying ISPs about prohibited content; and procedures for ISPs to follow to filter prohibited content hosted overseas.

An important aspect of the scheme is that it grants immunity from civil proceedings for actions done 'in compliance with': any code or standard that deals with procedures to be followed by service providers in dealing with notified content; the rules requiring compliance with access-prevention notices; and the rules requiring compliance with take-down notices.⁸⁷

5.5 The role of the Classification Board

According to the 'Explanation' which is included in the *Broadcasting Services Amendment (OnLine Services) Act 1999* (Cth), 'If the ABA is satisfied that Internet content hosted in Australia is potential prohibited content, and is likely to be classified RC or X, the ABA *must* request the Classification Board to classify the content' (emphasis added). The same is the case for content likely to be classified 'R'.

Thus, although it is the ABA which receives and investigates complaints, the Classification Board established under the Commonwealth Classification Act 1995 also plays a part in the regulation of Internet content by classifying material referred to it by the ABA. Depending on the nature of the Internet content, either the films or computer games classification

⁸⁷ *Broadcasting Services Act 1992* (Cth), Schedule 5, cl 88.

guidelines are used for this purpose. The OFLC Annual Report for 2000-2001 mentions the number of decisions made on Internet content, all of which are as a response to requests made by the ABA.⁸⁸

In the case of Internet content hosted outside Australia, the ABA itself determines the likely classification, again having regard to the Classification Board's guidelines.

The question whether the Classification Board is able to provide a classification service for proposed Internet content was raised by Senator Greig (Australian Democrats) on 5 April 2001. Response to this and related 'questions on notice' were tabled in the Senate on 25 June 2001. It was said that 'The OFLC does not provide online publishers with a classification service that is specific to Internet content'. However, Internet content in the form of a 'recording' may be submitted for classification as a film or computer game; whereas Internet content in a 'printed form' may be classified as a publication.⁸⁹ It was also said that 'Internet service providers and online publishers may submit existing or proposed Internet content for classification by the Classification Board under the Classification Act'.⁹⁰ In this independent capacity the Classification Board would operate under the Commonwealth Classification Act 1995 and would therefore be distinct from the scheme established under Schedule 5 to the *Broadcasting Service Act 1992*. This underlines the point that, despite the substantial cross-referencing, the ABA classification scheme for Internet content is legally separate from the classification scheme under the Commonwealth Classification Act.⁹¹

5.6 The role of NetAlert

⁸⁸ In 2000-2001 the Classification Board classified 133 instances of Internet content and refused classification to 68 (including 48 on grounds of child pornography) – OFLC, *Annual Report, 2000-2001*, pp 90-91. That all these are ABA related decisions was confirmed by telephone advice from the OFLC on 6 February 2002.

⁸⁹ This diverges from the ABA scheme which, as noted, makes no reference to the restricted categories for publications.

⁹⁰ *Commonwealth Parliamentary Debates*, Senate, 25 June 2001, pp 25059-25061. With reference to this, Electronics Frontiers Australia has observed that in March 2001 the OFLC 'was advising callers that it did not classify Internet content for prospective online publishers. The OFLC representative said that prospective online publishers should contact the ABA. An ABA representative said that prospective online publishers should contact the OFLC' - www.efa.org.au/Publish/saqsns_amswers.html In October 2001 it was said by a South Australian Select Committee that: 'As to assertions that the Board will not classify Internet content, the Committee noted that the Chairman had received a written assurance from the National Director that this is untrue' – Parliament of South Australia, *Report of the Select Committee on the Classification (Publications, Films and Computer Games) (Miscellaneous) Amendment Bill (No 2) 2001*, 30 October 2001, p 15. The OFLC has itself said that, in addition to its role under the ABA scheme, 'Individuals may also submit online content to the Classification Board for classification in certain circumstances' – OFLC, *A Review of the Classification Guidelines for Films and Computer Games: Discussion Paper*, 2001, p 3

⁹¹ Thus, the *Broadcasting Services Act 1992* (Cth) states that 'classified' means 'classified under this Schedule' (Schedule 2, cl 3).

Another facet to the ABA scheme is NetAlert, a community advisory body which conducts educational and research functions. On 6 September 2001 it officially launched its national toll free help line, website (www.netalert.net.au) and information kit.

5.7 Reporting on the scheme

On 30 September 1999 the Senate passed a motion calling on the Government to table a report on the effectiveness and consequences of the Internet content regulation scheme at six monthly intervals from the date of implementation. The first such report, setting out the operation of the scheme from 1 January to 30 June 2000 was tabled by the Minister for Communications, Information Technology and the Arts in September 2000.

This September 2000 report stated that 160 completed investigations resulted in the location of 93 items of prohibited or potentially prohibited content.⁹² 80 per cent of the problematic content hosted in Australia was concerned with depiction of a child in an offensive way, or with paedophile activity. As at 30 June 2000, the ABA had referred 51 items of serious Internet content hosted outside Australia to the Australian Federal Police and 44 items of Australian hosted content to the relevant State or Territory police service. Some items were referred to two or more agencies.

The April 2001 report, dealing with operation of the scheme from 1 July to 31 December 2000, stated that investigations into 221 complaints resulted in the location of 139 items of prohibited or potential prohibited content. As in the first six month period, a high percentage of the prohibited content located related to child pornography. From July to December 2000 the ABA referred 105 items of serious Internet content hosted outside Australia to the Australian Federal Police. It also referred 45 items of Australian hosted serious Internet content to the relevant State or Territory police service.⁹³

The latest of these reports was tabled in Federal Parliament on 13 February 2002 and covers the period from January to June 2001. It states that 185 completed investigations resulted in the location of 190 items of prohibited or potentially prohibited content. Of these, 127 were identified as child pornography or paedophile activity. In the reporting period, 8 take-down notices were issued to Australian ICHs, covering 37 items. Further, action was taken in respect to 153 items of overseas hosted content, including the referral of 104 items of serious Internet content hosted outside Australia to the Australian Federal police. Another 23 items of Australian hosted serious Internet content were referred to the State or Territory police services.

⁹² But note that some investigations involve consideration of more than one item of content. For example, the ABA may investigate a sample of the content on a WWW site about which a person has complained, and each page would be counted as an item in the statistics.

⁹³ Copies of the report are available at – www.dcita.gov.au

5.8 Comments on the scheme

The ABA administered Internet content regulation scheme was a long time in making. Over a number of years debate centred around whether any regulatory scheme was: (a) likely to prove effective, especially bearing in mind that most Internet content originates overseas; (b) technically possible; and (c) consistent with the principles of censorship operating under the National Classification Code, notably that adults should be able to read, hear and see what they want.⁹⁴ Although the co-regulatory nature of the scheme appears to have alleviated certain concern in the Internet industry, in other respects it has continued to draw criticisms from various quarters.

On the issue of the effectiveness of the scheme, it has been suggested that it exemplifies 'symbolic politics', namely, 'the desire of the decision-maker to appear active on an issue when he or she is not. It is the victory of *style* over *substance*'.⁹⁵ Another line of criticism is that the regime is likely to encourage 'potentially controversial sites to move outside Australia',⁹⁶ thereby shifting valuable e-commerce business offshore. On a more technical note, the libertarian Electronics Frontiers Australia has noted that one ABA approved Code of Practice included a list of 'approved filters' which ISPs were required to 'provide for use, at a charge determined by the ISP'. It is added:

The list of Approved Filters was based on a CSIRO study commissioned by the government in November 1999. This report entitled Access Prevention Techniques for Internet Content Filtering was released publicly in early January 2000. The study made no attempt to evaluate the effectiveness of the filter products. The criteria for inclusion in [the Code's] list of 'Approved Filters' seems to be based purely on an undertaking by the product supplier to incorporate URLs notified by the ABA in the filter blacklist.⁹⁷

Electronics Frontiers Australia subjected the April 2001 report on the operation of the ABA scheme to detailed analysis.⁹⁸ Among its key findings were that: the statistical reporting of the ABA's investigations seem to be deliberately designed to confuse and mislead the casual reader; the benefits of the regulatory regime are illusory, since almost all of the sites

⁹⁴ These and other issues were canvassed in - Senate Select Committee on Information Technologies, *Broadcasting Services Amendment (Online Services) Bill 1999*, May 1999. The Committee commented on why the Federal Government decided that online services will progressively resemble more of a broadcasting medium than publications (p 13).

⁹⁵ P Chen, 'Pornography, protection, prevarication: the politics of Internet censorship' (2000) 23 *University of New South Wales Law Journal* 221 at 222. In the circumstances, Chen sees this as 'reassuring' and as a better option 'to endeavouring to tame cyberspace in a meaningful way' (at 226).

⁹⁶ K Heitman, 'Vapours and mirrors' (2000) 23 *University of New South Wales Law Journal* 246 at 252.

⁹⁷ www.efa.org.au/Campaigns/99.html

⁹⁸ The full text is to be found at – http://www.efa.org.au/Analysis/aba_analysis.html

investigated are beyond Australian jurisdiction; and the costs of the scheme cannot be justified in view of the minimal benefits obtained. In summary, it was claimed that 'the scheme is an expensive and unaccountable waste of taxpayers' money that achieves no useful outcomes in the context of the global Internet'.⁹⁹

Responding to such claims, it has been argued that the scheme 'represents a useful first step' in extending classification to the Internet and that 'the *size* of that step is beside the point'.¹⁰⁰ An analogy is made in this respect with laws against providing alcohol to children – 'Most adults would not provide alcohol to a child, even if sure that he or she would not be caught, because they believe that it is wrong to do so. Part of the reason that they believe that it is wrong is that it is illegal. The technical effectiveness of the legislation is therefore somewhat extraneous to any assessment of its value'.¹⁰¹ The same authors also dispute the argument that the Internet industry will be stifled in Australia as a result of the regulatory scheme which is 'essentially one of self-regulation' – 'it could be said that the Internet industry benefits from the best of both worlds: writing its own rules (within certain limits), and yet having to take little initiative to ensure its compliance with those rules'.¹⁰² Senator Alston has pointed out that 'There is no requirement for ISPs and ICHs to monitor or classify content. They will not be liable for prohibited content accessed through or hosted on their systems unless the content has been specifically determined to be in a prohibited category and the ABA has directed that action be taken following a complaint'.¹⁰³

These are difficult issues, of a technical and other kind. On one view it is too early to determine the value of the ABA regulatory scheme. On another, if the alcohol analogy is indeed apt, our practical experience of those laws may suggest that the Internet regime is hardly likely to prevent children (older children especially) from accessing questionable online material in any absolute sense. It might be argued in this regard that no censorship/classification scheme can ever be truly comprehensive in scope. Take for example the classification of films, videos and DVDs. The assumption behind most discussion of it is that, give or take some 'black market' activity in pornographic videos, the system administered by the OFLC deals comprehensively with all material for sale or hire in Australia. But does it? Is it not the case that any number of foreign language videos and DVDs are for sale in this country, few, if any, of which have in all probability been classified by the Censorship Board? Perhaps the regulation of Internet content is not so different, except in degree, for in this case it is more apparent that the censorship scheme touches only a tiny portion of what is an incalculably large off-shore phenomenon. On another view, the difference in degree may be thought to be so great as to render inoperative the attempted comparison with film censorship. At least, it might be argued the other way, where

⁹⁹ http://www.efa.org.au/Analysis/aba_analysis.html

¹⁰⁰ E Handsley and B Biggins, 'The sheriff rides into town: a day for rejoicing by innocent westerners' (2000) 23 *University of New South Wales Law Journal* 257 at 259.

¹⁰¹ *Ibid* at 260.

¹⁰² *Ibid* at 259.

¹⁰³ R Alston, 'The government's regulatory framework for Internet content' (2000) 23 *University of New South Wales Law Journal* 192 at 194.

'offensive' sites do come to light under the ABA scheme there is some way of taking action.

Whatever one makes of the issue of the 'effectiveness' of the Internet censorship laws, the freedom of speech question it raises will remain to be answered. That the ABA regulatory scheme is a normative statement of some kind is clear, a declaration of what, at this stage, Australian governments deem to be suitable material for Australian citizens to access in their own homes. Whatever one may think of that, at the very least it would have to be said that this normative schema goes some way beyond what in official circles is described as 'classification'.

Note that a review of the legislation must take place before 1 January 2003. The review must consider whether it is possible to restrict access to 'R' rated material hosted outside Australia.¹⁰⁴

5.9 The transparency of the scheme

An issue which Electronics Frontiers Australia (EFA) has pursued as far as the Administrative Appeals Tribunal is that of the transparency of the ABA regulatory scheme. In February 2000 an application was made to the ABA under the Freedom of Information Act 1982 (Cth) for details on ABA decisions on complaints received about Internet content. According to Electronics Frontiers Australia: 'The ABA has consistently refused to provide the information sought, claiming exemptions under various proceedings in the Administrative Appeals Tribunal. The matter is now following the AAT's conference procedure and is expected to go to hearing around April/May 2001'. In a further comment, it was said:

EFA believes that the ABA should be held accountable to the Australia public for its administration of the [Broadcasting Services] Act. The ABA's attitude of total secrecy about details of its decisions has no parallel in the administration of censorship policy of other media.¹⁰⁵

This issue was discussed by Lauren Martin in *The Sydney Morning Herald* recently. Martin contends that the ABA is 'censoring its own censorship' by refusing to 'disclose what its five public servants and several million extra taxpayer dollars are protecting us from'. Even more 'astounding', in Martin's view, is that claim made by the ABA that if it can't operate the scheme in secret it 'might as well close up shop'. Martin continued:

The public interest in keeping it all secret, according to the ABA, 'clearly outweighs any public interest' in community review.

This is a startling change in the principles of Australian censorship. It also conflicts with [Senator] Alston's own assurances to the Senate that the Government would release details of what was

¹⁰⁴ *Broadcasting Services Act 1992* (Cth), Schedule 5, cl 95.

¹⁰⁵ www.efa.org.au/Campaigns/99.html

banned under the new law. The idea, he continually argued, was merely to ensure the same rules applied to computer screens as to film screens.

Yet in the case of a film, whether it's rated X or banned or whatever, its classification is on the censor's data base, and anyone can access it.

The Web censorship system is absurdly more secretive.¹⁰⁶

Relevant to this current debate is the principle enunciated by Don Chipp in 1970, that 'censorship should be open to public scrutiny'.¹⁰⁷ As the then Chief Censor, Janet Strickland, said ten years later, 'If citizens are to play an active part in their community, then they must be given meaningful information and be engaged in an on-going dialogue'; 'to share knowledge is to share power'.¹⁰⁸

5.10 Internet content regulation – State laws

As noted, the *Broadcasting Services Amendment (OnLine Services) Act 1999* (Cth) makes it clear that the ABA regulatory scheme does not regulate either producers of online content, or persons who upload or access content. The Act contemplates that online content creators and end users are to be regulated instead by a combination of State and Territory online enforcement laws and the criminal laws of the various Australian jurisdictions. This is returned to in the next section of this paper dealing with the NSW Classification Enforcement Amendment Bill 2001. A separate issue to consider is that, before the Commonwealth enacted its online legislation in 1999, three Australian jurisdictions had already passed their own legislative schema – Victoria, Western Australia and the Northern Territory.

Note that the Commonwealth legislation provides ISPs and ICHs immunity for State and Territory laws in respect to the carriage or hosting of prohibited material where the ISP or ICH was not aware of the content.¹⁰⁹ ISPs and ICHs are also exempted from any State or Territory requirement to monitor, make inquiries about, or keep records of, Internet content carried or hosted by them.¹¹⁰ To this extent only, some provisions of the relevant State and Territory laws discussed below will have no effect.

5.11 Western Australia and the Northern Territory

¹⁰⁶ L Martiin, 'Alston's X files: the secret truth about Internet censorship', *The Sydney Morning Herald*, 21 January 2002.

¹⁰⁷ D Chipp, 'Statement on Censorship', June 1970, p 8.

¹⁰⁸ J Strickland, 'Film censorship in the Eighties', *Convention of Motion Picture Exhibitors Associated of Queensland*, 21 July 1980.

¹⁰⁹ *Broadcasting Services Act 1992* (Cth), Schedule 5, cl 91 (a) and (c).

¹¹⁰ *Broadcasting Services Act 1992* (Cth), Schedule 5, cl 91 (b) and (d).

Provisions regulating Internet content are found under Western Australia's *Censorship Act 1996* (sections 99-102)¹¹¹ and the Northern Territory's *Classification of Publications, Films and Computer Games Act 1985* (sections 50X-50ZA). The relevant sections of both Acts are very similar and can be discussed in combination.

Two categories of material are regulated – 'objectionable material' and 'restricted material'. The '**objectionable material**' category is, in substance, similar to what is defined to be 'Refused Classification' (RC) under the National Classification Code. It includes: films, computer games and publications which have been refused classification; 'child pornography'; material that promotes, incites or instructs in matters of crime or violence; and material depicting extreme violence or cruelty, sexual violence and sexual fetishes 'in a manner that is likely to cause offence to a reasonable adult'.¹¹² It is an offence to use a computer service to knowingly transmit or request the transmission of, obtain possession of, or demonstrate objectionable material. It also an offence to advertise that such material is available for transmission. It is a defence to prove that the material is: an article of recognised literary, artistic or scientific merit; or a *bona fide* medical article; and that its transmission etc is 'justified as being for the public good'.

The '**restricted material**' category is defined in terms of material that is 'unsuitable for a minor to see, read or hear'. As such, it would include all material equivalent to the 'R18+' category for films and the restricted 'Category 1 and 2' classifications for publications under the National Classification Code.¹¹³ In this case, it is only an offence to use a computer service to 'transmit' or 'make available' restricted material *to a minor*. It is a defence to prove: compliance with a Code of Practice prescribed by the Minister;¹¹⁴ that all reasonable steps were taken to avoid a contravention; or reasonably believing that the person receiving the material was not a minor.

5.12 Victoria

The Victorian legislative regime is established under the *Classification of Publications, Films and Computer Games (Enforcement) Act 1995* (sections 56-59).¹¹⁵ Instead of the two

¹¹¹ Section 105 of the Act permits the Minister, on his own initiative or on application, to exempt 'any article or any computer service' from these provisions.

¹¹² Depictions of sexually explicit activity involving consenting adults, such as would be accommodated under the 'X' film classification are not included. Note should be taken here that, in the absence of an 'X' or 'R18+' classification for computer games, sexually explicit online material in a computer game form would be categorised 'objectionable material'.

¹¹³ Somewhat misleading is the argument that the definition of 'restricted material' reflects 'the criteria for the RC category, but modified to reflect unsuitability for minors' – see Parliament of South Australia, *Report of the Select Committee on the Classification (Publications, Films and Computer Games) (Miscellaneous) Amendment Bill (No 2) 2001*, p 4.

¹¹⁴ To date, no Code of Practice has been approved specifically under the Western Australian legislation – Parliament of South Australia, n 113, p 4. According to telephone advice from the Western Australian censorship officer, an ABA registered Code of Practice would be recognised for this purpose.

¹¹⁵ Note that exemptions are provided for under Part 8 of the Act.

category approach preferred in Western Australia and the Northern Territory, in Victoria there are three operative categories – ‘objectionable material’, ‘material unsuitable for minors of any age’ and ‘material unsuitable for minors under 15’.

‘Objectionable material’ is defined in a way that is consistent with the ‘RC’ category under the National Classification Code as this applies to publications, films and computer games. It is an offence to use an ‘on-line information service to publish or transmit, or make available for transmission, objectionable material’.¹¹⁶ It is a defence to prove that the ‘defendant believed on reasonable grounds that the material was not objectionable material’. Further, the offence does not apply unless the provider of an online service ‘creates or knowingly downloads or copies objectionable material’. Thus, the prosecution must first establish that the defendant intended to publish or transmit material of this sort; having done so, the onus then shifts to the accused to prove they held the reasonable belief on reasonable grounds that the material was not objectionable.

The **‘Material unsuitable for minors of any age’** category is similar to the ‘restricted material’ category under Western Australian and Northern Territory censorship laws. In Victoria it is only an offence to use an on-line information service to ‘publish’, ‘transmit’ or ‘make available’ this category of material *to a minor*. For the offence to apply, the information must be ‘knowingly’ transmitted etc. It is a defence to prove that the defendant: did not and could not reasonably have known that the recipient was a minor; had taken reasonable steps to avoid its transmission etc to a minor; or that the defendant believed on reasonable grounds that the material was not unsuitable for minors of any age.

The **‘Material unsuitable for minors under 15’** category relates specifically to computer service information in form of films or computer games classified ‘MA’ under the National Classification Code. As in the previous category, the same element of ‘knowingly’ transmitting etc material to a minor under 15 applies. In terms of the defences available, a unique feature is that the defendant may prove belief on reasonable grounds that the parent or guardian of the minor had consented to the material being transmitted etc to the minor.

5.13 Internet content regulation and the criminal law in NSW

Other Australian jurisdictions have taken a more cautious approach to the regulation of online content. In NSW, following the abandonment of the 1996 draft model State and Territory offence provisions, something of a wait and see policy has been adopted, with the intention of ultimately enacting workable and uniform legislation consistent with the Commonwealth scheme.

However, that is not to say that Internet content has remained entirely free of the criminal law in this, or any other, State. At least two sections of the NSW *Crimes Act 1900* are relevant in this respect. By the *Crimes Amendment (Child Pornography) Act 1995* the possession of child pornography was made an offence under section 578B of the *Crimes Act*. It transpired that proceedings for an offence against that section could not be commenced before the article in question had been classified by the Commonwealth

¹¹⁶

There is, in addition, specific provision prohibiting the advertising of such material.

Classification Board. In 1998 the section was amended to make it clear that a person can be arrested for, and charged with, an alleged offence against section 578B before the material concerned is classified.¹¹⁷

A second provision of the NSW Crimes Act to note is section 578C, again inserted by the *Crimes Amendment (Child Pornography) Act 1995*. As originally enacted, this section creates a specific offence of ‘publishing indecent articles’. The word ‘indecent’ is not defined,¹¹⁸ but it is provided that ‘an article may be indecent even though part of it is not indecent’. In determining the question of indecency, expert evidence is admissible as to whether the article in question has any literary or other merit. Under section 578C the word ‘article’ is defined broadly to include anything ‘that is a record’, which in turn is defined to mean ‘a gramophone record or a wire or tape, or a film, and any other thing of the same or of a different kind or nature, on which is recorded a sound or picture and from which, with the aid of suitable apparatus, the sound or picture can be produced (whether or not it is in a distorted or altered form)’. The word ‘publish’ is also defined broadly.

Section 578C was amended in 1997 to provide for ‘publishing *child pornography* and indecent articles’. Impetus for this change came from discussion of the criminal sanctions available against child pornography online by the ***Wood Royal Commission into the NSW Police Service***. Among other things, the Royal Commission noted that it favoured the introduction into the *Crimes Act 1900* of an offence of publishing child pornography, which should include ‘conventional and on-line publication’. It was suggested in this regard that the definition of ‘publish’ under section 578C should be expanded to include:

the use of a computer service by a person to transmit, make available for transmission, obtain possession of, demonstrate, advertise the availability for transmission of, or request the transmission of, an article that is known or reasonably suspected by that person to contain child pornography (as defined in the Crimes Act).¹¹⁹

¹¹⁷ *Crimes Legislation Further Amendment Act 1998*.

¹¹⁸ For an analysis of ‘indecent’ see – *Phillips v Police* (1990) 75 A Crim R 480. A ‘community standards’ test in keeping with *Crowe v Graham* (1968) 121 CLR 375 is to be applied. According to DeBelle J, ‘When considering contemporary standards, currently accepted in the Australian community, regard is had to the reasonable, ordinary, decent-minded, but not unduly sensitive, person’ (at 486). Indecent, it was said, is not synonymous with ‘obscene’...“obscene” is a stronger epithet than “indecent”. It denotes a higher degree of offensiveness’ (at 488).

¹¹⁹ Royal Commission into the NSW Police Service, *Final Report*, Vol. 1V: *The Paedophile Inquiry*, August 1997, p1148. The Royal Commission went on to say that a defence should be available where the person charged shows that the article concerned is of recognised literary, artistic or scientific merit, or a bone fide medical article; and in either case that the relevant activity is justified as being for the public good. Appropriate exemptions should also be available, in the opinion of the Royal Commission, for any service provider or operator of a telecommunications facility, save where that person knowingly permits, offers or encourages its service or telecommunications facility to be used for any such activities.

In addition, the Royal Commission favoured the introduction into the *Crimes Act* of an offence to proscribe:

the use of an on-line service to make any request, suggestion, or proposal constituting an invitation or encouragement to a person under the age of 16 years to engage in sexual activity (with the maker of that communication, or anyone else) knowing the recipient to be under 16 years of age, or recklessly careless as to whether the recipient is under that age.¹²⁰

In response, the Government introduced amendments to section 578C under the *Crimes Amendment (Child Pornography) Act 1997*, which created a specific offence of publishing child pornography. In the event, the amendment did not redefine the work 'publish' in this context, for the reason that the existing definition was considered broad enough to cover Internet offences.¹²¹ On the other hand, further to an amendment introduced by the Opposition, provision is made for the forfeiture of any computer used to publish child pornography.

The relationship between existing provisions of the criminal law and the NSW Classification Enforcement Amendment Bill 2001 are discussed in the next section of this paper.

6. THE CLASSIFICATION (PUBLICATIONS, FILMS AND COMPUTER GAMES) ENFORCEMENT AMENDMENT BILL 2001 (NSW)

6.1 Overview

The Bill covers three distinct matters, as follows:

- Schedule 1 introduces various procedural and technical amendments in keeping with reforms made to the national classification system by the Classification (Publications, Films and Computer Games) Amendment Act (No 1) 2001 (Cth) [**the Commonwealth Classification Amendment Act 2001**].¹²² This Commonwealth Act is to come into effect on 22 March 2002 or on proclamation if States and Territories pass complementary legislation before this date;¹²³

¹²⁰ Ibid.

¹²¹ *NSWPD*, 26 November 1997, pp2589-2590.

¹²² It was formerly known as the Classification (Publications, Films and Computer Games) Amendment Bill (No 2) 2000, and was originally introduced into the House of Representatives on 8 December 1999. It was originally intended to include provisions substituting 'NVE' for the 'X' film classification.

¹²³ The *reforms at the Commonwealth level* include: amending the term 'person aggrieved' for the purpose of applying for review by the Classification Review Board of a classification decision of the Classification Board; expanding the range of films that are exempt from classification to include certain current affairs, hobbyist, sporting and other films where the material is suitable for children at the 'G' or 'PG' level; empowering the Director of the OFLC to waive all or part of the fees payable under the Commonwealth Classification Act 1995 for certain material, including short films for limited distribution by a new or emerging film maker;

- Schedule 1 also makes provision for the introduction of a penalty notice scheme for the enforcement of minor classification offences. Section 61A would be inserted into the Principal Act for this purpose. The offences to which such penalty notices will apply are to be prescribed by the regulations; and
- Schedule 2 introduces a regulatory scheme for creators of Internet content, thereby supplementing the Commonwealth regulation of ISPs and ICHs under the *Broadcasting Services Act 1992*. For this purpose 'Part 5A On-line services' would be inserted into the NSW *Classification (Publications, Films and Computer Games) Enforcement Act 1995*.

Schedule 1 is uncontroversial and is not discussed further. It is the Schedule 2 scheme to regulate Internet content – proposed Part 5A - which is controversial and the subject of review by the Legislative Council's Standing Committee on Social Issues. Note is taken in this context of the comparable South Australian Bill, currently titled the Classification (Publications, Films and Computer Games) (On-line Services) Amendment Bill 2001 [**the South Australia On-Line Services Bill 2001**].

6.2 Background to Internet content regulation in NSW

Schedule 2 of the NSW Classification Enforcement Amendment Bill 2001 is this State's response to the proposed arrangement, as contemplated under Schedule 5 of the Commonwealth *Broadcasting Services Act 1992*, for the regulation of online content creators (producers of content) by a combination of State and Territory laws.¹²⁴ As discussed, the debate behind these developments is longstanding, reaching at least as far back as the early 1990s. In NSW draft model State and Territory offence provisions were formulated in 1996, but were soon abandoned. The emphasis in this jurisdiction has always been on the need for a uniform approach. As the Hon Fay Lo Po MP, then Minister for Fair Trading, said in November 1997:

After all, the Internet knows no State boundaries. In order to avoid a total jumble of criminal laws, an effort should be made to implement uniform and organised legislation. If ever an area of law cried out for the development of uniform legislation by way of consultation with other State governments and Territories, it is offences committed on the Internet.¹²⁵

and providing for serial classification of certain publications. Among the *main provisions of the NSW Bill* are the definition of 'exempt film' and 'exempt computer game' as having the same meaning as under section 5B of the Commonwealth Classification Act as amended in 2001. Further to this, provision is made for the 'calling in' of films for classification by the Director of the Classification Board where, on reasonable grounds, the Director believes that an unclassified film is not an exempt film and that is being published in NSW (Schedule 1 [18]). The provision is complementary to section 23A of the Commonwealth Classification Act as amended, with that section only applying to the same category of films which are being published in the ACT.

¹²⁴ End users are not directly regulated under the Bill.

¹²⁵ NSWPD, 26 November 1997, p 2590.

The immediate background to the present Bill was the release by the censorship Ministers in 1999 of Model Enforcement Provisions for public consultation. These form the basis of both the NSW Classification Enforcement Amendment Bill 2001 and the South Australian On-Line Services Bill 2001.

6.3 The South Australian On-Line Services Bill 2001

This Bill has undergone several changes in title. As originally introduced on 8 November 2000 it was called the Classification (Publications, Films and Computer Games) (Miscellaneous) Amendment Bill 2000. In this form it included provisions for the regulation of online content, plus the raft of procedural amendments found in Schedule 1 of the NSW Bill. As these last amendments were uncontroversial and needed to be enacted in time for the agreed deadline of 22 March 2002, a decision was taken on 6 June 2001 to divide the South Australian Bill in two. In effect, the online provisions, which were to be the subject of a Legislative Council Select Committee inquiry, formed a separate Bill, titled at that time the Classification (Publications, Films and Computer Games) (Miscellaneous) Amendment Bill (No 2) 2001. The Bill for the procedural amendments was now Classification Bill (No 1) 2001.

When the Select Committee reported on 30 October 2001,¹²⁶ the procedural Bill had received Royal Assent. In respect to the Internet content Bill, by majority the Select Committee recommended that it pass in an amended form.¹²⁷ When debate on the Internet content regulation Bill was resumed in the Legislative Council, the amended Bill had been retitled, the Classification (Publications, Films and Computer Games) (On-line Services) Amendment Bill 2001. At the time the South Australian Parliament was dissolved in December 2001, this amended Bill had passed through the Legislative Council and was before the House of Assembly. Consequent upon dissolution of the Parliament, the Bill lapsed. It remains to be seen whether the incoming Government will reintroduce the On-Line Services Bill into the new Parliament.

In any event, the South Australia Bill serves as a useful reference point for its NSW counterpart. As they are almost identical in content, they can be discussed in tandem.

6.4 Summary of proposed Part 5A (online content regulation)

The question of scope: As with the complementary ABA scheme, the NSW Bill does not purport to 'include ordinary electronic mail or information that is transmitted in the form of a broadcasting service'. 'Internet content' is defined to have the same meaning as it has in Schedule 5 to the *Broadcasting Service Act 1992* (Cth). In effect, the Bill does not seek to regulate ephemeral content. As explained in the Second Reading speech:

¹²⁶ Parliament of South Australia, *Report of the Select Committee on the Classification (Publications, Films and Computer Games) (Miscellaneous) Amendment Bill (No 2) 2001*, 30 October 2001.

¹²⁷ Dissenting was the Australian Democrat, the Hon Ian Gilfillan MLC.

Part 5A aims to catch content providers. It is not intended to catch material that is not stored and not generally available on the Internet. Hence, it does not apply to email or to real-time Internet chat.¹²⁸

However, as noted by the South Australian Select Committee, email is covered by the Commonwealth *Crimes Act 1914*.¹²⁹

The question of application: Consistent with the Commonwealth legislation, the Bill grants immunity to bona fide Internet Service Providers (ISPs) and Internet Content Hosts (ICHS). It does so under proposed section 45B (3) which states that a person is not guilty of an offence under Part 5A by reason *only* of the person: (a) owning, or having the control and management of the operation of, an on-line service (ISPs); or facilitating access to or from an on-line service by means of transmission, downloading, intermediate storage, access software or similar capabilities (ICHS).

Provision is also made for the regulations to create further categories of immunities. By way of illustration, this might apply to making objectionable material available online to a member of a law enforcement agency for investigatory purposes.

Offences – ‘making available or supplying objectionable matter on on-line service’: The Classification Enforcement Amendment Bill 2001 would create two new offences, the most serious of which is the offence of ‘making available or supplying objectionable matter on on-line service’. Objectionable matter is defined to include:

- films classified (or that would be classified) ‘X’;
- films or computer games classified (or that would be classified) ‘RC’;
- advertisements for ‘X’ or ‘RC’ rated films or computer games; or
- advertisements that have, or would be, refused approval under section 29(4) of the Commonwealth Classification Act 1995.

Reference is not made therefore to the restricted publications categories (Category 1 and 2). Instead, Internet content is dealt with as if it were ‘film’ or computer game’ content, the implications of which are discussed in the later section of this paper. Note that ‘film’ is defined broadly under the Commonwealth Classification Act 1995 and includes any form of recording from which a visual image can be produced, including a ‘computer generated image’. That definition is adopted under the NSW Classification Act.

Under proposed section 45C a person must not use an online service to ‘make available, or supply, to another person, objectionable matter: (a) knowing that it is objectionable matter; or (b) being reckless as to whether it is objectionable. ‘Recklessness’ is defined by proposed

¹²⁸ NSWPD, 8 November 2001, p 18252.

¹²⁹ Section 85ZE ‘Improper use of carriage service’. The provision prohibits the intentional use of a telecommunications carriage service in a way that a reasonable person would regard as ‘offensive’. Internet content as defined under the *Broadcasting Services Act 1992* (Cth) is excluded, but e-mails are not covered under that regime.

section 45E to mean knowing of a substantial risk that the matter is objectionable and unjustifiably taking that risk. The maximum penalty is 100 penalty units for an individual (\$11,000), 250 penalty units for a corporation (\$27,500).

The *elements of the proposed offence* are that the prosecution must prove that:

- the offence occurred at the place and time alleged; and
- the offender was the accused; and
- the accused, by means of an online service, made available, or supplied, objectionable material to another person; and
- the accused did not do so only because he/it is an ISP or ICH; and
- the matter was objectionable; and
- the accused, by means of an online service, made available, or supplied, another person with material either knowing it to be objectionable matter, or being reckless as to whether it was objectionable matter.

The prosecution must therefore establish *mens rea* (the mental element) as an element of the offence under proposed section 45C. It is for the prosecution to prove beyond reasonable doubt that the accused knowingly or recklessly made available, or supplied, objectionable material to another person.

Unlike under the Victorian legislation discussed in an earlier section of this paper, there is no defence available by which the onus would then shift to the defendant to prove he believed on reasonable grounds that the material was not objectionable material. On the other hand, it needs to be recognised that the test under proposed section 45C is set at a higher level than proving that a person merely made ‘objectionable matter’ available on the Internet. It must be proved by the prosecution that the person did so intentionally or recklessly. Nor would criminal liability attach where a person merely made a wrong decision about how the Classification Board would classify the material in question. For example, if a person thought that Internet content in the form of a computer game would be classified ‘MA’ (the highest category available at present), when in fact it was later classified ‘RC’ by the Classification Board, he would not have committed an offence unless it could be proved that, in arriving at that decision, the person had taken an unjustifiable risk.¹³⁰

With one exception the proposed provision is identical to proposed section 75C of the South Australian Bill. The exception is that under the South Australia Bill provision is only made for one maximum penalty of \$10,000.

Offences – ‘making available or supplying matter unsuitable for minors on on-line services: The second offence, under proposed section 45D, involves *knowingly* or *recklessly* making available, or supplying, to another person, any matter unsuitable for minors. *Matter unsuitable for minors* is defined to mean:

¹³⁰ This issue is discussed, although with specific reference to decisions falling between ‘MA’ and ‘R’ under the films classification system, in Parliament of South Australia, n 126, pp 17-18.

Internet content consisting of a film that is classified R, or that would, if classified, be classified R, or an advertisement for any such film consisting of or containing an extract or sample from the film comprising moving images.

The maximum penalty is 50 penalty units for an individual (\$5,500); 100 penalty units for a corporation (\$11,000).

It is a defence for the defendant to prove that access to the material in question 'was subject to an approved restricted access system at the time the matter was made available or supplied by the defendant'. **Approved restricted access system** access is defined to include any system approved by the ABA under the Commonwealth scheme, or any recognised by the relevant NSW Attorney General, by order published in the Government Gazette.

The elements of this second offence are basically the same as those for the first, except of course that the prosecution would have to prove that the matter was 'unsuitable for minors'. The difference is that, once the prosecution had proved its case, the onus would then fall on the defendant to prove that an approved restricted access system was in place.

The formulation of this defence provision in the NSW Bill is identical to that in the Model Draft Enforcement Provisions. On the other hand, the defence provision in the South Australian Bill is in somewhat different terms. It is stated in the alternative, so that it is a defence: (a) to prove that an approved restricted access system 'operated' at the time of the offence; or (b) that the defendant 'intended, and had taken reasonable steps to ensure, that such a system would so operate and any failure of the system to so operate did not result from any act or omission of the defendant' (proposed section 75D (2)(b)). This second arm to the defence was in fact the result of a recommendation made by the Select Committee. The rationale behind it was explained in these terms:

This ensures that a person cannot be liable if, after he or she had protected the content by means of an approved restricted access system, the system failed through no fault of the defendant.¹³¹

Whether this revised formulation is strictly necessary as a matter of law is doubtful. This was recognised by the Select Committee which noted that the Bill, in the form of the Model Draft Enforcement Provisions, does not require the defendant to prove that the approved restricted access system was 'operating correctly at the relevant time'. The Committee added:

What is required to establish the defence is that the content provider prove that the material was subject to such a system when it was made available or supplied by the defendant, that is, at the time of uploading. The Committee accepted, and the Bill recognises, that the content provider cannot be held responsible for the ongoing correct operation of the system adopted. However, the

¹³¹

Parliament of South Australia, n 126, p 26.

Committee considered that it may be possible to amend the wording of the Bill to make this point clearer, in order to reduce concerns.¹³²

It remains to be seen whether the NSW Bill is to be amended to reflect this more cautious approach adopted in South Australia.

6.5 Arguments for and against in the South Australian Report

As they are so similar, the arguments for and against the NSW Classification Enforcement Amendment Bill 2001 are very like those reported by the Select Committee into the South Australian On-Line Bill 2001. This part of the Select Committee's report is in fact set out in full at Appendix C. In broad terms, the arguments found there are familiar enough in the context of the debate on Internet content regulation. The Select Committee reported that concerns expressed in submissions about the Bill fell into three main groups:

- ***Concerns as to the need for the Bill*** – the Bill is unnecessary because adequate alternative solutions to the problem of offensive Internet content already exist. Regard was had in this respect to the ABA scheme and the criminal laws already in place in South Australia.
- ***Concerns as to the practicability of the Bill*** – the Bill is impractical in that it imposes an unreasonable burden on content providers, including business, and will not work. Central to the latter contention was reflection on the 'global and borderless nature of the Internet'. On the issue of practicality generally it was also argued that the classification systems for films and computer games are not suited to classifying material on the Internet.
- ***Concerns as to the justice of the Bill*** – the Bill is unjust because it criminalizes behaviour which should not be criminal, or imposes unacceptable restraints on free speech.

Only brief note was made of arguments in support of the Bill, notably relating to the accessibility of Internet material which is unsuitable or harmful to children. According to the Committee:

Two submissions urged that the Bill does not go far enough. The Festival of Light and the Australian Family Association urged that the Bill should also cover the uploading of MA15+ material onto the Internet, given that legal restrictions apply to this material offline. The Australian Family Association also argued that more should be done to make ISPs accountable for the newsgroups they carry, that there should be restrictions on the content of web portals, and that ISP based filtering be further considered.¹³³

¹³² Parliament of South Australia, n 126, p 16.

¹³³ Parliament of South Australia, n 126, p 22.

6.6 Part 5A and existing criminal laws

One issue raised in respect to the South Australian OnLine Bill was whether it is unnecessary because adequate alternative solutions to the problem of offensive Internet content already exist, notably in the form of State criminal laws. The same might be asked of the NSW Bill. Does the Classification Enforcement Amendment Bill 2001 add anything to the sections 578B and 578C of the *Crimes Act 1900* (NSW)?

Section 578 would permit prosecution for online *possession (end use) of child pornography*, a matter which is not dealt with under the Bill.

Section 578C would permit prosecution for the publication (creation) of child pornography, as well for publishing 'indecent' material generally online. This is because, as explained in the Second Reading debate for the amendment of the section, 'publish' is defined broadly to include Internet offences: 'placing an offensive item on the Internet where others can have access to it would constitute distributing, disseminating, circulating or exhibiting'.¹³⁴

As to the *publication of child pornography*, there is no doubt that the protection of children is a major policy objective of the Bill. In answer to a 'question without notice' on 25 October 2001, the Attorney General foreshadowed the introduction of the Classification Enforcement Amendment Bill 2001, commenting:

The practical effect will be that, for example, a predatory paedophile who creates a porn site on the Internet, aimed at luring young children into communication, will be able to be charged under these new provisions. This is in addition to the host of offences under the Crimes Act that such an offender is likely to have committed. In other words, this new legislation gives police another string to their bow. We will create another brick in the wall against online sex offenders.¹³⁵

Another brick perhaps, but is it substantially different to the one already in place? Section 578C (2A) prohibits the publication of 'an indecent article that is child pornography'. 'Child pornography' is defined in section 578C by reference to the extended definition of the term under the National Classification Code. The definition refers to material that '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)'.¹³⁶ In other words, there seems to be a clear intention that child pornography under the *Crimes Act* is to have the same meaning as under the National Classification Code. To this extent – specifically with respect to child pornography – it might be argued that the *Crimes Act* already covers the field of prohibition contemplated under the Bill.¹³⁷ A significant difference, however, concerns the

¹³⁴ NSWPD, 26 November 1997, p 2590.

¹³⁵ NSWPD, 25 October 2001, p 18038.

¹³⁶ *Crimes Act 1900*, section 578B (1).

¹³⁷ It would be for the court to decide whether the material in question in a particular case was

penalties available under section 578C, on one side, and the Bill, on the other. Under the Bill, the maximum penalty is 100 penalty units for an individual (\$11,000), 250 penalty units for a corporation (\$27,500). Under section 578C (2A) it is 1,000 penalty units (\$110,000) or imprisonment for 5 years (or both) in the case of an individual, or 2,000 penalty units (\$220,000) in the case of a corporation.

As to 'indecent articles' or material generally, the point to make is that the Bill is broader in scope and reach than section 578C. The category of material the Bill prohibits is not identified as 'indecent' in character, but extends in one direction to material in the restricted 'unsuitable for minors' category. As part of the policy of child protection, access to material classified 'R18+' under the film classification system is the subject of restriction under the Bill;¹³⁸ whereas restriction of such material is not contemplated under section 578C. It is the more extreme material identified with what the Bill calls 'objectionable material' which would be at issue under section 578C.

That said, it is important to recognise that 'indecent', as defined by the common law, is not synonymous with the statutory 'objectionable material' category. One cannot prejudge how a court would decide the question of indecency in any particular case, but there is no doubt that, potentially, the 'objectionable material' category is broader than its 'indecent' counterpart. Both 'X' classified films and 'RC' classified computer games are defined as 'objectionable material' under the Classification Enforcement Amendment Bill 2001. Would an 'X' classified film be 'indecent' for the purposes of section 578C? Would many 'RC' classified computer games be held to be 'indecent', bearing in mind the restrictive nature of the computer games guidelines generally, together with the fact that there is no 'R18+' classification available in this instance?

What is clear is that, although section 578C could be used against creators of 'indecent' Internet content, its scope of application is narrower compared to that envisaged under the NSW Classification Enforcement Amendment Bill 2001.

likely to offend against the standards of a reasonable adult. In the South Australia case of *Phillips v Police* (1994) 75 A Crim R 480 which concerned a prosecution under section 33 of the *Summary Offences Act 1953* for possession of videotapes showing men and boys urinating and undressing, Justice DeBelle found that the material did not fall under the statutory definition of 'child pornography'. There the term was defined to mean 'Indecent or offensive material in which a child (whether engaged in sexual activity or not) is depicted or described in a way that is likely to cause offence to reasonable adult members of the community'. *Summary Offences Act 1953* (SA), section 33 (1). Justice DeBelle concluded that the depictions at issue were not 'offensive to contemporary standards in the Australian community. Other epithets might readily come to mind – "boring", "tedious" and "unedifying" are three. But it would, I think, be wrong to classify the films as indecent material' (at 497).

138

Access to such material is granted to adults but only where an 'approved restricted access system' is in place.

6.7 Policy objectives of Part 5A– child protection, uniformity and consistency

The main policy objectives behind the Classification Enforcement Amendment Bill 2001 are: the protection of children; the establishment of a uniform system of criminal laws in respect to online content; and the consistent regulation of material on- and offline.

Child protection and free speech: Comment has been made about the child protection objective. As to the protection of children from ‘matter unsuitable for minors’ in the ‘R’ classification category, in a practical sense much depends on the effectiveness or otherwise of what the Bill calls ‘approved restricted access systems’, about which there appears to be a conflict of opinion. That at least is one perspective on the issue. Another is that any attempt to make the Internet safe for minors must have a deleterious effect on the freedom of speech of adults. One could say that the Bill’s restricted access approach to ‘R’ rated material online is the equivalent of trying to make the home viewing of ‘R’ videos and DVDs subject to some kind of password or PIN system of access. Such regulation, it might be contended, constitutes an intrusion upon civil liberty. This is especially the case where, it could be argued, the regulatory scheme in question is not really intended to work effectively in any practical sense, but is designed rather to perform a politically ‘symbolic’ function, by fulfilling what Chen has described as ‘the desire of the decision-maker to appear active on an issue when he or she is not’.¹³⁹

There are of course other viewpoints on this issue. For a group like Young Media Australia, advocates on behalf of children and their protection from harmful media experiences, the regulatory regime proposed under Part 5A strikes an appropriate balance between the rights of adults, on one side, and the guarding of children from harm, on the other. From this standpoint, the means used are proportionate to the ends which the scheme proposes to achieve. It might be argued in this context that what is contemplated under Part 5A is more akin to the restrictions placed on the entry of children to ‘MA15+’ and ‘R’ films, or the purchase or hiring of such films by children. Admittedly, proposed Part 5A places access restrictions on adults, but that, it might be contended, is a feature born of the technical problems involved in regulating online content. Point of exhibition, sale or hire restrictions are not suited to Internet regulation. What regulation can address is the creation and supply of online content and the establishment of conditions of access to it.¹⁴⁰ For its part, the South Australian Select Committee considered

this situation to bear analogies with the offline problems posed by minors attempting to obtain access to R films or to licensed premises, or attempting to purchase alcohol, tobacco or R videotapes. While it is acknowledged that such attempts sometimes

¹³⁹ P Chen, ‘Pornography, protection, prevarication: the politics of Internet censorship’ (2000) 23 *University of New South Wales Law Journal* 221 at 222.

¹⁴⁰ Moreover, while obstacles to adult access may be in place under proposed Part 5A, the sanctions of the criminal law under this scheme fall, not upon users of online content, but upon its creators.

succeed, it does not follow that these legal restrictions should be removed and the matter left to parents.¹⁴¹

Uniformity: It has been said that the guiding policy behind the NSW Government's approach to Internet regulation is the need for uniformity in the criminal law. This is worth restating following the above discussion of the adequacy, or otherwise, of existing criminal laws to control Internet content. Setting aside for the moment any substantive consideration of proposed Part 5A, its great virtue is that, based as it is on model provisions for all jurisdictions, it avoids needless complexity in an area of the law where the interests of uniformity are paramount. That three Australian jurisdictions have already enacted their own criminal law regimes does not contradict the overwhelming case that can be made on behalf of national uniformity. Still less does the existence of a maze of existing laws in other jurisdictions contradict that case.

Few would contest that argument. However, contestability arises the moment substantive issues of content are placed back into the regulatory equation.

Consistency: It was said in the Second Reading speech: 'The Bill is based on the principle that any matter that is illegal or controlled offline should also be illegal or controlled online'.¹⁴² Is this an accurate summation of the practical effect of proposed Part 5A?

It is true that any material above 'M' for films and computer games, and anything beyond 'unrestricted' for publications, is subject to some form of control, be it conditions of sale or entry, or in extreme cases, the banning of material refused classification. It is also the case that the making and distribution of 'X' rated films is illegal in all States. The fact that they are not illegal in the Territories complicates matters, as it would be inconsistent in those jurisdictions for 'X' rated material to be criminalised online but not offline. Still, strictly speaking, the problem does not arise in that form for NSW, at least in respect to the creators and distributors of this kind of online content.¹⁴³

Where problems might arise is in the consistency of proposed Part 5A with the regime in place for the classification of publications. The fact is that the ABA administered scheme makes no reference to the publications classification standards or guidelines. The Bill follows this approach, thereby defining 'objectionable matter' and 'matter unsuitable for minors' solely by reference to the film and computer games classification systems. Does this mean that material available in print may not be accessed, or perhaps so readily accessed, online?

In NSW 'Category 1' publications are readily available in any newsagent, subject to such point of sale requirements as the need for material to be sold in a plastic bag.¹⁴⁴ Typically,

¹⁴¹ Parliament of South Australia, n 126, p 16.

¹⁴² *NSWPD*, 8 November 2001, p 18252.

¹⁴³ The issue can be said to arise in NSW from the standpoint of those adults seeking access to 'X' rated material online (as opposed to creating or distributing it).

¹⁴⁴ *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (NSW), section 20.

this applies to sex magazines of a less explicit kind, broadly equivalent in nature to a certain type of sexual material available under the 'R' film classification. In NSW again 'Category 2' publications, which can depict 'actual sexual activity involving consenting adults', are subject to more stringent point of sale restrictions, notably that they can only be sold in a 'restricted publications area'.¹⁴⁵ Broadly speaking this is equivalent to the 'X' film classification which would be banned altogether under the Classification Enforcement Amendment Bill 2001.

In this way a distinction can be drawn between the 'Category 1' material available in print, under restriction, but banned completely from the Internet. What is legal offline is therefore illegal online.

Conversely, it can be pointed out that, at present, 'R' rated material is not available at all on Pay TV. Some might argue that, in terms of accessibility and perhaps in other ways, the Internet is more analogous to this subscription broadcasting model than to the regulatory scheme in place for publications.

6.8 The 'adult themes' debate

Equally problematic perhaps is the 'matter unsuitable for minors' category which refers to material classified 'R' under the films classification system. The general point to make is that, while making the Internet safe for children is a worthy goal of public policy, potentially it could have enormous implications for the material that is readily available to adults online. Comment has been made in this regard that many films are classified 'R', not for depictions of sex or violence, but for the way they deal with such 'adult themes' as incest, child sexual abuse and suicide. David Marr has quoted the claim made by Electronics Frontiers Australia that 'During the three years ended June 2000, over 50 per cent of films were classified 'R' because they contained "adult themes"'.¹⁴⁶ The 'R' classification of the film *Lolita* in 1999 is an example.¹⁴⁷ Marr goes on to suggest that the application of such an approach to the Internet could mean that material appearing freely in the press could be made subject to restriction online. According to Marr:

If the NSW regime of Internet censorship comes into force, the *Herald* will not be able to republish online material from the newspaper which it guesses the OFLC might classify as unsuitable for people under 18. That would mean, for instance, that Monday's story republished from *The New York Times* about the erotic frescoes of Pompeii could not safely be placed on the Internet.¹⁴⁸

¹⁴⁵ *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (NSW), section 21.

¹⁴⁶ D Marr, 'The letter that dare not speak its name', *The Sydney Morning Herald*, 2 January 2001.

¹⁴⁷ *Lolita* was classified 'R' for a combination of 'adult themes and medium level violence'.

¹⁴⁸ D Marr, 'The letter that dare not speak its name', *The Sydney Morning Herald*, 2 January 2001.

Do concerns of this kind have real substance? It can be noted that the ABA has taken action in relation to prohibited and potentially prohibited content on the basis that the item contained 'adult themes'. Over the 18 month reporting period from January 2000 to June 2001, a total of 7 'adult themes' take-down notice decisions were made for online content hosted in Australia. No more information is available as to the specific nature of these online sites, thus making it impossible at this stage to draw any general conclusions about the operation of this aspect of the ABA scheme. It can only be assumed that if any of the 7 items related to mainstream 'news and current affairs', then the matter would have been reported in the press and made subject to an application for review. On this basis, it might be contended that the warnings of Marr and others are alarmist. One counter argument is that the scheme to regulate the Internet is an example of 'creeping censorship'; a further contention is that the mere presence of such a regime may have a 'chilling' effect on free speech online.

6.9 Judging online material by the standards applicable to films and computer games

It has been said that the ABA regulatory scheme classifies online material by reference to film and computer games standards, but not by reference to the publications guidelines. The NSW Bill adopts this approach by its definition of 'objectionable matter' and 'matter unsuitable for minors'. That certain inconsistencies may flow from this has been discussed. That the classification of online material by reference mainly to films is not entirely appropriate has also been raised in the debate, in submission to the South Australian Select Committee and elsewhere.

As noted, Internet service providers and online publishers may submit existing or proposed Internet content for classification by the Classification Board under the Commonwealth Classification Act 1995. One of the curiosities of the present situation is that, for this OFLC administered classification scheme, Internet content in the form of a 'recording' may be submitted for classification as a film or computer game; whereas Internet content in a 'printed form' may be classified as a publication. The possibility that this might lead to material being classified inconsistently on and offline was considered by the South Australian Select Committee which commented, first, that it did not know of any instances of this kind and, secondly, 'if the content provider were genuinely to form a view as to the online restrictions, based on offline classification, he or she would not commit an offence even if this view proved to be incorrect...'.¹⁴⁹

Perhaps the more general point to make is that, having regard to the fact that so much Internet content is in the form of the printed word, it seems anomalous to exclude the publications guidelines from an assessment of such content. The debate about 'adult themes' is a case in point. Surely it is to the standards which apply for the printed word that one would look for guidance when classifying comparable Internet material. It would seem to make more sense, when classifying an Internet site containing a fictional account in writing of sexualised violence, to be guided by the methods and standards used to classify, for

¹⁴⁹

Parliament of South Australia, n 126, p 15.

example, the book version of *American Psycho*,¹⁵⁰ and not by reference to its film counterpart. Perhaps for all practical purposes that is what the classifiers would do in any case.

6.10 Comment

The Classification Enforcement Amendment Bill 2001 raises big issues about censorship in Australia. It also raises a host of intricate technical questions. The big issue is encapsulated in the contest between the claims of free speech, on one side, and the protection of children, on the other. Does the Bill strike an appropriate balance between these competing policy objectives? Alternatively, does it add yet another, possibly unnecessary, tier of labyrinthine complexity to the regulation of what might once have been called the private sphere of life? As to the intricacies involved, these would seem to be the inevitable consequence of pushing the regulatory scheme beyond what the National Classification Code terms 'Refused Classification', or what in a similar vein section 578C of the *Crimes Act* refers to as the publication of 'child pornography and indecent articles'.

7 OTHER ISSUES AND DEVELOPMENTS

7.1 Convergence and the review of classification guidelines¹⁵¹

In its publication, *A Review of the Classification Guidelines for Films and Computer Games: Discussion Paper*, the OFLC raised a series of discussion points and appended to these arguments for and against. One example is the question, 'Should there be a uniform national approach, including a single set of classification standards, for the classification of entertainment media?' Another question posed is, 'Should interactive products, such as DVDs, computer games and online content, be classified the same way as cinema films and videotapes?'

Both questions impact on the more general issue of 'convergence' of media. Traditionally, different regulatory mechanisms and standards have been applied to film, television and multimedia, partly due to their different means of delivery (for example, interactive computer games rather than linear films), but also because of their perceived differential capacity to influence the viewer. However, as the Parliament of Victoria's Family and Community Development Committee said in its recent report, 'The emergence of interactive multimedia and the increasing convergence of television and multimedia technologies question the appropriateness and effectiveness of this medium-based approach in the future'.¹⁵²

Quite what implications these developments have for the current classification systems is not clear. For its part, the Committee commented that 'multimedia convergence will enable content selection by a user in a way that has never taken place before, so that the

¹⁵⁰ The book is a Category 1 publication; the film is rated 'R'.

¹⁵¹ The current review deals only with films and computer games; the guidelines for publications were reviewed separately in 1999.

¹⁵² Parliament of Victoria, n 48, p 139.

classification decisions made by TV and OFLC classifiers based upon context will become increasingly meaningless'.¹⁵³ While recommending further inquiry into the matter, the Committee went on to say that it is

likely that censorship and classification of film, television and multimedia content by government agencies will become increasingly difficult, with such content being provided from many diffuse sources and being presented in interactive formats that are less easily subject to definition.¹⁵⁴

A host of distinct issues are involved in the convergence debate. That censorship is entering a new and far more complex era is not in doubt. The significance of the convergence issue is acknowledged in the OFLC discussion paper which states:

The convergence of media, particularly in multi-dimensional digital recordings, requires a consistent approach to the classification of traditionally discreet media. The issues raised by the convergence of media are not reflected in the existing classification scheme where different standards (or guidelines) are applied to publications, films and computer games.

An approach where classification standards vary on the basis of the format or medium in which the content is distributed is increasingly difficult to maintain.¹⁵⁵

At the very least this argument appears to be leading the film and computer games standards into a more consistent line. Whether it results in a common set of guidelines, with an 'R18+' classification for computer games, remains to be seen. If so, it could mean that the 'R' classification is more restrictively defined.

7.2 The 'X' classification for films

The debate about the 'X' film classification is longstanding. The background to the most developments in regard to it have been explained in a Commonwealth Parliamentary Library publications as follows:

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

¹⁵³ Parliament of Victoria, n 48, p 140.

¹⁵⁴ Parliament of Victoria, n 48, p 141.

¹⁵⁵ OFLC, *A Review of the Classification Guidelines for Films and Computer Games: Discussion Paper*, 2001, p 8.

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.¹⁵⁶

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.¹⁵⁷

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.¹⁵⁸ 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'.¹⁵⁹

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. He warned of the dangers of driving the pornography industry underground. Senator Campbell also set out the category of material that should be banned, including child pornography. Having done so, he 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'.¹⁶⁰

7.3 Community assessment panels

¹⁵⁶ 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.

¹⁵⁷ K Jackson, n 29, p 3.

¹⁵⁸ 'Censorship Ministers Meet', *Ministerial Media Statements*, 27 July 2000.

¹⁵⁹ Federal Attorney-General, 'Warning labels for X-rated videos', *Media Release*, 17 November 2000.

¹⁶⁰ *Commonwealth Parliamentary Debates* (Senate), 30 October 2000, p 18598.

An ongoing concern in the censorship debate has been over the representativeness of classifiers, in particular those serving on the peak Classification Board. This was reflected in various recommendations made by the Senate Select Committee on Community Standards Relevant to the Supply of Services Utilising Electronic Technologies. For example, in a report from October 1996 it recommended 'a restructuring of the OFLC to make it more reflective of community standards'. It also recommended that a community committee be established, representing major interest groups, to consider among other things any decision of the Classification Board giving a film an 'MA' or 'R' about which the Board was not unanimous.¹⁶¹

What the Government actually announced in December 1996 was less radical. Community Panels, made up of 'independently selected members of the community' were to be set up to assess selected decisions made by the Board prior to the film's public release.¹⁶² Such a system was subsequently established, comprising three Panels each with around 20 people of varying age and background. In October 1998 censorship Ministers agreed to extend the scheme and a further three Panels were organised in Perth, Adelaide and Bendigo. These panels reported in October 2000.¹⁶³ In July of that year the censorship Ministers had agreed that similar programs would continue to be run every five years.¹⁶⁴

7.4 Standing to appeal

One purpose of the Commonwealth *Classification (Publications, Films and Computer Games) Amendment Act (No 1) 2001* was to amend the term 'person aggrieved' for the purpose of applying for review by the Classification Review Board of a classification decision of the Classification Board.¹⁶⁵ The immediate background to this amendment was the decision of the Classification Review Board in 1999 to refuse an application for review in respect to the film *Lolita*. One applicant was Helping All Little Ones, the other an individual on behalf of Child Protection Connection. Neither, it was decided, was a 'person aggrieved' for the purposes of section 42 (1)(d) of the Commonwealth Classification Act 1995 and both therefore lacked standing to appeal.¹⁶⁶

Prior to this amendment, section 42 gave a right of appeal to four categories of persons: the original applicant before the Classification Board; the publisher; the federal Attorney General (who must appeal if requested to do so by a State or Territory Attorney General);

¹⁶¹ Senate Select Committee on Community Standards Relevant to the Supply of Services Utilising Electronic Technologies, *Report on R-rated Material on pay TV Part 2 and Review of the Guidelines for the Classification of Film and Videotapes*, October 1996, p 10.

¹⁶² Commonwealth Attorney-General, 'Ensuring community involvement in classification', *Media Release*, 27 December 1996.

¹⁶³ Commonwealth Attorney-General and South Australian Attorney-General, 'Film classification process comes under scrutiny', *Joint Media Release*, 6 October 2000. The Panels, each of which viewed 3 films each, agreed with the Board in 7 out of 9 films.

¹⁶⁴ OFLC, *Annual Report 2000-2001*, p 35.

¹⁶⁵ *Commonwealth Classification Act 1995*, section 42.

¹⁶⁶ *OFLC Annual Report 1998-99*, p 147.

and ‘a person aggrieved by the decision’. The term ‘person aggrieved’ has been interpreted to cover, at least, a person who has an interest in a matter beyond that which he or she has as an ordinary member of the public.¹⁶⁷ In its amended form, ‘person aggrieved’ includes, with certain safeguards, organisations or persons with a particular interest and involvement in the contentious aspect of the subject matter or theme of the particular publication, film or computer game. In the relevant Second Reading speech it was explained that ‘The Government believes that this amendment will, in relation to decisions where there is some community concern, introduce a greater degree of flexibility into the review process’.¹⁶⁸

Even in this amended form section 42 is still narrower in scope than the standing provision recommended by the ALRC in its 1991 report, *Censorship Procedure*. As part of its policy objective of involving the public in the classification process, the ALRC recommended a wide right of standing to apply for reconsideration of classification decisions, so long as the person was acting in good faith. Of this recommendation, the Deputy Secretary of the federal Attorney General’s Department, Norman Reaburn, commented that the ALRC had not ‘Appreciated the short commercial “shelf life” of a cinema film and, accordingly, its proposal does not achieve its stated aims’. He added: ‘There is also the potential for opening the system to manipulation by well-intentioned but unrepresentative persons or groups’.¹⁶⁹ As amended, section 42 seeks to safeguard the review process from such ‘manipulation’.

7.5 R v Hughes and the question of constitutional validity

The cooperative legislative scheme for classification is based on the adoption by the States of classification decisions made by Commonwealth statutory officers. These officers include the Director of the Classification Board who has, in addition, further powers under the State Acts, notably ‘calling in powers’ in respect to submittable publications and certain computer games.¹⁷⁰

Other arrangements of this type, involving the conferral of State functions and powers upon officers and authorities of the Commonwealth are in place.¹⁷¹ The question which has arisen of late concerns their constitutionality. This is in the light of the High Court decision in *R v Hughes*, a case concerning the validity of the Corporations Law scheme. The joint judgment in that case appeared to confirm that: (a) Commonwealth authorities may perform

¹⁶⁷ In the ‘Hail Mary’ case (*Ogle v Strickland* [1987] 13 FCR 306) it was held that, under the *Administrative Decisions (Judicial Review) Act 1975* where the same test applies, a catholic priest had standing under the ‘person aggrieved’ test to seek judicial review of a decision to allow the importation of an allegedly blasphemous film.

¹⁶⁸ *Commonwealth Parliamentary Debates* (House of Representatives) 8 December 1999, p 13025.

¹⁶⁹ Senate Select Committee on Community Standards Relevant to the Supply of Services Utilising Electronic Technologies, *Submissions to the Committee on the consideration of the provisions of the Classification (Publications, Films and Computer Games) Bill 1994*, November 1994, pp 15-17 (N Reaburn).

¹⁷⁰ Those the Director has reasonable grounds to believe contain contentious material.

¹⁷¹ Other examples are set out by Justice Kirby in *R v Hughes* (2000) 74 ALJR 802 at Fn 146.

State functions and powers for the purposes of a cooperative Commonwealth/State scheme; but (b) the exercise by a Commonwealth authority or officer of State functions or powers coupled with a duty, particularly where the rights of an individual could be adversely affected, must be capable of being supported by a head of Commonwealth legislative power.¹⁷²

What implications, if any, the decision in *R v Hughes* may have for the national classification scheme is hard to say. In South Australia the view has been taken that the 'likelihood of any successful challenge to the validity of the scheme on this basis is extremely remote'. That said, a safety first approach was adopted by the former South Australian Liberal Government which considered it 'best to close off any possibility'. With reference to *R v Hughes* it was explained that

the High Court indicated that to the extent that State legislation seeks to confer duties on Commonwealth officials, such duties must be supported by Commonwealth heads of power. Further, a duty may be found even where the expression of the statute suggests merely a power, if in reality the power is coupled with a duty. This may be the case where a State Act does not confer any similar duty or power on a State officer.¹⁷³

For the sake of certainty, amendment was made to the South Australian classification legislation removing the power of the Director of the Classification Board to grant exemptions, leaving this solely to the Minister, and investing the local Classification Council with call-in powers co-extensive to those given to the Director.¹⁷⁴ It is moot whether, on a safety first basis, legislative amendment is required in NSW.

8. CONCLUSION

Censorship is not only about content, it is also about process. Prior to the reforms of the 1970s, the content of film and literature was heavily regulated by obscure administrative processes, lacking transparency and accountability. Much has changed for the better over the last three decades or so.

Of course, debates about censorship administration continue, as demonstrated by the

¹⁷² *R v Hughes* (2000) 74 ALJR 802 at 812; I Govey and H Manson, 'Measures to address Wakim and Hughes: How the reference of powers will work' (2001) 12 *Public Law Review* 254 at 257. As noted there is no direct Commonwealth 'censorship' head of legislative power. The Commonwealth Classification Act 1995 is based on the Territories power in section 122 of the Australian Constitution. Other heads of power available to the Commonwealth include the power to regulate overseas and interstate trade (section 51 (i)) and, potentially, the corporations power (section 51 (xx)). However, it is doubtful whether, in combination, these federal legislative powers could be said to cover the totality of powers and functions contemplated under the classification regime.

¹⁷³ *SAPD* (Legislative Council), 26 September 2001, p 2232.

¹⁷⁴ *Classification (Publications, Films and Computer Games) (Miscellaneous No 2) Amendment Act 2001* (SA).

controversies which flared up in the wake of the *Romance* decision by the Classification Board, and as suggested by the ongoing legal dispute between the ABA and Electronics Frontiers Australia. So, too, do controversies about content regulation. Behind this last debate stands the vexed question of the 'effects' media portrayals of violence, sex and other matters may have on behaviour. The subject has not been dealt with in this paper, where the emphasis has been instead on censorship law and administration. It was discussed in a previous Parliamentary Library publication which concluded that, on current evidence, research is unlikely to answer the policy questions at issue in any definitive way.¹⁷⁵ One certainty is that the regulation of content will always be contentious.

¹⁷⁵G Griffith, *Censorship: A Review of Contemporary Issues*, NSW Parliamentary Library, Background Paper No 1/1996.

APPENDIX A

Schedule 2 Amendments relating to on-line services

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

Schedule 2	Amendments relating to on-line services	1
	(Section 3)	2
Part 5A		3
	Insert after section 45:	4
Part 5A	On-line services	5
45A	Definitions	6
	In this Part:	7
	<i>access</i> has the same meaning as it has in Schedule 5 to the <i>Broadcasting Services Act 1992</i> of the Commonwealth.	8 9
	<i>Internet content</i> has the same meaning as it has in Schedule 5 to the <i>Broadcasting Services Act 1992</i> of the Commonwealth.	10 11
	Note. <i>Internet content</i> is defined so as to mean information that is kept on any article or material (for example, a disk) from which information is capable of being reproduced, with or without the aid of any other article or device and that is accessed, or available for access, using an Internet carriage service (as defined in that Act) but so as not to include ordinary electronic mail or information that is transmitted in the form of a broadcasting service.	12 13 14 15 16 17 18
	<i>matter unsuitable for minors</i> means Internet content consisting of a film that is classified R, or that would, if classified, be classified R, or an advertisement for any such film consisting of or containing an extract or sample from the film comprising moving images.	19 20 21 22 23
	Note. The <i>National Classification Code</i> set out in the <i>Classification (Publications, Films and Computer Games) Act 1995</i> of the Commonwealth ("the Code") provides for films and computer games to be classified RC that:	24 25 26 27
	(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	28 29 30 31 32 33
	(b) depict in a way that is likely to cause offence to a reasonable adult, a person who is, or who appears to be, a child under 16 (whether the person is engaged in sexual activity or not), or	34 35 36

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

Schedule 2 Amendments relating to on-line services

(c)	promote, incite or instruct in matters of crime or violence. Computer games that are unsuitable for a minor to see or play may also be classified RC.	1 2 3
	objectionable matter means Internet content consisting of:	4
(a)	a film that is classified X, or that would, if classified, be classified X, or	5 6
(b)	a film or computer game that is classified RC, or that would, if classified, be classified RC, or	7 8
(c)	an advertisement for a film or computer game referred to in paragraph (a) or (b), or	9 10
(d)	an advertisement that has been, or would be, refused approval under section 29 (4) of the Commonwealth Act.	11 12 13
	on-line service means an Internet carriage service within the meaning of Schedule 5 to the <i>Broadcasting Services Act 1992</i> of the Commonwealth and includes a bulletin board.	14 15 16
45B	Application of Part	17
(1)	This Part applies to an on-line service other than an on-line service, or on-line service of a class, prescribed by the regulations.	18 19 20
(2)	Nothing in this Part makes it an offence to supply objectionable matter or matter unsuitable for minors by means of an on-line service to any person, or class of persons, prescribed by the regulations.	21 22 23 24
(3)	A person is not guilty of an offence under this Part by reason only of the person:	25 26
(a)	owning, or having the control and management of the operation of, an on-line service, or	27 28
(b)	facilitating access to or from an on-line service by means of transmission, downloading, intermediate storage, access software or similar capabilities.	29 30 31

45C	Making available or supplying objectionable matter on on-line service	1
		2
	A person must not, by means of an on-line service, make available, or supply, to another person, objectionable matter:	3
		4
	(a) knowing that it is objectionable matter, or	5
	(b) being reckless as to whether it is objectionable matter.	6
	Maximum penalty: 100 penalty units for an individual, 250 penalty units for a corporation.	7
		8
45D	Making available or supplying matter unsuitable for minors on on-line service	9
		10
	(1) A person must not, by means of an on-line service, make available, or supply, to another person, any matter unsuitable for minors:	11
		12
		13
	(a) knowing that it is matter unsuitable for minors, or	14
	(b) being reckless as to whether it is matter unsuitable for minors.	15
		16
	Maximum penalty: 50 penalty units for an individual, 100 penalty units for a corporation.	17
		18
	(2) It is a defence to a prosecution under this section for the defendant to prove that access to the matter unsuitable for minors was subject to an approved restricted access system at the time the matter was made available or supplied by the defendant.	19
		20
		21
		22
		23
	(3) In this section:	24
	<i>approved restricted access system</i> means:	25
	(a) any restricted access system within the meaning of the <i>Broadcasting Services Act 1992</i> of the Commonwealth, or	26
		27
		28
	(b) any other system of limiting access declared by the Minister, by order published in the Gazette, to be an approved restricted access system for the purposes of this definition.	29
		30
		31
		32

Schedule 2 Amendments relating to on-line services

45E	Recklessness	1
(1)	A person is reckless as to whether matter is objectionable matter or matter unsuitable for minors:	2
		3
(a)	if the person is aware of a substantial risk that the matter is objectionable matter or matter unsuitable for minors, and	4
		5
		6
(b)	that having regard to the circumstances known to the person, it is unjustifiable to take the risk.	7
		8
(2)	The question of whether taking a risk is unjustifiable is one of fact.	9
		10

APPENDIX B

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
<p>1. Publications that:</p> <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
<p>2. Publications (except RC publications) that:</p> <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
<p>4. All other publications.</p>	Unrestricted

Films

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

DESCRIPTION OF FILM	CLASSIFICATION
1. Films that: (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
2. Films (except RC films) that: (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
3. Films (except RC films and X films) that are unsuitable for a minor to see.	R
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.	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
<p>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.</p>	MA (15+)
<p>3. Computer games (except RC and MA (15+) computer games) that cannot be recommended for viewing or playing by persons who are under 15.</p>	M (15+)
<p>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.</p>	G (8+)
<p>5. All other computer games.</p>	G

APPENDIX C

Analysis of issues raised in evidence

Parliament of South Australia

**Report of the Select Committee on The Classification (Publications,
Films and Computer Games) (Miscellaneous) Amendment Bill (No. 2) 2001**

5. ANALYSIS OF ISSUES RAISED IN EVIDENCE

5.1 Submissions

The Committee received 16 submissions, as listed in Appendix A. Oral evidence was also taken from the five bodies who asked to do so, as follows:

- Information Technology Council of South Australia
- Australian Computer Society
- South Australian Internet Association
- Young Media Australia
- Festival of Light

Although the Eros Foundation indicated a wish to give evidence, it could not be contacted to arrange this.

Submissions varied in their approaches from very general comment on principles, to specific discussion of particular aspects of the Bill. Some submissions opposed the Bill altogether, some pressed for modification, and some supported the Bill or suggested extensions. In general, submissions did not seek to argue that there is no problem with offensive internet content, nor that measures to protect users are unnecessary (although some argued that the level of community concern about offensive internet content is low). The emphasis of submissions which criticised the Bill was rather that the solution proposed by the Bill is undesirable, for various reasons.

Criticisms or concerns raised about the Bill fell into three main groups:

- a) the Bill is unnecessary because adequate alternative solutions to the problem of offensive internet content already exist;
- b) the Bill is impractical in that it imposes an unreasonable burden on content providers, including business, and will not work;
- c) the Bill is unjust because it criminalizes behaviour which should not be criminal, or imposes unacceptable restraints on free speech

5.2 Concerns as to need for the Bill

5.2.1 Effectiveness of Bill

Several submissions argued that it is useless for any individual jurisdiction to seek to regulate offensive internet content uploaded within its jurisdiction, because of the global and borderless nature of the internet. Offensive material may originate anywhere in the world and will be accessible to any user. To restrict content arising only in South Australia will have negligible impact on the total available content in South Australia and thus will not effectively protect South Australians.

The Committee noted that the majority of offensive internet content originates outside South Australia. Statistics of complaints made to the Australian Broadcasting Authority indicate that most of the content reported to its hotline is hosted outside Australia, and very commonly in the United States.

The majority of the Committee was inclined to the view that the fact that any one jurisdiction is only a minor contributor to the global problem is not an argument against action. This would be similar to arguing that because Australia is but a minor contributor to global environmental pollution, Australia should do nothing to address its contribution. The Committee did not find this argument convincing. The global problem can only be addressed if each jurisdiction is willing to do its part.

5.2.2 Existing laws

It was argued by the Australian Computer Society and the IT Council of South Australia, that the Summary Offences Act, together with the complaints handling regime provided by the Commonwealth Broadcasting Services Act, already sufficiently deals with offensive internet content. It was claimed that State provisions dealing with indecent and offensive material either already cover the same ground, or if not, could be made to do so with minor amendment, obviating the need for this Bill.

The Committee considered the scope of the present South Australian laws relating to indecent and offensive material, contained in s. 33 of the Summary Offences Act (set out in Appendix F).

This provision identifies three kinds of material: 'indecent material', 'offensive material', and 'child pornography'. 'Indecent' material is material of an indecent, immoral or obscene nature. These terms are not further defined and bear their natural meaning. 'Offensive' material is material which has one of the listed subject matters (cruelty, crime, drugs, etc), and is such as to cause serious and general offence amongst reasonable adult members of the community. 'Child pornography' is material which depicts or describes a person under 16 (or apparently so) in a way that would cause serious and general offence amongst reasonable adult members of the community. 'Material' can include computer data, discs and CD-ROMs, and computer data includes electronic data from which computer images can be created.

The provision then creates three groups of offences in relation to this material. These are:

- a) selling (which includes hire, barter, exchange, and producing for sale)
- b) exhibiting in a public place (including leaving the material there, or exhibiting it so as to be visible there)
- c) exhibiting to a minor, or to any other person so as to offend or insult.

In relation to child pornography, it also creates an offence of possession. Mere possession of the other material is not an offence.

The Committee noted that:

1. This provision would cover the possession of child pornography which a person has downloaded from the internet, a matter not addressed by the Bill. Mere downloading or storage on a hard drive where the material is not generally available will not offend against the Bill. The provision probably also covers the situation where two internet users make use of the internet to exchange offensive material (for example, swapping pornographic images

of children, or bomb-making recipes), again a situation not covered by the Bill if such exchange takes place by email.

2. This provision probably does not cover the uploading of indecent or offensive material or child pornography onto the internet, where the material is merely left on a site for general access (the situation covered by the Bill). This is because:

a) as to selling, much internet content is accessed free of charge: the offence of selling is probably not committed in that case.

b) some internet sites do charge for entry and in that case, it is arguable whether the content provider 'sells' the material to the viewer, or whether merely giving access for a fee is not a sale. If this is not a sale, then neither does the person uploading the material commit the offence of producing the material for sale.

c) to upload the material probably does not amount to exhibiting in a public place. A 'public place' is inclusively defined by the Act in such a way as to imply a physical place. As yet, the courts have not held that the internet is a 'public place' for the purposes of the criminal law.

d) as to exhibition to persons so as to offend, or to minors, it is doubtful whether merely putting the material on the internet, such that it can be found and viewed by another internet user, with whom there is no communication, would amount to 'exhibiting' the material to a person. The term is not defined and bears its ordinary meaning. There would be no need for an offence of leaving offensive material in a public place if leaving it where others can find it would in any case be 'exhibiting'.

It is possible that the provision would cover the sending of email containing offensive or indecent material to another person. This depends on whether by sending a person an email, you 'exhibit' its contents to the person.

For these reasons the Committee doubted whether it could be said that s. 33 already covers the same ground as the Bill.

5.2.3 Protection of children

Reference was made by several submissions to the need for parents to take responsibility for supervision of children's access to the internet. Reference was also made to the availability of filtering software which will restrict access to offensive material. Other submissions however claimed that filters were of limited use.

The Committee noted that parents can certainly assist in protecting their children from exposure to offensive material via the internet. Advice on steps that parents can take, including having the computer within view of the family, rather than in a child's bedroom, and installing filtering and tracking software, is readily available from numerous sources. In particular, Netalert, the body established by the Commonwealth in connection with the extension of the Commonwealth legislation to deal with internet content, provides advice to parents by means of publications and on its website.

However, the Committee also noted that:

a) this legislation is not limited to the protection of children. While children are particularly vulnerable, one object of the co-operative scheme is to protect everyone from exposure to unsolicited offensive material (see National Classification Code, Appendix C). Some material (for example, material instructing in how to commit crimes) is restricted for the good of the community as a whole.

b) material which would be caught by the Bill is not limited to pornography, as some submissions tended to assume. It can include material which incites or instructs in crime, such as instructions on how to build explosive devices, hijack aircraft or manufacture drugs of addiction or biological weapons. It can include racial or religious vilification material, such as anti-Semitic, anti-Asian or white supremacist propaganda. It can include material which encourages suicide, or violence against others, such as school shootings. It can include paedophile material, whether of a sexually explicit nature or not.

Given the breadth of material which might receive an RC classification, the Committee considered that it was unrealistic to expect that filters would always successfully detect it, or that parental supervision will always be an adequate solution.

c) literature discussing available filters suggests that filtering cannot be a complete solution. Filtering tends to rely on identification of key words in the text of the website. It can be both over- and under-inclusive, that is, it may fail to detect an offensive site which does not contain any keywords, and it may block innocuous or helpful sites, such as educational material, which contain the keyword. Also, there is software readily available on the internet which can disable filters.

5.3 Concerns as to practicability of the Bill

5.3.1 Effect on internet industry

Some submissions argued that the Bill would cause businesses which might otherwise be established in South Australia to prefer to set up business in other Australian jurisdictions or off-shore. Fear that their proposed internet content might offend the law was considered a very significant consideration for some businesses, such that they would either move their operation interstate or overseas, or arrange to have internet content hosted in other jurisdictions, to the detriment of South Australian content hosts. This argument was put both by the SA Internet Association, and in a joint submission by Thomson Playford and Internode Pty Ltd.

The Committee was concerned at this suggestion and sought further comment from the SA Internet Association on this issue. On analysis, it appeared to the Committee that the issue was one of perception. The Bill does not seek to regulate internet service providers, which are regulated by the Commonwealth law. Rather, it applies to content providers, that is, individuals or businesses which upload material onto the internet in such a way that it is stored and accessible to others. Further, it makes no difference under the Bill whether offending content is hosted locally or interstate or overseas. If the content is uploaded in South Australia, an offence is committed regardless of the location of the server where it is stored.

However, the concern pressed by these commentators was that the mere presence in the statute book of laws penalising the uploading of certain internet content will give rise to a perception that South Australia is unfriendly to internet technology and hence will deter new business. Further, the risk that the business may commit an offence by uploading certain material onto its website was considered a deterrent to setting up business here. There also appeared to be a concern that some content providers, misunderstanding the Bill, would choose to have their content hosted outside South Australia, in the (albeit mistaken) belief that this would protect them from criminal liability. If this happens, South Australian internet service providers could lose business.

The Committee noted that, despite the popular perception of the internet as lawless, the reality is that many of the ordinary laws of the land apply to conduct on the internet. (For example, laws relating to defamation, misrepresentation, false advertising, racial vilification, threats, and like forms of unlawful speech do not exempt internet communications.) In many jurisdictions, including Australia and New Zealand, some level of internet-specific content regulation is a fact of life. For example, although one witness expressed a perception that there are no laws regulating internet content in Queensland, and that it is therefore viewed by information technology businesses as a desirable business location, Queensland in fact does have laws bearing on internet content, although different in form and scope from those proposed in the Bill.

The Committee considered that the reality will increasingly be that the internet is not regarded as a special place exempt from the ordinary laws of the land, but simply another arena in which certain restrictions are imposed for the good of the community as a whole. Businesses will have to accept a degree of internet content regulation as a fact of life. The question is not so much whether to regulate internet content, but how.

Further, the Committee considered it unlikely that many legitimate businesses would wish to upload to the internet content which is or would be classified R, X or RC, and indeed no submission contended otherwise. To the extent that businesses might wish to upload R content, the Bill would permit this, provided that the material is protected by a restricted access system, that is, a password or PIN.

5.3.2 Costs to business

It was argued by the Australian Computer Society, the IT Council of South Australia, Thomson Playford and Internode Systems Pty Ltd that businesses which maintain an internet presence will incur substantial costs of having material classified. It was contended that because of uncertainty about how material would be classified, classification will be necessary in practice although not required by law. Because this will need to be repeated each time the content is changed, a very significant burden could result.

The Committee noted that the Bill does not require content providers to have their proposed content classified. They may choose to do so but that is a matter for them. Hence, the Bill does not directly increase costs to business. The majority of the Committee considered that, in most cases, the content creator should be able to judge by reference to the guidelines and general experience in their application offline, what is acceptable online. Experience with focus groups in the context of the Community Assessment Panels suggests that members of the public with minimal training can readily understand and correctly apply the film guidelines.

The Committee agreed that if a business does require the certainty of classification, this would come at a cost. The cost is fixed by Commonwealth regulation and is beyond the control of the States. Film classification can be expensive, depending on the extent of the material to be classified. In some cases, it will be more cost-effective to submit the material in text form as classification of publications is generally cheaper. It is therefore true that if the business frequently changes the content of its website, and wishes to have it classified each time, this would prove expensive. However, it is somewhat unlikely that changes of a merely updating nature, which do not substantially change the nature of the content, would result in a change of classification. The business may prefer to use its own judgment in applying the guidelines, rather than seeking classification.

The Committee also considered it most important to understand, as many submissions failed to grasp, that criminal liability does not arise under the Bill just because the content provider makes a mistake about the likely classification of the material. This mistaken view was propounded in several submissions. The mental element of the offence, a matter required to be proven by the prosecution beyond reasonable doubt, is crucial. That is, for example, merely putting unprotected R material on the internet will not be an offence under the Bill. An offence occurs either:

- a) when one uploads the material knowing it is or would be classified R, X or RC, or
- b) when one uploads the material recklessly as to its classification, that is, one unjustifiably takes a substantial risk, that the material is or would be classified R, X or RC.

Hence, where the material is unclassified, and one genuinely reaches the conclusion based on the guidelines that it would not fall within the offending categories, no offence is committed.

5.3.3 Application of classification system to internet content

Several submissions argued that the present classification system, designed for films, publications and computer games, is unsuitable to the internet. Arguments developed under this head related to two main themes: perceived practical difficulties in having internet content classified, and difficulty in applying the film and computer game guidelines to internet content.

As to the first theme, some submissions argued that internet content will not be classified by the Board, or that the procedures for such classification are yet to be developed. Others argued that, while the Board will classify the material, the difficulty lies in the fact that the content must be submitted for classification in an off-line form, that is, on a disk or CD ROM, or in print. It was contended that either a) this may mean that once uploaded, because the material is in another form, the classification may change, or b) in any case, because content providers will wish to change and update their content frequently, the initial classification is of little value. Some also argued that certain types of internet content are insusceptible of being reduced to disk, CD or print form for classification.

Several submissions also argued that the costs associated with having internet content classified were prohibitive for content providers such as individuals and small business. One submission claimed that classification will not protect the material and that it will be necessary for the content provider to have it reclassified if prosecuted, leading to further cost.

That submission also argued that the reduced fee where an item is 'demonstrated' is only available if the applicant travels to Sydney.

As to the second theme, some submissions argued that the film and computer games guidelines should not be used in classifying internet content because:

- a) internet content does not resemble film,
- b) the guidelines are insufficiently clear and
- c) the guidelines are unreasonably restrictive of free discussion.

It was noted by some that the guidelines are scheduled for review this year.

As to assertions that the Board will not classify internet content, the Committee noted that the Chairman had received a written assurance from the National Director that this is untrue. The Committee accepted this assurance and found that internet content can be submitted to the Board for classification in printed form, on disk or on CD-ROM. It must be accompanied by the required application form and fee. The Board will issue a classification certificate in the ordinary way. Content which is classified as a film or computer game will not change classification merely because it is then uploaded onto the internet. Content which is submitted for classification as a publication will be so classified and thus will not be classified into the categories G, PG, M, MA, R, and X, which relate to films, but will be classified Unrestricted, Category I, or Category II, being the classifications for publications. Any item submitted may be classified RC as this category crosses the boundaries of form.

Some submissions expressed concern that if material is submitted for classification as a publication, therefore, one could still not know what its classification would be when uploaded to the internet. However, the Committee was not aware of any instance of a text or film which had been classified inconsistently on- and off-line. That is, if the material is not subject to legal restrictions off-line, putting it online is unlikely to attract legal restrictions, and vice versa. Moreover, if the content provider were genuinely to form a view as to the online restrictions, based on the offline classification, he or she would not commit an offence even if this view proved to be incorrect, for the reasons given above.

As to the reduced fee where a game is 'demonstrated', the Committee heard that the Chairman understood from the Office of Film and Literature Classification that a written demonstration is acceptable for this purpose.

As to the appropriateness of the film guidelines for internet content, the Committee noted that the guidelines for both film and videotape are presently under review. The intention of the review is to design a single set of guidelines which will be appropriate for use for film, computer games and internet content. The draft amended guidelines put forward for comment in that review include considerations such as interactivity, technical features, and incentives and rewards, to be taken into account in assessing the impact of the material. The period for public comment closes on 31st October 2001.

The Committee noted that if the review results in an amended set of guidelines, designed with internet content in mind, this may go some way to addressing concerns expressed in some submissions as to the applicability of the guidelines to internet content. The Committee also noted however that all classification guidelines are under periodic review and that the lifespan of each set of guidelines may be only a few years, given the rate of technological

change. The legislative framework must therefore be independent of the actual content of the guidelines from time to time.

5.3.4 Restricted access systems

It was argued that it is unduly burdensome to require providers of R level content to protect it with a restricted access system. Such systems were claimed to be unacceptably intrusive into the privacy of the applicant for a PIN or password. Further, it was argued that the content provider cannot prove that such a system was applied to the site. It was also argued by one submission that the use of a restricted access system will stigmatise a site, in that such systems are generally associated with sexually explicit material, and not with material generally found in the R category. One submission argued that it should be a requirement for the prosecution to prove that there was a reasonable opportunity for a minor to access the material online.

The Committee noted that restricted access systems are available from a number of commercial suppliers on the internet. A person who wishes to be allocated a PIN or password so as to access a protected site is required to provide verification of age. As it is the site user who pays for the age verification, the content creator may or may not need to pay anything for the password protection. As to arguments that this is invasive of privacy, the Committee considered that this was no more so than the requirement for age verification to enter an MA15+ or R film, or to enter licensed premises.

One submission argued that attempts to protect minors by the use of passwords or PINs will be unsuccessful. Because of the commercial nature of many of these services, there is an incentive to grant passwords or PINs. Children may produce convincing faked verification of age, or the password provider may be lax in checking material submitted. It was therefore argued that such attempts should be abandoned and the matter left to parents.

The Committee considered this situation to bear analogies with the offline problems posed by minors attempting to obtain access to R films or to licensed premises, or attempting to purchase alcohol, tobacco or R videotapes. While it is acknowledged that such attempts sometimes succeed, it does not follow that these legal restrictions should be removed and the matter left to parents.

As to the concern that content providers will be required to prove that the restricted access system was operating correctly at the relevant time, the Committee noted that the Bill does not require the content provider to prove this. What is required to establish the defence is that the content provider prove that the material was subject to such a system when it was made available or supplied by the defendant, that is, at the time of uploading. The Committee accepted, and the Bill recognises, that the content provider cannot be held responsible for the ongoing correct operation of the system adopted.

However, the Committee considered that it may be possible to amend the wording of the Bill to make this point clearer, in order to reduce concerns.

5.3.5 Difficulties of detection

Some submissions claimed that the Bill will be ineffective as police will not be able to obtain information from ISPs or ICHs which are outside South Australia, in order to trace who uploaded particular content, so nothing is added by the Bill.

Evidence from the SA Internet Association suggested to the Committee that considerable technical expertise may be available to identify the source of material found on the internet. However, of course, there may be cases where the content provider cannot be identified or cannot be found, just as there are off-line criminal offences where a perpetrator cannot be identified or cannot be found. The Committee did not consider this in itself to be a reason why the law should not be able to deal with those who can be found.

5.4 Concerns as to justice of the Bill

5.4.1 Free speech

Some submissions, for example that of the Electronic Frontiers Association Inc, argued that the Bill will discourage or prevent the legitimate discussion, online, of serious social and political issues and will restrict the provision of legitimate information. It was argued that the Bill breaches Australia's international obligations under the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, and the legislated principle that adults should be able to see, hear and read what they want.

As an illustration, several submissions argued, by reference to the film guidelines, that the Bill will make it illegal to discuss 'adult themes' such as crime, marital problems, drug and alcohol dependency, etc. (The guidelines are set out in Appendix D.)

The Committee noted that the film guidelines do not prohibit the discussion of adult themes in M or MA material, that is, material which would not be legally restricted under the Bill. although such themes may also result in material receiving an R classification. Committee members noted from general experience that in fact fairly confronting treatments of serious themes are commonly found at the M and MA level. Having regard to what is available at the M and MA level offline, and in publications which are not subject to legal restriction, the Committee did not consider that the application of the guidelines would be likely to prevent the free debate and discussion of serious topics on the internet.

5.4.2 Criminal liability

Some submissions argued that the Bill penalises a person for failing to guess correctly how the Classification Board would classify a given item. That is, it was claimed that if a person is wrong in his or her evaluation of the likely classification of an unclassified item which is made available on the internet, an offence is committed. Some submissions noted that some material may be very close to the borderline between MA and R, and that not uncommonly, the Board will classify an item R only to have the classification altered to MA on review, or vice versa. It was claimed that accordingly, it was unreasonable to impose criminal liability on content creators, who do not have the benefit of the Board's classification training.

The Committee considered that, as discussed above, this argument is based on a misunderstanding. The Bill does not attach criminal liability to a wrong guess about

classification. Police must prove beyond reasonable doubt that the person either knew the classification or likely classification or, if not, that the person unjustifiably took a risk that the material was or would be R, X or RC. A person who, having considered the material by reference to the guidelines, genuinely reached the view that it would be classified MA, would not commit any offence in uploading that material without restriction, even if it later proved that the material was classifiable R.

5.4.3 Role of police

Some submissions argued that the Bill allows police to determine the classification of the material rather than requiring that it be classified by the national Board. It was argued that this determination should be reserved to the Classification Board, given that police have no expertise in classification and in any event are not an appropriate authority to classify content (for example, this was argued by the Arts Law Centre of Australia, Thomson Playford, and Internode Systems Pty Ltd).

The Committee noted that the Bill does not give police any power to determine the classification of an item. This misconception may have arisen from the new s. 83B which was added by the Classification (Publications Films and Computer Games) (Miscellaneous) Amendment Bill (No 1) which has passed the Parliament. Under that provision, police can serve a defendant with a notice inviting him or her to admit (relevantly):

- that an item which was unclassified would have been classified X or RC, or
- that an item was classified R, X or RC.

It is up to the defendant whether he or she wishes to admit this. If so, then he or she signs the notice and this is tendered in court as evidence of the defendant's admission. In that case, it is not the assertion by police, but the admission by the defendant, which proves the classification.

If the defendant does not agree with police about the classification of the item, the case proceeds in the ordinary way. That is, police must have the material classified by the Board, or if it is already classified, obtain the Board's certificate, so as to be able to tender evidence of the classification at trial. The notice served by police does not determine the classification of the item, and indeed has no further relevance, except as to costs if the prosecution is successful. Contrary to what some submissions suggested, the police allegation cannot function as proof of any relevant fact in the case.

5.4.4 Warning notices

Some submissions argued that the Bill should be modified to allow the content provider to be first notified when the offensive material is detected, and given an opportunity to remove it, before prosecution can proceed.

Several submissions noted that under the Commonwealth regime, which deals with the responsibilities of internet service providers and internet content hosts, a notice is served on the provider or host requiring it to take down the material, that is, to prevent further access. It is only if the provider or host fails to comply with the notice within the permitted time that it commits an offence. It was suggested that such provision should also be made in respect of content providers.

The Committee noted that content providers are in a different position from internet service providers and internet content hosts. While the latter have no way of knowing what content is hosted on their systems from time to time, the content provider is well aware of the material he or she is making available on the internet. It is therefore reasonable for the law to expect the content provider to take reasonable care to see that that material is lawful. This is no different from publications offline. For example, the law expects a person who makes a speech or publishes a written document to consider first whether its contents may be defamatory, may breach racial vilification laws, or may amount to misrepresentation or misleading or deceptive conduct. He or she is not entitled to expect others to identify this and give a notice, before legal consequences will flow. The situation should be no different in the case of on-line publication.

5.4.5 Commencement of prosecution

Several submissions argued that it should be a requirement that before a person can be charged with an offence in respect of internet content, that content must be classified. It was argued to be inappropriate that police be able to allege an offence without having proof of the classification. The concern expressed was that a content provider who may be innocent can be put to the expense and inconvenience of a defence when in fact police did not have the evidence to secure a conviction.

The Committee noted that this is the ordinary legal position. The law does not generally require police to prove any element of an offence before charges can be laid. Rather, the elements of the offence must be proven at trial. If, however, a summary prosecution fails, the defendant can apply to the court for costs. The risk of being ordered to pay the defendant's costs may operate to some extent as a deterrent to the bringing of prosecutions without evidence. The majority of the Committee did not see any sufficient justification to depart from the ordinary rules in the context of internet content prosecutions.

5.4.6 Artistic and scientific merit

Several submissions noted that the Bill does not provide a defence in terms of the literary, artistic or scientific merit of the material, nor an exemption process. It was submitted that there should be such a defence, so as to cover the publication of, for example, legitimate sex education materials aimed at teenagers.

The Committee noted that the Bill does not provide a defence in terms of literary, artistic or scientific merit, because this is one of the factors which the Board must consider in classifying the item under the Commonwealth Act (s.11(2)). Because this matter is already inbuilt into the classification of the item, it was not considered by the Committee to be necessary to add it on as a consideration in the Bill.

One submission also argued that it should be possible for content creators to apply for exemption from the law in appropriate cases. The Committee noted that the principal Act already provides (by Part 8) for exemptions to be granted in respect of particular organisations and events and of particular films, publications or computer games. This could be used to seek exemption in relation to internet content which, as discussed earlier, will be either a film or computer game as a result of the application of the definitions in the Commonwealth legislation.

5.4.7 Libraries and internet cafes

It was argued by some submissions that the Bill runs the risk of catching a person, such as a library or café, who provides access to computer terminals linked to the internet. Some submissions argued that such a person 'makes available' such internet content as the user may access, including offensive content. It was contended that this is unreasonable in that such a person has no control over content posted on the internet and accessed by the users of these terminals.

The Committee considered this concern to be unfounded. Even if the words 'make available' are wide enough to cover merely giving access to a computer terminal, which seems unlikely, the library or other provider of such access would be very unlikely to have the necessary mental element of knowledge or recklessness as to the classification of the material accessed by the user (and indeed would probably not know what material the user might access). Hence, the Committee did not consider that such persons were at risk of committing an offence.

5.4.8 Online/offline consistency

Several submissions argued that, contrary to the Government's stated intentions, the Bill would make illegal online material which could be lawfully published offline.

In particular, it was argued that the Bill would criminalise the provision of R material to adults online, whereas adults can freely access such material offline. This argument appeared to be based on the drafting structure of the section, that is, the fact that the existence of a restricted access system can be proven in defence and is not an element of the offence. It was also claimed that the provisions in relation to advertisements were inconsistent with the off-line laws. One submission argued that material legal in publications (such as magazines aimed at teenage girls) would be likely to be illegal on the internet under the Bill.

The Committee considered this to be a misunderstanding. The Bill treats R material on-line in the same way that such material is treated off-line. That is, the material is restricted to persons over 18 and age verification can be required. Some commentators have been concerned because the drafting of the clause requires the content provider to prove that a restricted access system had been put in place, rather than requiring police to prove that no such system applied. However, this is a matter well within the knowledge of the content provider and readily provable by him or her. The net result is that a person who in fact protected the content by a restricted access system commits no offence.

This form of drafting is familiar in the statute book. In the principal Act, several of the offences created are subject to specific defences which can be raised by a defendant. For example, section 35 creates the offence of exhibiting an R film in a public place in the presence of a minor. This is all that police are required to prove to establish the offence. However, the exhibitor can make out a defence if he or she proves that the minor produced acceptable proof of age. Police do not have to prove that the minor failed to produce such proof. This is because the exhibitor should be well able to establish this situation, if it is the case. The reality is, nevertheless, that if the exhibitor has in fact done its duty in requiring proof of age, no offence is committed. The same is true in relation to a number of other offences in the principal Act.

Other analogies can be found in the many provisions of the Motor Vehicles Act as to defences which may be raised by a motorist, such as that the vehicle was not in his or her possession at the relevant time, or was driven without his or her knowledge or consent. These are not required to be negated by police but are matters of exoneration which the defendant can readily establish. Similarly, see the various statutory provisions permitting a defendant to raise a defence of due diligence.

5.4.9 Parity with other jurisdictions

Some submissions argued that the Bill would impose a harsher regime than prevails in the other Australian jurisdictions which have legislated in this area, ie Victoria, Western Australia and the Northern Territory. It was contended that it would be unfair to treat South Australian content providers less favourably than content providers in other States.

The Committee examined the provisions enacted by these jurisdictions, which are summarised above at 1.3 and reproduced in Appendix E. It noted that those provisions go further than this Bill in certain respects.

For example:

- the Western Australian and Northern Territory provisions criminalize the downloading or requesting of certain material, thus catching the recipient as well as the content creator.
- the Victorian provisions include restrictions on the making available of MA15+ level material, which is not covered by the Bill
- penalties under the Western Australian and Victorian laws are potentially higher than under this Bill and include imprisonment
- the interstate provisions cover email and chat materials. The Bill does not cover either.
- under the interstate provisions, a person cannot automatically establish a defence, in respect of material unsuitable for minors, that the material was protected by a restricted access system. This may or may not be sufficient, depending on the circumstances. Under the Bill, if the material was protected by such a system, that is the end of the matter
- under the Western Australian and Northern Territory provisions, there is no mental element to be proven by the prosecution in respect of material unsuitable for minors. The content provider's state of knowledge about the content is irrelevant.
- Under the Victorian laws, police do not need to prove any state of knowledge in relation to objectionable content or content unsuitable for minors. However, the content provider can seek to establish a defence of reasonable belief that the matter was not objectionable. (The exception is in relation to MA15+ level material.)

There are some respects in which the Western Australian provisions are less extensive than the Bill. For example, the Western Australian law does not extend to X material. However, on balance, the Committee was not persuaded that the Bill is more draconian than these other laws.

5.4.10 Penalties

Some submissions argued that the proposed maximum penalty of \$10 000 is too high, when compared with the other penalties fixed by the principal Act. A counter argument was put by

one submission that the uploading of offensive material onto the internet is likely to affect a larger number of persons than the sale of a single copy of a book or magazine and thus that the higher penalty is justified.

The Committee noted that the proposed penalty is similar to that in the Northern Territory and lower than the maximum penalties set by Western Australia and Victoria. It is somewhat higher than penalties under the Act for selling a single publication or film, because an internet site may be accessed by many more persons than would see the copy of the publication, or view the hired videotape. Of course, the penalty is a maximum and evidence that in fact few or no persons accessed the site would be a mitigating factor. As a matter of common law, the maximum penalty would only be imposed in the most serious case.

In contrast to the situation in Western Australia and Victoria, this Bill does not propose imprisonment. Indeed, there is no penalty of imprisonment for any offence against the principal Act.

5.4.11 'Making available'

Some submissions claimed that the Bill does not make clear what is meant by the term 'make available'. It was argued that this might cover hosting, downloading the material or other steps.

The Committee noted that the expression 'make available' is intended to cover uploading the material onto the internet such that it is stored and available to others. The Committee considered that it was clear as a result of clause 75B(3) that content hosts and ISPs are not caught. As a matter of natural meaning, downloading could not be covered since this is merely accessing material that is already available on the internet.

5.5 Support for the Bill

Submissions supporting the Bill were received from:

Australian Family Association
Festival of Light
Young Media Australia

Arguments put in favour of the Bill included:

The internet is highly accessible in homes, schools and libraries, and in particular is accessible to children. The internet contains a volume of material unsuitable for or harmful to children. The material may be encountered by persons, including children, who are not seeking and do not wish to encounter, the material, because innocent search words are sometimes associated with offensive sites.

Two submissions urged that the Bill does not go far enough. The Festival of Light and the Australian Family Association urged that the Bill should also cover the uploading of MA15+ material onto the internet, given that legal restrictions apply to this material offline. The Australian Family Association also argued that more should be done to make ISPs accountable for the newsgroups they carry, that there should be restrictions on the content of web portals, and that ISP based filtering be further considered.

The Committee noted that legal restrictions apply to MA15+ material offline, in that a child under 15 must be accompanied by a parent or guardian. No direct online equivalent of this situation exists. It may be that the closest offline approximation of the 'parent accompanied' requirement of MA lies in the supervision of children's internet access by parents and teachers, whether by being present, or installing filter products, or tracking software, or otherwise.